INDIGENT LEGAL SERVICES BOARD

AGENDA

November 7, 2014
Association of the Bar of the City of New York

I. **Opening Remarks by the Chief Judge**

II. **Approval of Minutes from September 26, 2014 Board Meeting (Attachment A)**

III. **Third Annual Report of the ILSB (April 1, 2013 - March 31, 2014) (Attachment B)**

IV. **Additional FY 2015-2016 Budget Request (Attachments C and D - Memo and Chart)**

V. **Proposed *New York State Office of Indigent Legal Services Appellate Standards and Best Practices* (Attachment E)**

VI. **Status Reports**

- Update on Competitive Grants and Distributions

VII. **Proposed Schedule for 2015 Board Meetings**

- Friday, April 10
- Friday, June 19
- Friday, September 25
- Friday, November 6

VIII. **Concluding Remarks**

Minutes for ILS Board Meeting

September 26, 2014
11:00 A.M.
Association of the Bar of the City of New York

Board Members Present: Chief Judge Lippman, Mike Breslin, Carmen Ciparick, Sheila DiTullio, John Dunne, Joe Mareane and Lenny Noisette

ILS Office Attendee(s): Bill Leahy, Joseph Wierschem and Andy Davies

I. Opening Remarks by the Chief Judge

The Chief Judge welcomed and thanked all for attending.

II. Approval of Minutes from the June 13, 2014 Board Meeting

The Chief Judge inquired whether the board members had received copies of the minutes from the prior meeting. The board members acknowledged that they had in fact received the minutes. The Chief then asked the Board to vote to approve the minutes.

John Dunne moved to approve the minutes; his motion was seconded by Sheila DiTullio and unanimously approved by the board.

III. Allocation of FY 2014-2015 Aid to Localities Appropriation

Bill Leahy provided a memo to all members outlining in detail his proposal that the FY 2014-2015 Aid to Localities be allocated for four purposes:

- **Statutory Distribution** ($40 million to NYC; there are no longer any statutory distributions to non-NYC counties)
- **Quality Improvement Distributions** (Distributions #3-5)
  - Distribution #3: $7,361,326 which is the third year of the 3-year distribution authorized by the board in September 2012
  - Distribution #4: $7,361,326 which is the second year of the 3-year distribution authorized by the board in September 2013
  - Distribution #5: $15,488,228 which is the first of a new 3-year allocation of funds (see memo for further details)

- **Competitive Grants**

  - Quality Enhancement and Upstate Caseload Reduction: $4 million (3rd of 3 years)
  - Counsel at First Appearance: $4 million (1st of 3 years; prior 3-year allocation concluded)
  - Model Upstate Parental representation Office: $870,139 (1st of 3 years with slight reduction from prior authorization due to single source contract for Steuben (see below))
  - Wrongful Conviction Prevention Center: $870,139 (1st of 3 years with slight reduction from prior authorization due to single source contract for Steuben (see below))
  - Assigned Counsel Infrastructure: $870,139 (1st of 3 years with slight reduction from prior authorization due to single source contract for Steuben (see below))

- **Single Source Contracts**

  - Clinton County: $80,000 (1st of 3 year single source contract)
  - Steuben County: $98,658 (1st of 3 year single source contract)

Carmen Ciparick moved to approve the proposed allocations; her motion was seconded by Joe Mareane and unanimously approved by the board.

IV. Budget Status for FY 2015-2016

Bill Leahy provided a memorandum detailing his 2015-2016 budget request of $117.5 million - an increase of $34.6 million.

The Chief Judge stated that NYC is doing a good job with criminal caseload reduction, a "model" for the rest of the state - funded through the judiciary budget pursuant to legislation.

Bill Leahy noted that last year's ILS budget request was ambitious but this year's request will be more ambitious. He also noted that last year's request was unmet, except for a $100,000 increase for his office's operating budget.

The proposed budget request has two components: state operations and aid to localities. The State Operations request is $5.5 million - an increase of $3.6 million. This includes ILS staffing, Regional Support Centers and a Statewide Appellate Center. The Aid to Localities request is $112 million - an increase of $31 million. This includes Upstate Caseload, Counsel at First Appearance, ACP Improvement, Parent representation Offices and Wrongful Conviction Prevention Centers.

Bill also distributed and summarized a 5-year plan with required funding

increases to improve the overall quality of representation in New York State. Some noteworthy components include total state funding of the regional support centers - an essential structural piece of the plan - as well as a statewide appellate center.

John Dunne commented that the quality of appellate representation is a real issue. Bill noted that Risa Gerson is already working with Al O'Connor from NYSDA to assist many localities in this area.

Judge Ciparick also added that NYS Bar Association has appellate pro bono opportunities.

Bill further explained his ambitious Aid to Localities plan with a focus on upstate caseloads. Over a 5-year period, he is suggesting an increase from $20 million to $100 million.

Joe Mareane suggested that the office tie this plan to reasonable caseload numbers and parity with NYC.

Bill noted that Seymour James commented that the NYC funding through OCA has made a significant difference with the level of practice.

Lenny Noisette inquired why the Wrongful Conviction Centers were broken out from the Regional Support Centers and Bill responded by explaining that obtaining funding for the regional centers and appellate centers are top priorities.

Bill requested a vote on his 2015-2016 budget proposal.

John Dunne moved to approve the proposed budget request; his motion was seconded by Carmen Ciparick and unanimously approved by the board.

V. Publication of 2013 Upstate Cost Estimate on Wednesday, September 24

Bill distributed and discussed the ILS Report *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York - 2013 Update*. The overall conclusion of this 2013 update to the original 2012 report is that New York would have had to spend an additional $105,199,248 on indigent legal services in upstate counties - a 5.4% decrease from 2012 - to be in compliance with national standards. His intention is to publish an updated report each year at budget time. He also highlighted and commended the work of Andy Davies in compiling the report. The Chief Judge also recognized Andy Davies.

VI. Proposed Upstate Caseload Standards, Contingent on Full State Funding

Bill also distributed a memorandum highlighting pieces of the Cost Estimate report and detailing the need to establish a limit of 367 weighted new case assignments in any calendar year in institutional provider offices in the 57 upstate counties. He also noted that the achieving the target number of 367 cases is just a first step in ensuring the quality of legal representation for the indigent.

Joe Mareane stated that the message has to be re-emphasized at every opportunity that this will not be a county burden. Bill assured that the report emphasizes state funding.

Bill requested a vote of approval on the proposed limit of 367 weighted new case assignments in any calendar year in the institutional provider offices in the 57 upstate counties.

Carmen Ciparick moved to approve the limit of 367 weighted new case assignments; her motion was seconded by Sheila DiTullio and unanimously approved by the board.

VII. Status Reports

- Distribution of *Padilla* RFP: Bill noted that New York will likely be the first state to have regional immigration centers. The centers will be under the careful oversight of the central office and provide training, support and assistance.

- Integrating Social Workers into Practice: Bill explained that this event had 16 counties represented. His office is working collaboratively with the New York State Defender's Association (NYSDA) in this effort.

- Status of Development of Standards for Appellate and Family Court Representation: Bill reported that the Appellate Representation Standards will be distributed at the November meeting and the Parent Representation standards will be distributed at the first meeting in 2015.

- Status of Proposed Legislative Amendments: Counsel Joe Wierschem is collaborating with OCA Counsel Marc Bloustein on the proposed legislative amendments.

- Status of 3 RFPs Authorized at June 2014 Meeting: The preparation of the previously authorized RFPs is next in the queue at ILS.

VIII. Schedule for 2014 Board Meetings

The final meeting for 2014 is as follows:

- Friday, November 7

IX. Concluding Remarks

Bill noted the excellent progress of the Counsel at First Appearance efforts. He also thanked Deputy Chief Administrative Judge Michael Coccoma for his assistance with these efforts, especially in the City Courts.

The Chief Judge thanked everyone for attending and left the meeting in the hands of board member John Dunne.

