

NEW YORK STATE BAR ASSOCIATION

JOURNAL

6 to 3: The Impact of the Supreme Court's Conservative Super-Majority



NOVEMBER/DECEMBER 2023
VOL. 95 | NO. 6

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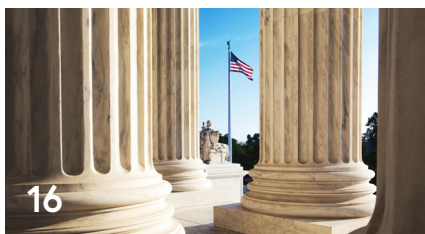
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Excellence in Mandated Representation: Revised Indigent Legal Services Appellate Standards

By Cynthia Feathers and Tammy Feman



What does it mean to be a quality appellate attorney? What are essential elements of appellate representation? Should there be a difference in the caliber of representation for clients who retain counsel and those who are entitled to assigned counsel – so-called “mandated representation” or “public defense” for criminal and family cases? Those were among the questions the New York State Office of Indigent Legal Services and the ILS Board¹ confronted when revisiting the Appellate Standards and Best Practices that ILS originally established in January 2015. This review was undertaken by a working group of appellate leaders from the Appellate Defender Council, an invaluable advisory panel serving ILS.² In October 2023, ILS issued significantly revised Standards after their review and approval by the ILS Board.³

There were compelling reasons to reconsider and overhaul the standards. In the last eight years, the world has changed in many ways relevant to mandated appellate representation. Increased attention on racial justice has heightened awareness of systemic inequities in the criminal and child welfare systems⁴ – and of legal arguments that should be advanced based on unfair treatment of public defense clients.⁵ There is a greater awareness of the importance of using inclusive language that honors people’s dignity and humanity. Further, many criminal and family laws have changed since 2015, as have Appellate Division rules governing appellate practice.

These new standards reflect core elements of effective advocacy that transcend mandated appellate representation. This is not surprising, given that the New York Rules of Professional Conduct provide a foundation for the standards and that the same expectations regarding ethics and excellence should apply to private and public appellate representation. All appellate counsel – whether providing private or public defense – must have proper qualifications, training and support, and they should not accept a case unless possessing the skill, time and resources needed to provide competent representation. Throughout the appeal process, the retained or assigned attorney should communicate with the client and seize every opportunity to persuade the court of the client’s position, which may include filing a reply brief when representing an appellant and orally arguing a case.

Funding Increases and Unique Challenges

A core value reflected in the original and revised standards is that persons entitled to assigned counsel should receive high quality representation. That requires robust government funding. Until recent times, such funding had been lacking in our county-based system of public defense.⁶ Thus, in 2015, some of the standards were more aspirational than achievable. Since the initial standards were published, however, New York State has appropriated substantial funding for public defense, which puts the

declared goals within reach.⁷ More important, however, the standards are not premised on what clients and counsel should settle for in New York, but rather on what government funding must be provided to make the vision of effective, constitutional representation in criminal and family appellate cases a reality.

The new standards do more than set forth broad precepts in black letter declarations. In commentaries and footnotes, they explore some of the unique challenges and responsibilities of appellate counsel in public defense cases; offer foundational support for the principles enunciated; and, where practicable, provide links to relevant resources and support. One fundamental aspect of mandated representation is the high stakes for clients. These matters often impact the liberty of convicted persons and the integrity of families facing government intervention. Another element of mandated cases is that clients are often from marginalized populations, including poor people, Black and brown people, LGBTIQ+ people, people with a history of mental health issues and others. Our clients have typically faced discrimination and bias throughout their lives, including in their experiences with the criminal legal system, the child welfare system or both.

The Revised Appellate Standards

The Appellate Standards are divided into three parts:

- A. Qualifications, Training, and Oversight of Counsel (Standards 1-4).
- B. Duties of Counsel (Standards 5-19).
- C. Special Ethical Considerations (Standards 21-26).

Some standards did not appreciably change (Standards 2, 3, 7, 13, and 16 on selection process, ongoing evaluation, initial steps, reply brief and relief after state remedies). However, there were major revisions to most standards, particularly the commentaries following the black letter statements, as described below.

Qualifications, Training and Oversight

Revised Standard 1 on competence greatly expands on the original standard by citing Court of Appeals authority describing meaningful appellate advocacy and by adding necessary elements of competence: proficiency in technology; consultation with an experienced attorney by new attorneys; cultural consciousness; and advocacy based on the impact of race and trauma on the client and the case.⁸

New Standard 4 regarding brief review squarely confronts how private attorneys serving on assigned counsel program (ACP) panels can obtain review of their briefs. The prior appellate standard advocated review by another panel attorney – at a time when no mechanism existed

for such service. The revised standard declares that consideration of a brief by a generous colleague on a pro bono basis is inadequate to meet this important standard and that government funders must cover the cost of such services. 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.

