

RESOLUTION NO. ____ – 2021

RESOLVED, that this Board hold a public hearing pursuant to Section 209.141(4) of the Laws of Westchester County on Local Law Intro. No. ____ - 2021, entitled “A LOCAL LAW amending the Laws of Westchester County by adding a new Chapter 186 creating the Independent Office of Assigned Counsel.” The public hearing will be held at __.m. on the ____ day of _____, 2021 in the Chambers of the Board of Legislators, 8th Floor, Michaelian Office Building, White Plains, New York. The Clerk of the Board shall cause notice of the time and date of such hearing to be published at least once in one or more newspapers published in the County of Westchester and selected by the Clerk of the Board for that purpose in the manner and time required by law.

TO: HONORABLE BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a communication from the County Attorney recommending adoption of “A LOCAL LAW amending the Laws of Westchester County by adding a new Chapter 186 creating the Independent Office of Assigned Counsel.”

Your Committee is informed that New York State County Law (“County Law”) Article 18-B (“18-B”), sections 722-722-F, enacted in 1965, delegated to counties throughout New York State and New York City, the responsibility for providing counsel to indigent defendants in criminal and Family Court cases. While section 722 of the County Law set out the types of providers that counties could employ to fulfill the right to counsel, the statute provided no details as to the proper establishment of Assigned Counsel Programs. Therefore in the past, counties and bar associations in New York State created and maintained programs with little guidance.

As your Committee is aware, currently, Westchester County provides indigent legal services or Assigned Counsel pursuant to a Plan of Representation (“Plan”) approved by the New York State Administrator, first entered into in 1965, amended in 1975, and renewed on an annual basis, between the County, Legal Aid Society of Westchester County (“Legal Aid”) and the Westchester County Bar Association (“WCBA”). *See* Chap. 878, Laws of 1965. The Plan provides for legal representation by Legal Aid attorneys and by private attorneys (“18-B Panel”) for indigent clients. Membership on the 18-B Panel is coordinated by the WCBA, who reviews applications and certifies to Legal Aid a list of attorneys who may be appointed to represent indigent defendants in the criminal and Family Courts in Westchester County. Legal Aid as

“administrator” of the Plan, promulgates rules and regulations for the conduct of the Plan and coordinates the assigned counsel assignments of its own attorneys as well as the 18-B Panel. Legal Aid also applies for funding from New York State to improve the quality of indigent legal representation in the County. The County is responsible for the payment of the 18-B Panel attorneys. Vouchers for payment of attorneys on the 18-B Panel are first submitted to the Court for approval, then to Legal Aid for review and processing and finally to the County Finance Department for payment.

Your Committee is advised that Westchester County, along with other counties throughout New York State have or are in the process of amending their Plans based upon legislation enacted by New York State mandating reforms in the provision of indigent legal services in New York. These reforms are the result of a settlement of a lawsuit brought in 2007 by the New York Civil Liberties Union against New York State alleging that the State had systematically and structurally denied meaningful and effective representation to defendants entitled to publicly funded representation in violation of their Sixth Amendment right to counsel. *Hurrell-Harring v. State of New York*; 15 N.Y.3d 8 (2010); 930 N. E. 2d 217 (N.Y. 2010). As a result of this litigation, in 2010, the New York State legislature enacted New York State Executive Law (“Executive Law”) §§ 832 and 833 respectively, authorizing the creation of the New York State Office of Indigent Legal Services (“ILS”), and a 9-member Indigent Legal Services Board (“ILS Board”). The express statutory purpose of both ILS and the ILS Board “is to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law.” See, Executive Law §§ 832(1), 833 (1).

Your Committee is further advised that in October 2014, the parties in the *Hurrell-Harring* case reached a Settlement Agreement that mandated New York State to remedy four major areas of deficiency in the provision of indigent legal services: the lack of counsel at arraignment; excessive caseloads and inadequate support services; lack of quality control and oversight structures; and the failure to have a uniform standard of eligibility for the assignment of counsel. The Settlement, which required the state to provide funds for reform, applied only to the five counties involved in the lawsuit and not to any of the other fifty-two upstate counties or to New York City. On January 17, 2017, however, Governor Cuomo proposed the extension of the *Hurrell-Harring* reforms throughout New York State at state expense. ILS was given responsibility to develop plans for the statewide reforms to the provision of assigned counsel and to oversee their implementation. On April 10, 2017, the final FY 2018 New York State budget included two statutory amendments. Specifically, County Law § 722-e, which since 1965 had required counties to fund Assigned Counsel, was amended to specify that any costs of implementing the ILS reform plans “shall be reimbursed by the state to the county or city providing such services.” Further, the statute provides that the “state shall appropriate funds sufficient to provide for the reimbursement required by this section.”