John Dunne moved for the meeting to go into Executive Session; his motion was seconded by Sheila DiTullio and unanimously approved by the remaining Board members.

At the conclusion of the Executive Session, no action was taken. John Dunne moved to adjourn the meeting and his motion was seconded by Lenny Noisette.

The Third Annual Report of the Indigent Legal Services Board

April 1, 2013 – March 31, 2014 (Fiscal Year 2013-2014)

"It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* - the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense."

Anthony Lewis, Gideon's Trumpet, chapter 13, p. 205 (Random House, NY, 1964)

"We had great faith and hope that the process we envisioned would breathe life into the guarantee of the right to counsel, that through our efforts, New York would be a vanguard state enforcing the rights of poor people. We sought to create a model for the nation that would provide the independence of defense lawyers and zealous representation of clients necessary to a fair criminal justice system. That was a long time ago. In the interim, New York State has neglected the public defense system that was created in 1965....

Public defense lacks sufficient funding. It also lacks standards, resources for recruitment, training, supervision and support services, statewide accountability, and most importantly, political and professional independence...."

Testimony by Michael Whiteman, counsel to Governor Rockefeller, quoted in STATUS OF INDIGENT DEFENSE IN NEW YORK: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services, FINAL REPORT (June 16, 2006) at 3.

- **Executive Summary:** While this Third Annual Report of the Indigent Legal Services Board (ILSB) will document abundant activity by the staff of the Office of Indigent Legal Services (ILS or Office), and while it will identify specific advances toward improving the quality of representation under New York's county-based and largely county-funded mandated representation system, its central message is that the State of New York, as of March 31, 2014, had yet to respond in a meaningful or satisfactory way either to Anthony Lewis's explicit 1964 challenge, or to Michael Whiteman's withering modern assessment. At no time was the inadequacy of the State's response more telling than at the very end of March, 2014, when the final state budget appropriation for fiscal year 2014-2015 contained funding for none of

the major initiatives approved by the Board and proposed by the Office in its October 15, 2013 Budget Request (Attachment A), and further articulated in its presentation at the Joint Legislative Hearing on February 5, 2014 (Attachment B). Despite all the studies including the Final Report to the Chief Judge of the State of New York (Kaye Commission Report) on June 18, 2006; despite the recognition of severe systemic deficiencies by all seven Court of Appeals judges in *Hurrell-Harring v. State of New York* (15 NY3d 8) on May 6, 2010; and despite the first detailed estimate of the true cost of bringing New York into compliance with national maximum caseload limits, the final state budget for FY 2014-2015 included no additional funding to provide counsel at arraignment in additional upstate counties; no additional funding to reduce caseloads and improve the quality of representation in the 57 upstate counties; no funding for the proposed Regional Support Centers that would provide state-funded expertise and assistance to beleaguered county-based providers; no funding for the proposed New York State Appellate Resource Center that would provide a level of assistance to county-based criminal defense providers similar to that which the state has long afforded to county prosecutors; and no funding to address the twin parent representation deficiencies of no early representation at the time one's child has been forcibly removed from the home, and no coherent system for providing effective representation to parents in counties which lie outside the geographic confines of New York City. The budget did include an increase of $100,000 for the hiring of a badly needed Assistant Grants Manager.

I. **Significant Staff Activity:** During the year, the ILS staff and Board continued their efforts to "improve the quality of services provided pursuant to article eighteen-B of the county law[,]" pursuant to Executive Law sections 832 (1) (Office) and 833 (1) (Board). Some of the highlights of those efforts are described below.

- Counsel at First Appearance: In August, 2013, the Office announced grant awards of $12 million over a three-year period to 25 counties to begin providing counsel at a criminal defendant's first court appearance, where the prosecution formally begins, the right to counsel attaches, and bail may be set. Robert Lonski, head of the Erie County Bar Association's assigned counsel plan, said "I know people think it doesn't make that big a difference to the resolution of the case, but the people who are saying that are not standing there with cuffs on." (New York Law Journal, "25 Counties Get Grants to Provide Counsel at Arraignments", August 8, 2013).

- Upstate Quality Improvement and Caseload Reduction: On August 22, 2013, the Office released its second competitive RFP, which invited every upstate county to apply for funding to either reduce excessive institutional defender caseloads, or improve the quality of its representation by other means. In March, 2014, the Office announced the grant awards of $12 million over a three year period to 45 upstate counties. These grants were seen as the first step toward utilizing state funding to improve the quality of representation and reduce excessive caseloads, as was being accomplished in New York City under 2009 legislation. (New York Law Journal, "Counties Share $12 million for Criminal Representation", March 24, 2014).

- Standards and Best Practices: During June and July, 2013, the Office convened two working groups. One, under the leadership of the Office's Director of Quality Enhancement for Appellate and Post-Conviction Representation, Risa Gerson, took on the responsibility of drafting Appellate Standards and Best Practices. The second, led by our Director of Quality Enhancement for Parent Representation, Angela Burton, was constituted as the Child Welfare Standards Workgroup. Both of these groups were composed of eminent practitioners and academics in their field. Each formed subcommittees, met regularly, and reached consensus on issues of significance. It is anticipated that both will produce Standards for approval by the Board during the 2014-15 fiscal year.

  Also, on April 5, 2013, the New York State Bar Association Committee to Ensure Quality of Mandated Representation approved the ILS Standards for Trial Level Representation which had become effective on January 1, 2013, and incorporated those standards into its 2013 revision of its June 19, 2010 *Revised Standards for Providing Mandated Representation*.

- On November 15, 2013, the Office published its *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*. The key finding of this first-ever undertaking was that, for the year 2012, in order to comply with maximum national caseload limits, "New York would have had to spend an additional $111,214,533 on indigent legal services in upstate counties." Thus, for the first time, the state was presented with a detailed, data-driven

estimate of the actual cost of remedying the persistent problem of excessive caseloads in upstate New York, in support of the ILS effort to bring those caseloads into compliance with national limits.

- Regional Immigration Assistance Centers: In January, 2014, the Office sent its draft RFP to the Office of State Comptroller for its review. At the end of the time period encompassed in this report, the RFP remained under review. We anticipate its issuance in the coming months. (Note: the RFP was issued on September 23, 2014, and proposals are due by December 18).

- Chief Defender Advisory Group: The ILS Director and staff members met with the CDAG on May 16 and October 17, 2013 in Albany. Among the topics considered were best use of state funding (both non-competitive quality improvement distributions and competitive grants); state-funded Regional Support Centers; the development of performance measures; the need for an increase in authorized payment levels for experts and investigators; incomplete or delayed discovery; and the special problems confronting Assigned Counsel Programs.

- List serves: The Office continued its outreach to providers by creating two practice area list serves, one for providers of representation in Family Court, and one for appellate practitioners. The latter may be expanded to include criminal trial attorneys in the coming year.

- Trainings and Professional Development: ILS staff members have participated with the New York State Bar Association (NYSBA), the New York State Defenders Association (NYSDA), the NYSBA Task Force on Family Court, the Child Welfare Court Improvement Project's Statewide Multi-Disciplinary Task Force, the American Bar Association's Parent Attorneys' Conference, the Center for Modern Courts, the National Legal Aid and Defender Association (NLADA), the National Association for Public Defense (NAPD), the National Association of Criminal Defense Lawyers (NACDL) and other organizations to present and receive training and to continually study and make efforts to improve the quality of representation for clients who are entitled to the assistance of counsel in criminal and Family Court cases, but who are unable to retain counsel.

- Assessment of Counsel at Arraignment: With the assistance of a summer intern, the Office's Director of Research began an internal study of the efficacy of providing counsel at arraignment in Ontario Country. He also brought added research value to the Office via his participation on the NLADA Research and Data Analysis Committee.

II. **State Funding:** At its September 26, 2013 meeting, the Board approved a budget request for FY 2014-2015 of $99.5 million, an increase of $16.7 million from the prior year appropriation of $82.8 million.