Duties of Counsel: Caseloads, Conflicts, Meetings, Risks, Briefs

Revised Standard 5 on accepting cases elaborates on the qualifications needed to accept a given case, which include staying abreast of evolving laws and understanding the potential impact of convictions on noncitizens and the relief that may be available via postconviction motions. Moreover, the new guideline calls upon parent defense counsel to have a firm grasp on provisions of Family Court Act Article 11 governing appeals and on relevant sections of the CPLR impacting family cases. This standard also underscores the importance of appellate attorneys controlling their caseload to ensure that clients do not unnecessarily endure inordinate delays, which could mean years of wrongful imprisonment or separation from a child.

In a similar vein, revised Standard 6 broadens the scope of potential conflicts of interest to encompass such factors as insufficient funding or excessive caseloads or both, as well as the financial incentive that may exist for some attorneys to give preference to retained appellate clients over assigned clients.

The often arduous task of obtaining a complete record on appeal is addressed in Standard 8. Regarding the content and form of the record, the revised commentary advises appellate counsel to consult the Statewide Practice Rules of the Appellate Division, which did not exist when the original standards were issued. Other new elements include a discussion of the availability and impact of presentence reports in criminal appeals and links to resources for appeals under the Sex Offender Registration Act.

Revised Standard 9 as to client meetings provides a deeper discussion on this central topic. An in-person visit is still advocated for every client to build a meaningful attorney-client relationship. The commentary explains that, since the client does not have any agency in choosing counsel and may harbor mistrust toward “the system,” there is an even greater need for in-person meetings in assigned cases than in other cases to overcome understandable skepticism. This standard does, however, convey some flexibility by noting that counsel should use the mode of communication best suited to meet the client’s needs. While the old standard acknowledged that resources to cover the costs of traveling to

visit incarcerated clients were not provided to appellate counsel, the new standard asserts that such costs should be covered. This guideline also advises that, if the client is not proficient in English, counsel should arrange for an interpreter for in-person meetings and a translator for written materials, and details requirements for effective use of such services.

New Standard 10 on risks expands on prior guidance about a core “be careful what you wish for” danger of appellate practice as to judgments based on guilty pleas. Appellate counsel must clearly explain risks presented where the sought-after vacatur of a guilty plea could result in reinstatement of all charges and, ultimately, a lengthier sentence. Among other things, the revised guideline stresses that counsel must “meet the clients where they are” by explaining risks in plain language. Further, if the client is not proficient in English, the risk letter must be translated verbatim and should be explained in a follow-up visit. Signed risks letters are no longer characterized as the only way of ensuring that the client understands the risks, but instead as one reliable means of achieving that goal.

Distinct risks to noncitizens are signaled in the current standard. Further, potential dangers of family court appeals are explained. Many appealable orders, whether intermediate or final, become moot before the appellate process plays out. Counsel must be savvy about these dynamics and carefully consider how litigation may or may not bring a desired outcome. This could involve invocation of an exception to the mootness doctrine or the pursuit of a modification of the subject order, rather than a direct appeal, the commentary explains.

New Standard 11 on timely filing of appeals provides guidance on factors to be considered in prioritizing cases, including whether the client is incarcerated and whether children have been placed outside the family. As to family court appeals, the revised commentary addresses the availability of statutory preferences and motions for expedited review.

Revised Standard 12 regarding writing the brief offers far more detailed guidance than the original standard. Some new key insights offered are that issues must be identified before the fact section is written and that storytelling is part of persuasive advocacy. The impact on family appeals of new facts going to parental fitness are explained in the new commentary. As to argument sections of criminal briefs, the revised standard describes the importance of preserving federal issues for habeas corpus review. For all briefs, counsel’s ethical power to test legal boundaries is now addressed, as is the importance of scrutinizing the record for possible issues of racial or gender bias. This new standard also advises that, after the facts and argument sections have been drafted, counsel should seek to employ a theme to tie together all elements of the brief. Finally, where English is not the client’s best language

and the client is not proficient in English, the revised commentary notes the advisability of counsel having an in-person visit with the client where an interpreter is present to convey the essence of the brief.