Your Committee notes that a new subdivision of the Executive Law § 832 (4), entitled “Additional Duties and Responsibilities,” gave ILS the authority to craft and implement plans for statewide implementation that provide counsel at arraignment, caseload relief, and quality improvement. Pursuant to this mandate, ILS has been meeting with public defense providers and local government officials in the counties and New York City to create implementation plans that

meet the mandates of the Executive Law, determine appropriate interim steps, and estimate the cost of full compliance with those plans in the coming years. Accordingly, to aid counties and to ensure quality representation, ILS, in consultation with the ILS Board, promulgated Standards for Establishing and Administering Assigned Counsel Programs (“Standards”, attached hereto), pursuant to Executive Law § 832. These Standards encompass criminal defense, family law, and appellate representation of assigned counsel clients. With Statewide implementation of reforms in compliance with the Standards, 41 counties and New York City now operate with independent administrators, and all counties are developing enhanced structure and resources for their assigned counsel attorneys.

Your Committee is informed that the County’s Plan currently relies upon Legal Aid to provide attorneys for representation of indigent clients, administer the 18-B panel of private attorneys to represent indigent clients, apply for all funding from the State and process the vouchers to forward to the County for payment of attorneys. ILS strongly believes that this arrangement clearly creates a conflict of interest for Legal Aid; in 2020, the then Presiding Justice of the Appellate Division, Second Department, indicated the necessity for the County to create a new Plan for an Assigned Counsel program that would meet the requirements of not only New York State law but the Standards as well. Over the past several months, I and the Chief Deputy County Attorney have met and consulted with ILS, WCBA and Legal Aid to establish a new program for the provision of assigned counsel in Westchester County. We have drafted proposed legislation to create an Independent Office of Assigned Counsel (“Office”) that complies with New York State law and the Standards issued by ILS. Moreover, on

February 25, 2021, as required by County Law §722, ILS formally approved the County's new plan for provision of Indigent Legal Services contained in the proposed legislation creating the Office.

Your Committee is further informed that pursuant to the proposed legislation, the Office will be administered by an Assigned Counsel Administrator with the advice and consent of an 11 member independent Assigned Counsel Board of Directors. The Board of Directors will be appointed by the County Executive on the recommendations of various Bar Associations and confirmed by this Honorable Board. All of the administrative duties currently carried out by Legal Aid will be assumed by the Office. The County will contract with the WCBA and other appropriate agencies to provide specific services including review of attorney applications for certification and recertification to the 18-B panel, as well as training, investigation, expert witnesses, social work/sentencing advocacy, quality control, or second chair and mentoring programs. Moreover, the Assigned Counsel Administrator will be responsible for applying to the State for the Distributions of Funding and Grants to fund the Office. As with any County Department or Agency, the County Board will approve the Budget and any contracts of the Office as required by law.

As you know, this Honorable Board must comply with the requirements of the State Environmental Quality Review Act ("SEQRA"). Your Committee is advised that the Department of Planning has reviewed the applicable SEQRA regulations, and has concluded that this proposed Local Law is not an action. Your Committee concurs with that conclusion.

Your Committee, after careful consideration, recommends adoption of this Local Law.

Dated: July 12, 2021
White Plains, New York

Benjamin Boykin
Dedat Ladi
Kit Swell
Nancy Barr
Mary Jane Ahmady
Colin [Signature]

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Legislation

COMMITTEE ON

Law & Major Contracts

FISCAL IMPACT STATEMENT

SUBJECT: Office of Assigned Counsel NO FISCAL IMPACT PROJECTED

OPERATING BUDGET IMPACT

To Be Completed by Submitting Department and Reviewed by Budget

SECTION A - FUND

GENERAL FUND AIRPORT FUND SPECIAL DISTRICTS FUND

SECTION B - EXPENSES AND REVENUES

Total Current Year Expense \$ -

Total Current Year Revenue \$ -

Source of Funds (check one): Current Appropriations Transfer of Existing Appropriations

Additional Appropriations Other (explain)

Identify Accounts: _____

Potential Related Operating Budget Expenses: Annual Amount \$ -

Describe: _____

Potential Related Operating Budget Revenues: Annual Amount \$ -

Describe: _____

Anticipated Savings to County and/or Impact on Department Operations:

Current Year: _____

Next Four Years: Beginning in 2022, the Office of Assigned Counsel is anticipated to require approximately \$1.5 million in appropriations annually. It is also anticipated that these expenditures will be eligible for State reimbursement between \$500k - \$1 million annually.