Of this amount, $96 million was sought for Aid to Localities, an increase of $15 million. The increase was sought for additional caseload relief and support for assigned counsel programs ($8 million); for providing counsel at first appearance in criminal cases ($4 million); and for quality improvement and early representation for parent and other adult respondents in child protective proceedings ($3 million).

The remaining $3.5 million was requested under State Operations, an increase of $1.7 million. Modest amounts were sought for the hiring of an Assistant Grants Manager and to award initial staff merit increases. $1 million was requested to begin building and staffing our planned Regional Support Centers, and $500,000 was sought for our planned New York State Appellate Resource Center.

Despite the Board's action, the Executive Budget for FY 2014-2015 did not include any increase, either in Aid to Localities or in State Operations. The final budget did include a $100,000 increase to add the Assistant Grants Manager position. Thus, the final appropriation for FY 2014-2015 was $82.9 million.

III. **Four Essential Principles:** As we have done each year, we wish to reemphasize the four key principles or actions that are essential to the ability of the Board and the Office to continuously improve the quality of mandated representation, as our statutory provisions command. They are:

a) Sufficient Funding and the Elimination of Sweeps: There must be a significant increase in state funding in order to remedy the systemic defects identified by the Court of Appeals in its 2010 decision in *Hurrell-Harring v. State of New York*. The specific targeted reforms proposed by the Office and Board in each annual appropriation request should be funded. Finally, transfers or "sweeps" from the Indigent Legal Services Fund must cease. The monies in that Fund must be

preserved in full for their intended purpose of supporting improvements in the quality of legally mandated representation.

b) Independence: The independence of the Office and Board from political interference is a centerpiece of Article 30, and adheres to the first of the American Bar Association's *Ten Principles of a Public Defense Delivery System*. It must continue to be scrupulously honored.

c) State-Funded Regional Support: New York's county-based system cannot operate effectively unless it is supplemented by state-funded and ILS-operated Regional Support Centers. These centers would provide support to local providers with training, mentoring and supervision; expertise in appellate, family and criminal defense practice; and the facilitation of investigative, forensic and other necessary client services.

d) Enforcement Authority: The Office and Board must be given the enforcement authority needed to assure uniformly high quality representation statewide. This includes the authority to approve assigned counsel and conflict defender office plans, and to enforce the standards and criteria established by the Office and the Board.

Dated: November 7, 2014

Jonathan Lippman, Chair	Michael G. Breslin	Carmen Beauchamp Ciparick
Sheila DiTullio	Vincent E. Doyle	John R. Dunne
Joseph C. Mareane	Leonard Noisette	Susan Sovie

Andrew M. Cuomo
Governor

STATE OF NEW YORK
OFFICE OF INDIGENT LEGAL SERVICES
STATE CAPITOL, ROOM 128
ALBANY, NEW YORK 12224
Tel: (518) 486-2028 Fax: (518) 474-0505
E-Mail: info@ils.ny.gov
http://www.ils.ny.gov

William J. Leahy
Director

Joseph F. Wierschem
Counsel

Improving the Quality of Mandated Representation Throughout the State of New York

To: Indigent Legal Services Board

From: William J. Leahy, Director

Re: Additional FY 2015-2016 Budget Request

Date: October 16, 2014

The near-final settlement agreement between the plaintiffs and the state in the Hurrell-Harring case does not guarantee ILS any particular increased funding level or number of additional staff positions with which to implement the settlement provisions, except for specified additional funding amounts to defray the costs of providing counsel at first appearance, track attorney caseloads, and improve the quality of indigent defense in the five lawsuit counties. What the settlement language we have seen does include is a provision affirming that the Executive Branch "shall use its best efforts to provide [ILS] the resources necessary to carry out its responsibilities under this agreement[,]"; and also a second provision that "[t]he Executive shall use best efforts to seek and secure the funding specifically identified in this Agreement, as well as any other funding necessary, as determined in the sole discretion of the Executive, to implement the terms of this Agreement including, without limitation, funding sufficient for [ILS] to carry out its responsibilities under the Agreement."

In our meeting last week with the plaintiffs and state defendant's representatives, we stated our firm expectation that the Executive Budget for FY 2015-2016 would provide authorization and funding for the additional staff positions necessary for our successful implementation of the settlement terms; above and beyond the additional funding request authorized by the Board on September 26, 2014 to carry out our statutory responsibility to improve the quality of mandated legal services throughout the state. We believe that a dedicated staff of eight persons will be required to successfully implement the terms of the settlement in these five noncontiguous counties; consisting of a Chief Implementation Attorney, four additional attorneys, and three paralegals. Therefore, should you authorize the Office to implement the Hurrell-Harring settlement, I seek your further authorization to add funding and support for these eight positions in the FY 2015-2016 budget request we must file with the Executive Branch on or before October 21, 2014; the total amount of such additional request not to exceed $950,000.

NEW YORK STATE
DIVISION OF THE BUDGET
ALL FUNDS BUDGET REQUEST FY 2015-2016
AGENCY SUMMARY- OFFICE OF INDIGENT LEGAL SERVICES
RECAPITULATION OF CURRENT YEAR ADJUSTED APPROPRIATIONS
AND REQUESTED CHANGES FOR THE NEXT FISCAL YEAR

Appropriation Category/Fund Type (A)	Adjusted Appropriations 2014-2015 (B)	Requested Change (C)	Total Request (Column B + C) 2015-2016 (D)
STATE OPERATIONS General Fund Special Revenue – Federal Special Revenue – Other Enterprise Internal Service Fiduciary	1,900,000	+4,550,000	6,450,000
SUBTOTAL	1,900,000	+4,550,000	6,450,000
AID TO LOCALITIES General Fund Special Revenue Fund – Federal Special Revenue Fund – Other Enterprise Fiduciary	81,000,000	+31,000,000	112,000,000
SUBTOTAL	81,000,000	+31,000,000	112,000,000
CAPITAL PROJECTS Capital Projects Funds Special Revenue – Other Internal Service Fiduciary Enterprise	-0-	-0-	-0-
SUBTOTAL	-0-	-0-	-0-
DEBT SERVICE			
AGENCY TOTAL	82,900,000	+35,550,000	118,450,000

NEW YORK STATE OFFICE
OF INDIGENT LEGAL SERVICES
APPELLATE STANDARDS AND BEST PRACTICES

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NEW YORK STATE OFFICE
OF INDIGENT LEGAL SERVICES
APPELLATE STANDARDS AND BEST PRACTICES

PREAMBLE

The Office of Indigent Legal Services (ILS), in consultation with its Board, promulgates these standards under the authority conferred by Executive Law § 832. The Standards for Appellate and Post-Judgment Representation apply to all mandated post-judgment representation in criminal cases, post-disposition representation in family law cases, appeals of SORA risk level determinations, and Mental Health Law Article 10 appeals. Because appellate practice is a specialized area of practice requiring distinct expertise, particularized standards apply. These standards are to be read in conjunction with the ILS Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest and the New York State Bar Association Revised Standards for Providing Mandated Representation.

The standards promulgated here apply to all existing and future systems for the delivery of mandated indigent appellate representation.. 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.

QUALIFICATIONS, TRAINING, AND OVERSIGHT

I. Qualifications of Assigned Appellate Attorneys

Before accepting responsibility for the appeal of a criminal or family court case, attorneys must demonstrate competence to handle the assignment.

Commentary

A competent appellate attorney must know the law, rules, procedures and principles governing appellate practice, including preservation, harmless error, mode of proceedings error, and interest of justice jurisdiction, and be sufficiently experienced in the substantive and procedural law of New York to obtain a complete record within the appropriate time frame, to supplement the record as might be necessary, to identify appealable issues from a record, to write a persuasive, well researched and well supported professional brief, and, generally, to provide effective and zealous client-centered representation.