Further Duties of Counsel: Arguments, Leave To Appeal, Noncitizens, Sentences, Postconviction

Current Standard 14 on oral argument provides a more penetrating discussion about why oral argument matters, including the conviction conveyed by counsel's presence and, even where the client does not prevail, the chance to mitigate the damage of an adverse decision. Once again, the applicable rules of the statewide practice rules are cited, as is counsel's duty to report to the client about the oral argument. In the revised commentary, counsel is provided with helpful guidance about how to prepare for, and conduct, oral arguments.

New Standard 15 on leave applications includes practical guidance not presented in the original commentary, by citing relevant statutes and appellate court rules as to the content and deadlines for criminal applications versus family appeal motions and as to counsel's ethical duty to seek permission to appeal to the Court of Appeals. Also, a critical distinction is made between criminal cases where a substantive leave letter is required and where such submission is not warranted. Finally, the new standard suggests that counsel should seek expert assistance in drafting leave applications and offers links to relevant resources about such applications.

Revised Standard 17 on representing non-U.S. citizens provides significant new guidance. Whereas the prior standard advised that counsel must pursue an ineffective assistance claim where defective immigration advice was rendered, the current standard notes that such a claim should be pursued only "where appropriate" – e.g., when the requisite showing of prejudice can be made. Given the complex nature of immigration law impacting criminal and family law cases, the new commentary emphasizes the importance of receiving expert advice from specialty counsel with expertise in the intersection of immigration, criminal and family law. The standard reveals the availability of ILS Regional Immigration Assistance Centers to obtain such expert assistance for free. In addition, the new commentary provides a critical update on relevant law in discussing when a state court order reducing a sentence may be given effect by an immigration court.

New Standard 18 regarding comprehensive client-centered representation provides links to several potential resources to aid counsel and the client in pursuing matters outside the scope of the appeal assignment, such as parole release and reentry.

Current Standard 19 on sentencing issues covers not only counsel's duty to explore possibly illegal sentences but also the imperative to argue, where appropriate, that the sentence was harsh and excessive. The revised commentary sets forth the broad plenary power of the intermediate appellate court to modify an unduly harsh or severe sentence and notes that counsel should address not only the period of incarceration but also of post-release supervision. Also covered are the risks presented by some sentencing arguments, as well as the need to attack New York's ubiquitous waivers of the right to appeal before the mid-level appeals court can exercise its discretionary authority to consider whether more leniency may be warranted.

A sea change in postconviction representation is captured in Standard 20 on CPL Article 440 motions. CPL 440.10 motions seek to set aside convictions based on facts outside the record, while CPL 440.20 motions are filed to set aside illegal sentences. The original commentary indicated that counties should provide funding for appellate counsel to pursue these underutilized motions. An insufficiently heralded change in the law on "440 motions" is explained in the current standard. Without prior court approval, appellate counsel now have the authority to investigate and file CPL 440.10 motions, which are the primary vehicle in New York for setting aside wrongful convictions. Such power – and duty – also applies to motions challenging illegal sentences.

Further, there is an expanded discussion of various bases for relief under CPL 440.10 and of the interplay between direct appeal and postconviction motions as vehicles to attack an illegal sentence. In the family appeals arena, the closest analogue to 440 motions is the underutilized CPLR 5015, which is available to seek vacatur of certain orders appealed from based on default or new evidence or fraud or pursuant to the trial court's inherent discretionary power in the interest of substantial justice, as the revised guideline indicates.

Special Ethical Considerations: Communication, Issues, Diminished Capacity, Case File, Coram Nobis

New Standard 21 on client communication is stronger than the prior version in proclaiming counsel's duty to be proactive in overcoming impediments to meaningful communication. Moreover, the revised commentary now observes that counsel should determine and honor how the client would like to be addressed.

Revised Standard 22 on issue selection continues to emphasize the importance of an attorney-client dialogue about the issues to raise and counsel's duty to help as to pro se supplemental briefs where there is ultimately an attorney-client disagreement about issues. However, the new standard emphatically declares that the strategic decision about arguments to make on appeal belongs to