Prepared by: Gideon Grande

Title: Deputy Director

Department: Budget

Date: July 13, 2021

Reviewed By: 
Budget Director

Date: 7/13/21

LOCAL LAW INTRO. NO. 2021

A LOCAL LAW amending the Laws of Westchester County by adding a new Chapter 186 relating to the creation of the Independent Office of Assigned Counsel.

BE IT ENACTED by the County Board of the County of Westchester as follows:

Section 1. A new Chapter 186 is hereby added to the Laws of Westchester County to read as follows:

Chapter 186

INDEPENDENT OFFICE OF ASSIGNED COUNSEL

- Sec. 186.11. Short Title**
- Sec. 186.21 Purpose**
- Sec. 186.31. Definitions.**
- Sec. 186.41. Board of Directors, Membership**
- Sec. 186.51. Board of Directors, Powers and Duties.**
- Sec. 186.61. Assigned Counsel Administrator, Appointment, Term.**
- Sec. 186.71. Administrator, Powers and Duties.**
- Sec. 186.81. Operation of Program**
- Sec. 186.91, Rules and Regulations**
- Sec. 186.101. Severability**

Sec. 186.11 Short Title.

This Chapter shall be known as and cited as “The Independent Office of Assigned Counsel.”

Sec. 186.21 Establishment, Purpose

There shall be an Office of Assigned Counsel, which shall operate as an independent office of the County, the purpose of which is to maintain an Assigned Counsel Program in the County by establishing protocols and policies for assigning attorneys to indigent public defense clients to ensure the provision of professional, skilled, ethical and client centered legal representation of such indigent public defense clients. The Assigned Counsel Program shall operate in compliance with the Standards for Establishing and Administering Assigned Counsel Programs promulgated by the New York State Office of Indigent Legal Services pursuant to

New York State Executive Law section 832 (“Standards”).

Sec. 186.31. Definitions

- a. Administrator. The person who administers the Assigned Counsel Program in the County and ensures that the Standards are met;
- b. Assigned Counsel. A private attorney or attorneys, other than an attorney or attorneys employed by an institutional provider, paid by the government to represent public defense clients;
- c. Assigned Counsel Program. An entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensures that those attorneys provide quality representation;
- d. Clients. Persons entitled to representation in criminal defense and family law matters under New York State County Law Article 18-B;
- e. County. The County of Westchester;
- f. Independent. Freedom from improper influence and control by an outside entity, to ensure that the Assigned Counsel Program and assigned counsel make decisions based solely on the interests of clients;
- g. Judge. Judges, magistrates, and any other persons with adjudicative powers over clients eligible for mandated representation;
- h. Mandated Representation. Government-funded legal representation that is constitutionally or statutorily required including, but not limited to, representation in criminal matters pursuant to New York State County Law Article 18-B, family court proceedings, and appellate representation, regardless of the client’s party status;
- i. Mentor or Mentoring Attorney. An experienced attorney who provides training, consultation, and guidance to less experienced attorneys on the Panel;
- j. Office of Assigned Counsel. The office responsible to administer the Assigned Counsel program in Westchester County;
- k. Panel. The Assigned Counsel Panel’s list of attorneys eligible to receive assignments in the County, which should be limited to those in good standing and with the requisite skills and training;
- l. Quality Representation. Representation of clients in a professional, skilled, ethical, and client-centered manner;

m. Standards. Standards for Establishing and Administering Assigned Counsel Program's in New York State promulgated by the New York State Office of Indigent Legal Services pursuant to New York State Executive Law section 832.