Before appointment to an appellate panel, all attorneys must demonstrate competence: e.g. sufficient knowledge and skill to handle criminal appellate assignments. *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.1(a) ("A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

Attorneys who are assigned to criminal appellate assignments must be familiar with motions to vacate convictions and sentences pursuant to CPL article 440, since a particular assignment may require the filing of such a motion. *See* Standard XX – Collateral Litigation: CPL Article 440 Motions. Further, assigned counsel should be familiar with civil proceedings related to criminal defense, such as state writs of habeas corpus (CPLR article 70) and petitions for a writ of mandamus or prohibition (CPLR article 78). Attorneys who accept family law assignments should be familiar with civil practice pursuant to the Family Court Act or, in the case of Supreme Court assignments, with the CPLR and the Domestic Relations Law. Finally, in every case, counsel should consider the possibility of continuing to seek relief on behalf of the client after exhausting all state remedies, as required by Standard XVI – Seeking Relief After State Remedies Have Been Exhausted.

Attorneys who have been trained and supervised by institutional providers may demonstrate their competence and qualifications through recommendations and formal evaluations created in the institutional program. Alternatively, attorneys can establish their competence and qualifications by submitting five substantive appellate briefs. If attorneys do not have five substantive briefs to submit with their application, attorneys may demonstrate competence and knowledge through other relevant prior work experience, including clerkships.

II. Selection Process

A selection committee shall review applications and conduct interviews of all candidates for appointment to appellate criminal and family court panels.

Commentary

A selection committee comprised of at least three persons shall interview all attorneys applying to join an appellate criminal or family court panels. Selection committees shall include experienced local appellate practitioners. Members of the selection committee need not reside or practice in the county in which the selection committee operates. Selection committees shall review the applicants' materials, including the appellate briefs submitted.

Briefs should be evaluated on the basis of legal analysis, writing skills, and persuasiveness. *See* Standard XII – The Appellate Brief. In the interviews, selection committees shall gauge applicants' ability to communicate and answer questions in a professional and thoughtful manner, and probe applicants' knowledge of relevant area of law, with attention to whether and how applicants keep abreast of legal developments.

III. Continued Evaluation of Attorneys

Institutional defender programs and assigned counsel plans shall create systems to periodically re-evaluate staff and panel members, respectively, ensuring that all attorneys continue to provide competent, effective and zealous representation after their initial hiring or acceptance to an appellate panel.

Commentary

Assigned Counsel Plans shall create a system of re-evaluation of panel members. Service on a panel is a privilege not a right, and there shall be no preference for retaining current panel members over new applicants.

Whether the continued evaluation system relies on the judgment of an administrator or that of a committee of panel members, re-evaluation will consider panel members' writing, ability to recognize legal issues, research, and client communications skills. The reviewer(s) will consider what Continuing Legal Education courses panel members have completed, and which research tools they use.

Newly admitted panel members shall be re-evaluated after either one year of service on the panel or the submission of three briefs, whichever comes first. All three substantive briefs should be read as well as all *Anders* briefs, which must be read in conjunction with the record. Panel members who have been on the panel for more than one year and who have been successfully re-evaluated on at least one occasion shall be periodically re-evaluated.

IV. Mandatory Brief Review

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

Commentary

Effective appellate representation requires consultation to ensure that meritorious issues are identified and arguments are well-honed. All assigned attorneys' work must be reviewed by an experienced attorney before it is filed with the court. To ensure that there are sufficient numbers of reviewers, all qualified panel members shall review colleagues' briefs. To be qualified to review briefs, panel members must have three years of experience in family law or criminal appeals. Panel attorneys who review briefs shall be compensated at the 18-B rate for such services.

Reviewers working with new panel members must review the record on appeal to ensure that meritorious issues are identified and properly presented, that appropriate relief has been sought, and that adverse facts are not overlooked or omitted. Review of the record shall continue until all those who have reviewed the new panel member's work deem the attorney competent to review the record independently, and the attorney has been re-certified to continue on the panel. However, all panel members, no matter what their level of experience, must submit their briefs for critique to an experienced attorney. Reviewers are not responsible for editing briefs but are free to make editing and substantive suggestions. Therefore, panel members should submit briefs for review early enough to allow time for revision and, if needed, resubmission. This collaborative process, however, does not relieve panel members of their duty to present polished briefs for review.

DUTIES OF APPELLATE COUNSEL

V. Accepting Cases

Before agreeing to accept assignments, appellate counsel must ensure that they have sufficient experience, expertise, time, and resources to provide quality representation.

Commentary

Attorneys handling assigned appeals, whether at an institutional defender or as individual assigned counsel, should refuse to accept cases that exceed their ability and resources. Attorneys with minimal experience should not handle complex cases. See Rules of Professional Conduct [22 NYCRR 1200.0], Rule 1.1 (b) (a lawyer shall not handle a matter when not competent to do so without associating with a lawyer competent to handle it). Courts should not require public defense plans or programs or individual assigned counsel to accept excessive workloads. Accepting complex cases beyond one's ability may result in the failure to address non-frivolous issues, while accepting too many cases may result in delays in prosecuting the appeal. "Justice delayed is justice denied" when an incarcerated defendant waits too long for a meritorious issue to be raised on appeal. Individual attorneys, as well as institutional defenders, must use their best professional judgment in determining whether accepting additional cases or continued representation in previously accepted cases will cause inadequate representation. If so, they must take appropriate steps, including declining additional cases, seeking leave to withdraw from existing cases, and seeking funds for additional attorneys or other staff or resources.

VI. Conflicts Of Interest

Upon being assigned, appellate counsel must make sure that no conflict of interest exists and promptly move to be relieved as counsel if a conflict does exist. In family law cases, where multiple parties may be involved, a conflict check must be done as to every party.

Commentary

Like all clients, those entitled to mandated representation deserve an attorney who has no conflicts of interest, and attorneys should have in place systems to check for conflicts. *See* Rules of Professional Conduct [22 NYCRR 1200.0], Rule 1.10 (e) ("A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and 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."). Conflicts on appeal can take many forms; it is impossible to provide an exhaustive list of potential conflicts. The most obvious conflicts are presented by the representation of criminal co-defendants or multiple respondents in family law cases. Consideration must also be given to other conflicts, such as where counsel represents a critical witness. While some conflicts may be waivable, any waiver must be explained fully to both clients involved, and if either client is unwilling to waive the conflict, counsel must move to be relieved. *See* Rules of Professional Conduct [22 NYCRR 1200.0], rule

1.7 (conflict of interest: current clients) Rule 1.9 (duties to former clients) and Rule 1.0(j) (informed consent).

Additional concerns are presented for institutional defenders where the client has been represented by the trial division and representation continues through the appeal. In such circumstances, appellate counsel from a mixed provider should carefully consider claims of ineffectiveness and seek to be relieved when such a claim is arguable. Counsel should be mindful that screening for ineffective assistance should not be undertaken if there is a significant risk that the attorney's own interests would cloud professional judgment. *See* Rules of Professional Conduct [22 NYCRR 1200.0], Rule 1.7. The appellate counsel who screens the case for an ineffectiveness claim must not have participated in representing the client at the trial level. Where the client has raised ineffective assistance, appellate counsel who determines that there is an arguable claim should seek to be relieved. Counsel who determines that there is no arguable claim should so inform the client. However, an institutional defender need not advise every client who was previously represented by its trial division that such office cannot raise an ineffectiveness claim, since that could signal to the client that there may be a viable claim, though none exists.

VII. Initial Client Contact and Case Assessment

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

Commentary

The case assessment should include determining whether: immigration issues need to be addressed, bail pending appeal should be sought, additional convictions or matters should be addressed, and the client seeks the transcripts. If a post-conviction motion was denied, counsel must determine if a motion for permission to appeal was filed. When appropriate, counsel should seek to consolidate the appeal from denial of the motion with the direct appeal. In family law cases, this assessment should include ascertaining whether case developments have rendered the appeal academic or against the client's interests, warrant efforts to expedite the appeal, or otherwise affect the appellate strategy and should seek to obtain the client's agreement to withdraw an appeal that will otherwise be dismissed as moot. *See* Standard XXI – Client Communication.