ILS Appellate Standards and Best Practices: Summary of Key Revisions

1. Competence – Requires that attorneys possess technological and cultural competence.
2. Selection Process – No major revisions.
3. Ongoing Evaluation – No major revisions.
4. Brief Review – Discusses resources now available for brief review.
5. Accepting Cases – Explores evolving legal knowledge needed to accept appeals.
6. Conflicts of Interest – Addresses conflicts flowing from insufficient funding or excessive caseloads.
7. Initial Steps – No major revisions.
8. The Record – Cites the Statewide Practice Rules of the Appellate Division and notes the role of the presentence report in criminal cases.
9. Client Meetings – Explores why in-person meetings, including with incarcerated clients, are important; the requirement of reimbursing travel costs; and the need for interpreters or translators in some cases.
10. Risks – Discusses in greater detail how and why counsel must explain appeal risks to clients in both criminal and family cases.
11. Timely Filing – Provides guidance on factors to consider in prioritizing cases and addresses the availability of statutory preferences and motions for expedited review in family appeals.
12. The Brief – Offers expanded guidance on how to write and structure the brief to tell a story, persuade the court, preserve federal issues and push the limits of the law.
13. Reply Brief – No major revisions.
14. Oral Argument – Explains why oral argument matters, cites the Statewide Practice Rules and offers guidance on how to prepare for argument.
15. Leave Applications – Provides practical guidance on relevant laws and rules dictating the content and deadlines for criminal leave application and family motions for permission to appeal to the Court of Appeals.
16. Relief After State Remedies – No major revisions.
17. Representing Noncitizens – Provides more nuanced advice on when to argue that legal advice on immigration consequences was unconstitutionally ineffective; stresses the importance of obtaining expert guidance and updates the law on the impact of sentence reductions in immigration court.
18. Comprehensive Representation – Provides links to resources to help the client in matters such as parole release and reentry.
19. Sentencing – Addresses counsel's duty to not only determine if the sentence is illegal but also if there is a viable argument that the punishment was harsh and excessive, and notes the threshold need to challenge waivers of appeal in most guilty plea cases.
20. CPL Article 440 Motions – Discusses a critical change in the law allowing counsel assigned to the direct appeal to make motions in the trial court to set aside judgments of conviction based on facts outside the record, as well as motions to set aside illegal sentences.
21. Client Communications – Asserts that counsel must be proactive in overcoming impediments to communication throughout the appeal process and must be sensitive and respectful in addressing the client in the preferred manner.
22. Issue Selection – Declares that the strategic decision about what issues to raise on appeal belongs to the attorney, while noting the importance of robust consultation with the client.
23. *Anders* Briefs – Details the many arguable issues that may be presented in plea appeals to avoid submitting briefs contending that no nonfrivolous issues exist and that appellate counsel should be relieved of the assignment. Analyzes the errant use of *Anders* briefs in family cases.
24. Diminished Capacity – Provides far greater clarity and specificity regarding how to proceed when the appellate client has diminished capacity and discusses a recent, pertinent ABA standard.
25. Case File – Cites a recent, relevant regulation to support the principle that case files for criminal clients should be maintained for the life of the client.
26. Coram Nobis – Stresses the duty of loyalty to a client who has accused counsel of rendering ineffective assistance and notes the availability of a self-defense exception that counsel may invoke in very limited circumstances.

appellate counsel and invokes U.S. Supreme Court authority to support that principle.

In explaining why briefs asserting that no nonfrivolous issues exist are generally anathema, new Standard 23 on these so-called Anders briefs⁹ provides an expanded treatment of this vital topic. The many arguable issues that may be presented in criminal appeals based on guilty pleas are detailed in the new standard. Also explored is relevant family appeal authority shedding light on why appellate counsel may file errant Anders briefs. The problem could sometimes lie in the different calculus for private versus assigned appeals. When a potential client approaches retained counsel about an appeal that has a very remote chance of success, responsible counsel will provide a realistic assessment to inform a sound decision about moving forward – or not. In mandated representation, in contrast, if any issue is even arguable, counsel should present substantive arguments to the higher court, unless the client opts to withdraw the appeal.

Underlying the emphasis on achieving merits review of legal issues in mandated appeals is the elemental concept that a system providing for broad appellate review of criminal judgments and family court orders is crucial to achieving justice. Of course, appellate decisions can bring about corrective action to benefit aggrieved parties, while also enlightening lower courts. In addition, expected and frequent oversight by a higher court may lead to more careful lower-court decisions going forward. (The same goes for Court of Appeals review of orders issued by intermediate appellate courts.)

Extensive revisions to Standard 24 on diminished capacity seek to provide greater clarity on this topic. The original standard vaguely indicated that, when the client has diminished capacity, counsel must take appropriate action. The revised standard explains that counsel should maintain a conventional relationship as much as possible and only take specified protective measures where such a relationship is not possible. As the prior commentary, the current one cites to a relevant ethical rule, but the revised standard then goes on to offer specific guidance by citing a recent American Bar Association standard that is on point. The revised ILS Standard still does not dictate one correct path to pursue for all appellate clients with diminished capacity but is more nuanced than before in discussing factors counsel should consider in determining what course of action to pursue on a case-by-case basis.