Sec. 186.41. Assigned Counsel Board of Directors

a. There shall be an Assigned Counsel Board of Directors which shall consist of eleven (11) members. Nine (9) members shall be appointed by the County Executive subject to confirmation by the Westchester County Board of Legislators. One member shall be a former magistrate judge who served for at least two (2) years on a Town or Village Court located within Westchester County. One member shall be chosen from among several recommended by the Westchester Women's Bar Association. One member shall be chosen from among several recommended by the Westchester Black Bar Association. Two members shall be chosen from several recommended by the Board of Directors of the Westchester County Bar Association. Two members shall be chosen from qualified members of the general public who are not members of the legal profession and who reside in Westchester County. Two members shall be attorneys in good standing, who are active members of the Westchester County Bar Association's 18-B panel, chosen from several recommendations made by the Westchester County Bar Association. In no event shall the majority of the Board of Directors be composed of members who are current or former Judges;

b. Two members of the Board of Directors shall be ex-officio members as follows: (1); the Supervising Judge of the Criminal Courts of the Ninth Judicial District provided that if the Supervising Judge is not a resident of Westchester County, then a Judge of the Westchester County Court selected by the Chief Administrative Judge of the Ninth Judicial District; and (2) a Westchester County Family Court Judge recommended by the Chief Administrative Judge of the Ninth Judicial District. The two ex-officio members of the Board of Directors shall not vote on matters coming before the Board of Directors;

c. No member of the Board of Directors shall hold a position as a prosecutor, a member of law enforcement or any other government official whose duties may be adversarial to mandated representation;

d. The first Chair of the Board of Directors shall be chosen from among the members of the Board of Directors upon a majority vote and shall serve for a three (3) year term. Thereafter alternating members of the Board of Directors may serve as Chair upon majority vote of the Board of Directors to serve a three (3) year term. No ex-officio members or judge shall serve as Chair of the Board of Directors. Immediately upon selecting a Chair, the Board shall notify the County Executive in writing, who shall have 21 days to approve or disapprove of the selection. If the County Executive approves of such selection or fails to act within 21 days, the selected person shall commence his or her term as Chair of the Board. If the County Executive does not approve the selection of a Chair within 21 days, another member

shall be chosen as Chair by majority vote of the Board of Directors and written notification of such selection shall be sent to the County Executive for approval or disapproval as provided for in this subdivision.

e. Of the members of the Board of Directors first appointed, four (4) shall be appointed for one year; four (4) shall be appointed for two (2) years and five (5) shall be appointed for three (3) years. Every attempt shall be made to choose members of the Board of Directors from differing constituencies in each of the staggered terms. Upon the expiration of the term of office of any member of the Board of Directors, his or her successor shall be appointed to membership on such Board for a term of three (3) years and shall be chosen in the same manner as the predecessor;

f. No person shall serve as a member of the Board of Directors for more than two (2) consecutive three (3) year terms;

g. Any member chosen to fill a vacancy created otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he or she is to succeed;

h. A majority of the Board of Directors shall constitute a quorum for the transaction of business.

i. No member of the Board of Directors shall be compensated for the services to be provided but may be reimbursed for any reasonable expenses that may be incurred in the conduct of their official duties of such members.

Sec. 186.51. Board of Directors, powers and duties

The Board of Directors shall have the following powers and duties:

a. Provide guidance and advice on the operation of the Office of Assigned Counsel and Assigned Counsel Program in the County;

b. Appoint the Assigned Counsel Administrator in consultation with the New York State Office of Indigent Legal Services;

c. Study and review the existing program under Article 18-B of the New York State County Law for provision of indigent representation in the Criminal and Family Courts in the County and recommend any appropriate modifications to the program;

d. Establish and implement uniform rules and regulations in compliance with the

Standards for creation and administration of an Assigned Counsel program to enable the effective provision of indigent legal services in Westchester County;

- e. Review and approve the annual Budget request from the Assigned Counsel Administrator for submission to the County Budget Director in compliance with County Budgetary law and procedures;
- f. Review and approve contracts recommended by the Assigned Counsel Administrator for operation of the Assigned Counsel program prior to submission to the appropriate board for approval by the County;
- g. Consult with the New York State Office of Indigent Legal Services, the Judiciary and community groups regarding provision of indigent legal services in the County;
- h. Prepare an Annual Report for submission to the County Executive and County Board of Legislators by December 31st of each year regarding the services provided by the Office of Assigned Counsel including but not limited to: numbers and types of cases, attorney caseloads and Office expenditures.

Sec. 186.61. Assigned Counsel Administrator; appointment, qualifications, term

- a. The Board of Directors shall appoint an Assigned Counsel Administrator subject to the approval of the County Executive and confirmation of the Board of Legislators. Any person so appointed shall be an attorney in good standing, licensed in the State of New York, possess administrative experience, skill in the representation of criminal defendants and/or adults in Family law matters, and demonstrate integrity and commitment to quality representation of public defense clients;
- b. The Administrator shall serve full time and shall not engage in the private practice of law during their appointment;
- c. The Administrator shall serve a term of four (4) years subject to reappointment at the discretion of the Board of Directors;
- d. The Administrator may be removed for cause by the Board of Directors, after notice and an opportunity to be heard pursuant to procedures established by the Board of Directors.