VIII. Obtaining the Complete Record

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

Commentary

Obtaining a complete and accurate record of trial proceedings is a vital and sometimes daunting task. Lengthy delays may be experienced in obtaining transcripts, and thus they should be

promptly ordered by counsel. *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.3 (diligence). Given the duty to promptly prosecute Family Court appeals, it is especially critical that, immediately upon assignment, counsel order record documents and, when encountering difficulty in timely obtaining them, seek assistance from the appellate court.

In criminal cases, counsel should determine that transcripts are complete and include pretrial hearings; plea proceedings or the trial including jury selection; and sentencing. If material portions of the minutes are lost, counsel should move for a reconstruction hearing. Counsel should seek to obtain transcripts of relevant proceeding not covered by the assignment. In addition, counsel should obtain a copy of the entire court file. If papers were filed with the court but are not part of the file, appellate counsel should seek to obtain them from trial counsel. In criminal cases, in addition to motion papers and decisions, counsel should obtain the file jacket, endorsements, accusatory instrument, prosecutor's disclosure statements, all written waivers, jury notes, the verdict sheet, predicate felony statement, sentence and commitment order, presentence report, and other sentencing documents.

In family law cases, relevant court file documents will include the notice of appeal, decision and order appealed, pleadings, motion papers, forensic evaluation reports, mental health studies, probation reports, written closing statements, and relevant prior orders in the same or related proceedings.

Counsel should obtain a copy of exhibits marked for identification or entered into evidence where relevant to issues to be raised, and in SORA cases should obtain a copy of the SORA Board's Risk Assessment Instrument and Case Summary. In addition, counsel should move to unseal relevant records. Counsel should speak to trial counsel and request counsel's file where appropriate. Particular attention must be given to determining if there were issues raised or litigated that may not be apparent from the appellate record. If the client or the record reasonably suggests a possible ineffective assistance claim, counsel should request defense counsel's trial file.

While the types of documents needed for mandated representation appeals are uniform among all Appellate Division Departments, the manner of obtaining, compiling, and authenticating such documents vary. Thus, counsel must know the relevant Department's rules. In some Departments, counsel must subpoena original papers; in others, specific documents from the court file are requested and counsel compiles a record. In some Departments, the court obtains the transcripts for counsel; in others, counsel must order them. When counsel orders sealed transcripts, such as *Lincoln* hearings, they likely will be provided directly to the Appellate Division. Practices differ among Departments, and sometimes among counties within a given Department, regarding how exhibits, forensic reports, and presentence reports are obtained and provided to the appellate court. Finally, some Departments permit certification of the record, while others, in the absence of a stipulation, require an order from the original court settling the record.

IX. Meeting with the Client

To establish a relationship of trust and confidence, counsel must meet with the client. If the client is incarcerated, the meeting should occur in the jail or prison, unless such a meeting would not be in the client's best interest. If the client is not incarcerated, a meeting may occur at counsel's office. If that is not feasible or if a visit at another site might yield more relevant information, counsel should make appropriate arrangements. Once a relationship has been established, counsel may communicate by phone, but should be mindful that such conversations with incarcerated clients typically are not secure. Further, counsel should consider the security of phone calls to clients who live with co-defendants or co-respondents or anyone who might use information about the client in a harmful way.

Commentary

Generally, after reviewing the record, counsel should meet in person with the client. If an in-person meeting is not reasonably feasible, counsel should communicate with the client on a secure phone line or, alternatively, through a secure video conferencing link. Meeting personally with the client provides an opportunity to establish a meaningful relationship, which is as important in appeals as in trials. The attorney is assigned to represent a client, not to write a brief. *See Commentary,* American Bar Association, ABA Standards, Criminal Justice, Prosecution Function and Defense Function, Standards 4-8.3 at 241 [3d ed. 1993], available at http://www.reasonabledoubt.us/aba_defensefunction.pdf: "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."; *see also* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.4 (communication).

Clients are often incarcerated far from the county of conviction, and resources required for visiting clients are substantial. It is recognized that the resources to cover these substantial costs are not currently provided to appellate counsel. For this important standard to be satisfied and for prison visits to become routine, funders must cover the additional expenditures that will be required. When counsel is assigned, the need for personal visits should be considered by counsel (and the appointing authority). Counsel should be reimbursed for travel time and expenses, as well as phone charges.

Personal visits are important for many reasons. Clients may be unable to read and understand counsel's written communications, may be unable to form a trusting relationship with someone they have never met, may be unwilling to provide sensitive information by phone or letter, may be receiving bad advice, or may face circumstances that affect their decision-making and communication abilities. By visiting clients, counsel may learn far more from them and convey far more to them than otherwise would be possible. Although appellate briefs may not contain facts outside the record, gaining information through in-person meetings can be crucial to litigating post-judgment claims. For example, if counsel learns that a client has a history of mental illness and was suffering from such condition during the proceedings below, a motion to vacate the conviction may be viable. *See* Standard XX – Collateral Litigation and Standard XXII – Issue Selection.

X. Counseling about Risks

Counsel must fully advise the client as to potential risks involved in pursuing the appeal and attempt to minimize such risks as the appeal progresses. In family law cases, counsel must advise clients about the impact of subsequent and collateral proceedings on the judgment being appealed. Counsel should caution clients that an order entered on consent is not appealable and modifies any earlier order.

Commentary

The client must be fully informed of risks presented by an appeal. Perhaps the area of greatest danger occurs when seeking vacatur of a guilty plea. Such appeals may present the risk that a defendant successful on appeal could ultimately suffer a more serious conviction or a greater sentence. Counsel who believes that potential risks outweigh potential benefits should advise the client to forgo the appeal. If the client nevertheless wishes to pursue the appeal, an in-person meeting may be required to discuss the matter. *See* Standard XXII – Issue Selection. Further, before going forward with such an appeal, counsel should obtain the client's signed, written statement that the risks have been explained and understood and that the client has decided to proceed with the appeal. In family law proceedings, disputes between the parties often evolve long after entry of the challenged order or judgment. Subsequent developments (such as removals, findings of derivative neglect, surrender of parental rights, or modification orders entered on consent) may supersede and moot the appeal. Thus, appellate counsel should advise the client to notify counsel of subsequent proceedings. In addition, appellate counsel should seek to discuss with trial counsel the potential impact of subsequent orders or judgments on the appeal.

XI. Filing the Appeal in a Timely Manner

Counsel shall file the appeal expeditiously, taking care to safeguard the client's rights by taking all actions necessary to meet applicable time limits.

Commentary

The appeal process is inherently lengthy, and counsel is obligated to seek to move the appeal forward as expeditiously as possible. *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.3 (diligence). Clients often wait months before an appellate attorney is assigned. Once assigned, counsel should contact the client and promptly seek to obtain all record documents. In some Appellate Division Departments, counsel should move to settle the record if the opposing parties do not cooperate in a timely manner. *See* Standard VIII – Obtaining the Complete Record. Counsel should ensure that caseload demands do not prevent prompt completion of other steps in the appeal process. *See* Standard V – Accepting Cases. These steps include record review, legal research, and brief writing. The duty to file the appeal in a timely manner applies with special force in appeals from Family Court orders or judgments. Recognizing the urgency of litigation that may involve placement or custody of children, Family Court § 1112 (a) confers a preference in such cases. In addition, the rules of some Appellate Division Departments impose a duty upon attorneys handling assigned Family Court cases to prosecute the appeals promptly.

XII. The Appellate Brief

The appellate brief should be clear, concise, and well organized, and it should provide the court with the facts and law necessary to make a well-reasoned decision. The brief should be professional in appearance, free of typographical errors, consistent with court rules and citation requirements, and accurate in record and legal cites.