The revised Standard 25 on the case file continues to state that the file generally belongs to the client, which – unlike for clients in civil appeals – should be maintained throughout the client's life. The reason for such a requirement is compelling: the files may be sought in the distant future for matters such as state postconviction motions based on ineffective assistance of counsel, federal habeas corpus petitions or immigration proceedings. In addition, the new standard

bolsters and updates this guideline by citing a New York regulation, published after the prior Standards were issued, that supports the duty to maintain client files for the client's life or until the client's 80th birthday.

The updated final standard deals with coram nobis applications asserting that appellate counsel was ineffective. The revised treatment of the topic is more emphatic than the original one in stressing the primacy of the duty of loyalty owed to the client – even when the effectiveness of the appellate representation is called into question by new counsel. The original commentary focuses on the limited circumstances in which confidential information may be disclosed. In contrast, the new commentary begins by observing the core concept that a client in a criminal case has the right to effective assistance of appellate counsel. The situations in which confidential information may be revealed are set forth in greater detail in the new Standard, and the availability of a self-defense exception to protect counsel is discussed. Striving to end the Appellate Standards on a positive and philosophical note, the current commentary opines that lessons learned from making errors can enable counsel to do a better job going forward.

Final Thoughts

A takeaway from the new Standards is that delivering mandated appellate representation in criminal and parent defense cases is an important endeavor that requires dedication, expertise and skill. Attorneys performing such work should be applauded for their role in protecting the rights of vulnerable New Yorkers and helping to shape sound precedent to guide litigants, courts and counsel. These attorneys should have access to the resources required to meet the revised ILS Appellate Standards and Best Practices and should receive compensation that dignifies their contribution to our legal system and society and reflects the weightiness and complexity of the appellate representation they render.



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Endnotes

1. In 2010, the ILS Office and the ILS Board were created to “monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law.” Executive Law § 832 (1), § 833 (1).
2. The authors of this article served on both the ILS working group that produced the original standards and the working group for the revised standards. The efforts of the latter group were also informed by non-ILS experts on several topics, including immigration consequences and representation of clients with diminished capacity.
3. www.ils.ny.gov/files/Appellate%20Standards%20Final%20100423.pdf.
4. Child welfare cases – child protective matters, such as abuse and neglect proceedings – are highlighted here on the issue of racial bias. But the Appellate Standards encompass mandated representation to parents in all types of family court matters, including child support violations, custody and visitation, and family offenses and resulting orders of protection.
5. Last year, the Third Department held, for the first time in New York, that the exclusionary rule can be applied to a racially motivated stop, even where a police officer had probable cause to believe a traffic infraction was committed. See *People v. Jones*, 210 A.D.3d 150 (3d Dep’t 2022). This momentous decision declared that the New York Constitution provides broader protection than the Fourth Amendment of the U.S. Constitution with respect to pretextual traffic stops, which have been the catalyst for many tragic and even fatal encounters between police and Black motorists.
6. New York State Commission on the Future of Indigent Defense Services (Final Report to the Chief Judge of the State of New York (June 2006)).
7. In recent years, substantial state resources have been appropriated to help improve

the quality of mandated criminal defense throughout the state. The fiscal year 2023-2024 budget includes \$273.8 million to achieve reforms in mandated criminal defense representation. The state budget also provides \$14.5 million to improve parent representation. While that is a \$10 million increase over FY 2022-23’s allocation for parent representation in family court matters, there is an urgent need for a far greater state investment in such representation – a right of constitutional dimension. Finally, the final enacted state budget for FY 2023-24 amended County Law § 722-b to increase the hourly rate of compensation for assigned counsel, which had been stagnant for nearly two decades, to \$158 an hour. When the vouchers of assigned attorneys are cut, however, the hourly rate is effectively reduced. This can devalue mandated representation and deter assigned counsel from doing this important work.

Other relevant resources available now did not exist when the Standards were first issued. For example, in 2016, ILS created a unique statewide network of six Regional Immigration Assistance Centers to support defense counsel in representing noncitizen clients. Last year, ILS launched a Statewide Appellate Support Center to provide resources, training and consultation to attorneys providing mandated representation at the trial, appellate, and postconviction level. The appellate center offers attorneys possessing extensive experience in direct appeals in criminal and family cases and attorneys with years of experience in postconviction practice, as well as special assistants for investigations and mitigation. Attorneys and other legal professional can seek consultations by emailing SASC@ils.ny.gov.

8. Understanding race issues and possessing cultural competence are deemed to be requisites of effective representation in revised ABA Ten Principles of a Public Defense Delivery System (August 2023), Principle 7.

9. See *Anders v. California*, 386 U.S. 738 (1967).



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