Commentary

To be effective, an appellate brief should distill the relevant facts, law, and arguments supporting the claims presented to their essence in order to assist the court in making a correct decision. Counsel should keep in mind that courts and their clerks are dealing with a large case load involving a great variety of issues, so that clarity, brevity, and persuasiveness are at a premium. Presenting the facts coherently is particularly important. Judges are often familiar with the applicable legal principles; on the other hand, they must rely on the brief to learn the facts relevant to the legal issues. After providing a succinct recital of events to place the case in context, the brief writer should focus primarily on the facts that are necessary for resolution of the arguments raised. A witness-by-witness chronology may be helpful in preparing to write the brief, but it is not an effective way to convey the facts the court needs. The writer should provide a cogent, compelling narrative emphasizing the facts most salient to the claims.

The argument section should present the claims in a logical order, beginning with the strongest point, unless there is good reason to begin with another claim (for example, one that would result in dismissal, rather than a new trial). An introductory paragraph should summarize key facts, arguments, and relief requested. The following paragraphs should develop the components of the argument, beginning with topic sentences to guide the reader. Controlling authority should be set forth, and precedents should be used to explain why the relief sought should be granted. Key favorable cases should be carefully analogized to the facts, and key unfavorable cases should be distinguished. Whenever possible, decisions of the New York Court of Appeals or the relevant Appellate Division Department should be cited. Lengthy string citations typically are not helpful.

Counsel should know the applicable court rules, which differ among appellate courts, regarding brief length, format, font size, and other such matters. Where applicable, counsel should familiarize themselves with the rules on confidentiality, such as redacting names, addresses, social security numbers, etc.

XIII. Reply Briefs

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

Commentary

The appellate attorney should take advantage of every opportunity to advocate effectively for the client. In most cases, a reply brief will advance the client's cause. This is obviously the case where the opposition's brief contains misstatements or raises new issues or where a new relevant appellate decision has been rendered. Further, reply briefs may point out weaknesses in the opposing counsel's arguments, sharpen the issues for oral argument, and reveal the strength of the appeal.

XIV. Oral Argument

Where oral argument is permitted, counsel should appear and advocate on behalf of the client, unless doing so would not serve the client's interest. Zealous, effective representation requires that counsel thoroughly prepare for oral argument by reviewing the briefs, the record, and all relevant case law, including post-briefing decisions. Counsel should strive to present oral argument in a clear, cogent, and persuasive manner. The client should be informed promptly of the date, time, and place scheduled for oral argument.

Commentary

Oral argument is a critical opportunity to advocate for one's client and should not be waived unless it would not benefit the client. Thus, oral argument is the rule, and submission on the brief is the exception. Appellate justices have stated that, in close cases, oral argument can make a difference in the outcome. While the time permitted for oral argument is short, thorough preparation is labor intensive. This process should result in development of an outline setting forth key points, cites to key record pages and appellate decisions, and answers to anticipated questions. Where appropriate, counsel should be moot-courted and observe oral arguments in the subject court.

Counsel should be familiar with the relevant appellate court's rules regarding cases in which argument is permitted, how to make requests for argument, how notification of argument is provided, and whether rebuttal and post-argument submissions are permitted. In family law cases, counsel should know the relevant Department's practice regarding matters outside the record (*see Matter of Michael B.*, 80 NY2d 299 (1992) (allowing for disclosure upon appeal of subsequent developments in certain circumstances). Counsel should notify the client of the date, time, and place of oral argument so that the client or friends or relatives can attend.

XV. Leave Applications

If the intermediate appellate court does not grant the full relief sought, counsel must make an application for leave to appeal to the Court of Appeals, unless the client instructs counsel not to do so. If opposing counsel files a leave application, the assigned attorney must oppose it. In family law cases, counsel should consult with the client to discuss the possibility of further appeal and proceed according to the client's wishes. Where counsel is unable to consult with the client within the time allowed for filing a leave application, counsel should file the application.

Then counsel should explain the appellate process and determine whether the client wishes to proceed. If not, counsel should withdraw the application.

Commentary

In criminal cases, all Appellate Division Departments require a leave application if counsel is not successful. Counsel should be familiar with the different statutory provisions governing leave applications in criminal cases (where the motion is made either to an Appellate Division justice or the Court of Appeals) and in civil cases (where counsel may move first in the Appellate Division and then, if leave is denied, in the Court of Appeals). In addition, counsel should be familiar with the applicable court rules, including Court of Appeals rules requiring letter-applications in criminal cases and the need for formal motions in other cases. Finally, the availability of motions for reargument should be understood, and such applications should be made where appropriate.

When seeking leave in a criminal case in the Court of Appeals, filing only a form letter with copies of the briefs does not constitute effective appellate advocacy. Upon the filing of the initial leave letter, when a judge is assigned to consider the application, counsel should then make a substantive submission to the assigned judge. Such submission should be a persuasively written letter explaining why the case warrants review. Such reasons might include a split of authority, a novel issue or one of statewide importance, or the recent grant of leave in a case involving a similar issue. In addition, counsel should explain how the issue is preserved for review and should include relevant portions of the record. Finally, counsel should include all issues cognizable in a federal habeas petition. Similar principles apply to presenting leave-worthy issues in family law, Sex Offender Registration Act, and Mental Hygiene Law article 10 appeals.

XVI. Seeking Relief after State Remedies Have Been Exhausted

In every case, after having exhausted all state remedies, counsel must consider the possibility of pursuing further avenues for relief and, where appropriate, should seek such relief. If counsel determines that there is no realistic possibility that further review might yield positive results, counsel must explain to the client all options for such review.

Commentary

In most instances, once the state conviction becomes final, counsel's obligation to seek relief ends. However, in some cases, there may be a realistic possibility that relief may be achieved by a petition for federal habeas corpus relief or for U.S. Supreme Court review or by further investigation of the case. This standard recognizes that, in such a case, if the requisite resources are available, counsel should pursue these avenues. If such resources are lacking, counsel should consider law school clinics, legal services organizations, and other entities that might represent the client. Where further efforts would be futile, there is no obligation to pursue them. Counsel must inform the client of the options available for pro se litigation, as well as the relevant filing deadlines. In the rare family law case where further efforts are appropriate, counsel should consider pursuing such litigation or seek to make a referral to a nonprofit organization or pro bono counsel.

XVII. Representing Non-U.S. Citizen Clients

Counsel must promptly determine the client's immigration status, and when the client is not a U.S. citizen, ascertain the existence of immigration proceedings and the potential impact of the subject appeal on immigration status. If the appeal involves a criminal conviction or family law matter that is the basis for immigration proceedings, the attorney must ensure that immigration authorities are aware of the pending appeal. The attorney must investigate the advice provided by trial counsel concerning immigration consequences. Where such advice was defective or plea negotiations failed to address immigration consequences, the attorney must pursue an ineffective assistance claim. Counsel should assess the viability of all claims that might improve immigration consequences. A client's deportation does not relieve an attorney of the obligation to pursue appellate and post-conviction remedies. If 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, since deportation may imperil the appeal.

Commentary

Given the severity and inevitability of deportation for many non-citizen criminal defendants, deportation is an integral part of the potential penalty when such defendants plead guilty to specified crimes. *Padilla v Kentucky*, 559 US 356 (2010); *People v Peque*, 22 NY3d 268 (2013). As a result, providing competent appellate representation to such clients includes determining the immigration impact of the conviction and pursuing all available avenues for relief. This will require an attorney to possess knowledge in immigration law or consult other attorneys who possess such expertise. *See* Rules of Professional Conduct, Rule 1.1 (b) (a lawyer shall not handle a matter when not competent to do so without associating with a lawyer competent to handle it).

The U.S. Supreme Court has held that an attorney deprives a non-citizen defendant of effective assistance by failing to advise, or by misadvising, about the immigration effects of a conviction. *See Padilla v Kentucky, supra.* Thus, an appellate attorney representing such a defendant must investigate and pursue any viable claims arising from such lapses, either on direct appeal or via collateral attack. Moreover, the trial court has a duty to advise the non-citizen defendant of the possible deportation consequences of a guilty plea. *See People v Peque, supra.* The failure to do so may present an issue on direct appeal. The length of a defendant's sentence may trigger immigration consequences. Therefore, an attorney handling a non-citizen's appeal should argue for sentence reduction when available. *See People v Cuaran*, 261 AD2d 169 (1st Dept 1999) (reducing negotiated sentence from one year to 364 days to relieve defendant of unanticipated immigrant impact). A defendant's involuntary deportation does not justify dismissal of an appeal, at least where the remedy requested does not require further proceedings. *See People v Ventura*, 17 NY3d 675 (2011). Accordingly, an attorney should pursue all available appellate and post-conviction remedies, even when a client has been deported. Obtaining relief may enable a client to return to the United States.

XVIII. Holistic Representation

Appellate counsel has an obligation to provide comprehensive representation during the appellate assignment and also should determine whether the client needs assistance with matters beyond the assignment, such as parole advocacy, re-entry or unacceptable prison conditions.

Commentary

Incarcerated clients face many challenges they are ill-equipped to handle on their own. Moreover, they usually have difficulty accessing legal and social services. Their situation imposes a unique duty on appellate attorneys, who are often these clients' only legal advocates. When the resources needed to provide needed assistance are unavailable, the attorney should at least attempt to help the client contact appropriate services.

XIX. Sentencing Issues

When reviewing the issues to be raised on direct appeal in criminal cases, counsel must determine the legality of the sentence imposed. Counsel should also determine whether a client's sentence has been properly calculated by jail or prison officials and take steps to correct errors that operate to the client's disadvantage.

Commentary

The complexity of New York's sentencing laws imposes a special duty on appellate counsel to carefully review the legality of a client's sentence. For predicate felons, such review necessarily entails determining whether the subject prior felony sentence was legal and whether a prior out-of-state conviction qualified as a predicate felony in New York. For example, counsel's review may reveal that a client was wrongly sentenced as a second felony offender based on a crime not set forth in the Penal Law. *See e.g. People v Cammarata*, 216 AD2d 965 (4th Dept 1995). The client may have received a determinate sentence rather than a mandatory indeterminate sentence. *See e.g. People v McKay*, 10 AD3d 734 (2d Dept 2004). Counsel must raise such issues on direct appeal, or when that is not possible, must pursue relief via a CPL 440.20 motion. *See* Standard XX. Collateral Litigation: CPL Article 440 Motions. In addition, counsel has a duty to ensure that the sentence has been correctly calculated by correctional personnel and that jail time has been properly credited. In this regard, see *Matter of Guido v Goord*, 1 NY3d 345 (2004) (inmates do not secure jail time credit for out-of-state or federal detention unless certified record of detention is provided). Finally, a person confined pursuant to a civil commitment of the Family Court for a fixed period of time may receive jail time credit. See Correction Law §804-a (1); *Matter of Cunha v. Urias*, 112 A.D.3d 923 (2d Dept 2014) (discretionary reduction of the term of a civil commitment is available where the sentence is for a fixed period of time and the release is not conditional upon performance of an act.)

XX. Collateral Litigation: CPL Article 440 Motions

After reviewing the record and case file, and after meeting with the client, appellate counsel must determine whether an investigation is warranted as to a possible CPL § 440.10 or § 440.20

motion. Claims not cognizable on direct appeal may involve ineffective assistance of counsel, undisclosed *Brady* material, competency of the client, newly discovered evidence, improper and prejudicial conduct outside the courtroom, and sentencing issues that cannot be raised on direct appeal. If such a motion is warranted, counsel must file it, seek permission to appeal from the denial of such a motion, and represent the client if leave is granted to defendant or to the prosecutor.

Commentary

A client's rights may not be adequately protected when counsel limits the challenge to the conviction to filing a direct appeal; thus, appellate counsel must consider whether any issues should be raised through a post-conviction motion under CPL 440.10 or 440.20. See American Bar Association, ABA Standards, Criminal Justice, Prosecution Function and Defense Function, Standard 4-8.3(b) at 239 [3d ed. 1993], available at http://www.reasonabledoubt.us/aba_defensefunction.pdf: "Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding." The most common ground for a postconviction motion is a claim of ineffective assistance of counsel based on counsel's failure to investigate or prepare the defense, but appellate counsel should be aware of other possible claims that require the filing of an Article 440 motion. For example, counsel may learn that a witness's exculpatory statement to police was not provided to trial counsel; that the client suffers from a mental illness or cognitive impairment that rendered the proceedings, or particular rulings, invalid; that a juror committed misconduct; or that newly discovered evidence suggests that the conviction should be vacated. Counsel should also investigate where it appears that the sentence may have been improper, such as when a predicate felony conviction was illegal or, if from another state, did not include essential elements of a New York felony. When it appears that a CPL § 440.10 or § 440.20 motion is warranted, appellate counsel must make such application, seek permission to appeal from a denial, and represent the client on an appeal, if any. Counties must provide adequate funding for counsel to pursue these motions.

SPECIAL ETHICAL CONSIDERATIONS

XXI. Client Communication

At the outset of representation, counsel must provide general information about the appeal process and time frames and thereafter should keep clients informed about the status of their appeal or post-judgment motion, including explaining delays and providing a copy of each substantive document filed. Counsel should inform the client of the right to file a brief pro se where such right exists, and counsel should provide the procedural advice required to conform the client's filing to the rules of the court. The client should be notified promptly of any court decision, the proposed action in response, and the scope of any further representation. Counsel must be mindful of circumstances that could interfere with the client's understanding of the appeal process.

Commentary

Counsel's duty to keep their clients reasonably informed about their case is set forth in Rule 1.4 (a) of the Rules of Professional Conduct [22 NYCRR 1200.0]. Since appellate clients are often incarcerated and have limited ability to contact their attorneys, counsel must be proactive in providing salient information. Impediments to meaningful communication—such as language differences, illiteracy, youth, or mental or physical impairment—impose a special duty to ensure meaningful communication. *See* Standard XXIV– Diminished Capacity. At the outset of representation, counsel must ascertain if there are potential communication barriers and take steps needed to ensure that information provided is understood. For example, an interpreter or translator may be required. *See People v Rosario*, 19 AD3d 333 (1st Dept 2005). If the client cannot read, then the attorney must convey information verbally in a manner that facilitates a full understanding and protects sensitive and confidential material. *See United States v Santiago*, 495 F3d 27 (2d Cir 2007). *See* Standard IX - Meeting with the Client.

XXII. Issue Selection

Strategic decisions regarding the issues to be pursued on appeal should be made after thorough consultation between attorney and client. Counsel have an obligation to advise their clients of the potential risks presented, as well as to recommend a course of action. The attorney should raise all colorable issues the client desires, unless doing so could prejudice the client. The attorney should strive to include issues that can be further reviewed in a higher appellate court or through a federal habeas corpus petition if the intermediate appellate court appeal is unsuccessful.

Commentary

The client, not the attorney, decides whether to proceed with the appeal. *See Jones v Barnes*, 463 US 745, 751 (1983). Since potential appeal issues may present risks of a worse ultimate outcome following the appeal, counsel must advise the client as to recommended issues. *Boria v Keane*, 99 F3d 492 (2d Cir 1996) (attorney has constitutional obligation to provide client with professional advice as to course of action to pursue). *See* Standard XI – Counseling about Risks. In all cases, counsel should have a productive dialogue with the client about issues and strive to reach an agreement. *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.2(a) ("Subject to provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to pursued."). In most cases, there should be no ultimate disagreement. Where the client seeks to present issues against advice, counsel generally should accede to the client's wishes. Counsel should only decline to raise a desired issue if doing so would negatively affect viable issues raised. Where a desired issue is not raised, counsel must inform the client of his or her right to file a pro se supplemental brief and assist the client in adhering to court rules.

XXIII. *Anders* Briefs

Counsel should avoid filing motions and briefs asserting that no non-frivolous issues exist and seeking to withdraw as counsel. A narrow exception exists in criminal appeals where the client pled guilty, there were no substantive hearings (or rulings denying hearings), the minimum

sentence was imposed, and there are no plea vacatur issues or the client is unwilling to risk vacatur of the plea. In those rare cases, there well may be no non-frivolous issues, and filing an *Anders* brief may be appropriate.

Commentary

Early assertions by counsel that there is nothing to appeal may damage the attorney-client relationship, impeding an agreement on an appeal strategy. In most cases, in-depth analysis of the case, effective communication, and zealous representation will avert the need to file an *Anders* brief (*Anders v California*, 386 US 738 [1967]). Generally, such briefs are disfavored. The 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." American Bar Association, ABA Standards, Criminal Justice, Prosecution Function and Defense Function, Standards 4-8.3(a) at 239 [3d ed. 1993], available at http://www.reasonabledoubt.us/aba_defensefunction.pdf . 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." Id. at 241.

In New York, *Anders* briefs have long been a source of concern. In *People v Stokes*, 95 NY2d 633 (2001), the Court of Appeals reversed the Appellate Division and remitted for a de novo appeal with new counsel because an *Anders* submission—by counsel who had filed *Anders* briefs in 21 out of 26 cases—failed to safeguard the client's rights. Recently, the Second Department heightened its review of *Anders* briefs, and emphasized that with *Anders* briefs, a two-step analysis applies. *Matter of Giovanni S. (Jasmin A.)*, 89 AD3d 252 (2d Dept 2011). First, the reviewing court must be satisfied that counsel has conducted a thorough search of the record to discern any arguable claim that might exist. That means that the brief must do more than recite underlying facts and must provide more than an opinion that no non-frivolous issues exist. Second, where the requisite showing is made, the appellate court must do an independent review of the record to determine the correctness of counsel's assessment. While New York courts do not prohibit *Anders* briefs, counsel must do substantial research and analysis before contemplating such a brief, keeping in mind that the client cannot choose appellate counsel. In plea cases where no substantive hearings were held or were denied and clients received the minimum available sentence, *Anders* relief may be denied where a possible plea withdrawal issue exists. However, if the client is unwilling to assume the associated risk, counsel may want to consider filing a motion to be relieved on such basis.

XXIV. Diminished Capacity

Based on the record or personal contact with the client or information from third parties, if counsel reasonably believes that a client has diminished capacity to make decisions about the appeal, an appropriate course of action should be determined. Counsel should consider whether the appeal presents significant risks, whether a record should be made regarding the client's diminished capacity, and whether a person or entity could act for the client in making decisions as to the appeal.

Commentary

"When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client." Rules of Professional Conduct [22 NYCRR 1200.0], Rule 1.14 (a). Appellate representation presents a unique challenge as to such clients. Standard 7-5.4 of the Criminal Justice Mental Health Standards of the American Bar Association directs counsel to alert the court to doubts about competence to proceed, to prosecute the appeal despite such incompetence, and to raise issues deemed appropriate. However, such standard does not address appeal risks or the fact that disclosure of diminished capacity could adversely affect the client, such as by resulting in an unwanted change in conditions of confinement based on mental health status. No specific statutory mechanism exists to deal with appellate client incompetency. Given the complexities presented by clients with diminished capacity, this standard does not direct any specific action, but requires careful consideration of relevant factors before deciding how to proceed.

XXV. Case File

The case file maintained by counsel belongs to the client. Institutional defenders and assigned counsel should retain the file under as secure conditions as reasonably feasible throughout the client's life, unless directed otherwise. Counsel should promptly furnish a client's file to successor counsel. However, counsel may not disclose confidential information to successor counsel unless the client gives permission.

Commentary

The file belongs to the client; this includes attorney work product, with some minor exceptions. See *Sage Realty Corp. v Proskauer Rose Goetz & Mendelson,* 91 NY2d 30 (1997). While much discussion about client files arises in the context of trial representation, files created and maintained by appellate counsel are no different. In the absence of a client's specific directive otherwise, retention of files by county public defenders is governed by the State Education Department's records retention rules, which require such files to be maintained throughout the client's life. *See* 8 NYCRR 185.13 (Appendix J). Even if legal aid societies and assigned counsel are deemed beyond the rules' reach, the same principles apply. One ethical opinion says that, after retention for a reasonable amount of time, if counsel has requested instructions and received none, they may destroy files that do not contain foreseeably needed material. NY St Bar Assn Comm on Prof Ethics Op 623 (1991). It *is* foreseeable that mandated representation clients will need their files in the future due to theft or loss of documents in prison or during hasty moves or periods of homelessness. Such information could be important, for example, in CPL article 440 motions, immigration proceedings, family court matters, and predicate offender status determinations. As to the form in which files are maintained, the relevant rule states that copies may be kept in any "medium that preserves an image of the document that cannot be altered without detection." Rules of Professional Responsibility [22 NYCRR 1200.0], Rule 1.15 (d) (3). Originals should be maintained where they may be needed in future proceedings.

When counsel's representation has ended, and the client has obtained successor counsel for post-disposition proceedings in the same matter or another matter in which the client's file is relevant, the file should be provided to the client or successor counsel. Rules of Professional Conduct, rule 1.16 (e). This includes information in digital form. As stated in the Commentary to Standard XXVI – Coram Nobis, *infra*, counsel's obligation to cooperate with successor counsel does not cease just because the latter counsel may make an ineffective assistance claim; the duty to cooperate includes prompt provision of the file to such counsel. Client permission is required to disclose confidential information. Rules of Professional Conduct, Rule 1.9 (c) (2). Retained counsel may not withhold a file on the basis of inability to pay for copies; institutional defenders should not either. The expense of copying files upon request should be anticipated in the budget.

XXVI. Coram Nobis

Appellate attorneys are not permitted to disclose confidential information to prosecutors in post-conviction proceedings challenging the effectiveness of appellate representation. If a court seeks such information, attorneys should resist disclosure beyond what is needed to defend against an accusation of wrongdoing. In a coram nobis petition, if the client misrepresents relevant facts, counsel should provide the court with accurate information about the decision-making process. When counsel agrees that a mistake was made in the appellate representation, an affirmation admitting error should be provided.

Commentary

Attorneys have ethical duties to former clients, and a claim of ineffective assistance of counsel does not waive confidentiality. The Rules of Professional Conduct [22 NYCRR 1200.0] prohibit attorneys from disclosing confidential information, except upon informed consent (Rule 1.6 [a] [1]) or when reasonably necessary to defend the attorney against an accusation of wrongful conduct (Rule 1.6 [b] [5]). The rules prohibit use of confidential information to the disadvantage of a former client or disclosure of such information, except as permitted with regard to current clients (Rule 1.9 [c]). Under duties regarding loyalty and protection of confidences, counsel should avoid assisting prosecutors seeking to uphold former clients' convictions and sentences. These principles apply even when counsel's effectiveness is challenged. The American Bar Association Committee on Ethics and Professional Responsibility emphasizes the importance of maintaining confidential information when counsel is accused of ineffectiveness. *See* Formal Op 10-456 (2010). According to the opinion, attorneys may disclose only information reasonably necessary to prevent harm that would result from a finding of ineffectiveness. The opinion concludes that it is highly unlikely that disclosure of confidential information would be justifiable.

In response to a coram nobis petition, counsel should take no position and should supply only documents necessary to correct misrepresentations. When challenged as ineffective, counsel may wish to defend the performance rendered, but must recognize the transcendent duty to protect the client's interests. While at the trial level counsel may have information vital to an ineffectiveness claim, that is rarely the case at the appellate level. After all, the court has the transcript and the briefs, raising some issues and omitting others. The coram nobis petition presumably sets forth

issues that purportedly should have been raised, the prosecution has every incentive to argue that appellate counsel was not ineffective for failing to raise them, and the court is in a position to make its own assessment of the comparative strength of the issues. Counsel's opinion would add only self-serving rationalizations.