Sec. 186.71. Assigned Counsel Administrator; Powers and Duties

- a. The Administrator shall be the administrative head of the office, and shall have the duty to ensure that all indigent persons are provided with quality legal

representation as soon as feasible after arrest, detention or request for counsel in a criminal case and at the earliest possible stage of a state intervention case in Family Court;

b. Develop and monitor program policies, standards and operational procedures of the Assigned Counsel Program regarding qualifications for appointment to the panel, recruitment of attorneys to serve on the panel, limitations on attorney caseloads, guidelines for the administrative responsibilities of panel attorneys and supervision and review of attorney caseloads and quality of legal representation;

c. Maintain a panel of attorneys eligible to receive assignments for indigent representation based upon sufficient knowledge and experience;

d. Establish qualifications and standards for certification of attorneys to become members of the panel, pursuant to a certification program managed by the Westchester County Bar Association. Upon review of applications for certification and any other relevant information provided, the Westchester County Bar Association shall make recommendations to the Assigned Counsel Administrator regarding all applications for certification. All determinations on applications for certification to the panel shall be made by the Assigned Counsel Administrator. Any Attorney aggrieved by the determination of the Assigned Counsel Administrator may seek review of the determination by the Board of Directors;

e. Establish procedures and standards for a recertification program managed by the Westchester County Bar Association whereby every three (3) years attorneys must reapply to remain on the panel. Upon review of recertification applications and any other relevant information provided, the Westchester County Bar Association shall make recommendations to the Assigned Counsel Administrator regarding all applications. All determinations regarding applications for recertification to the panel shall be made by the Assigned Counsel Administrator. Any Attorney aggrieved by the determination of the Assigned Counsel Administrator may seek review of the determination by the Board of Directors;

f. Ensure adequate attorney participation on the panel and that training for assigned counsel is provided;

g. Oversee the rotation and coordination of panel attorneys, implement a fair and prompt process for assignments, ensure that the ability, training and experience of panel attorneys are matched to the complexity of the cases to which they are assigned and provide for timely assignments of counsel to indigent clients as soon as feasible after arrest, detention or request for counsel in a criminal case and at the earliest possible stage of a state intervention case in Family Court;

h. Review all vouchers for services provided through the Assigned Counsel program including attorney vouchers to ensure proper payment for services

performed;

i. Appoint a Deputy Assigned Counsel Administrator following consultation with the Board of Directors and such assistants and other administrative staff for the Office of Assigned Counsel as may be necessary, subject to the amounts appropriated therefor and pursuant to New York State Civil Service law and County hiring rules and regulations;

j. Prepare an annual Budget proposal for the Office of Assigned Counsel for review by the Board of Directors for submission to the County Budget Department pursuant to County law and policy;

k. Maintain records of accounts and expenditures of the Office of Assigned Counsel in compliance with all applicable law and County policy;

l. Serve as an information resource;

m. Establish procedures for submission, investigation and resolution of complaints from clients, client family members, co-counsel, opposing counsel and the Judiciary regarding legal representation;

n. Conduct a periodic evaluation and review of the Assigned Counsel Program budget and communicate the fiscal and programmatic needs of the program to New York State Office of Indigent Legal Services to obtain state funding;

o. Prepare contracts with appropriate legal organizations such as the Westchester County Bar Association upon the approval of the Board of Directors and review by the Law Department, to perform certain services required by the Assigned Counsel Program as enumerated in this Chapter in compliance with all legal and budgetary mandates;

p. Attend meetings of the Board of Directors and provide periodic reports as requested by the Board of Directors on the Assigned Counsel Program which shall include numbers of cases assigned, attorneys assigned, services provided to the Panel and Office of Assigned Counsel expenditures;

q. Ensure compliance with County laws, policies and procedures;

r. Approve requests by panel attorneys of use of funding issued by the New York State Office of Indigent Legal Services for any non-attorney professional services such as investigative, expert witness, social work, interpreter, mental health, supervised visitation or any other professional service, as required to provide quality representation;

s. Remove, or suspend for a definite period of time, an attorney from the panel for cause, upon notice and after an opportunity to be heard, subject to review by the Board of Directors pursuant to procedures established by the

Board of Directors;

- t. Make application for other sources of state and federal funding to meet the budgetary and programmatic needs of the Assigned Counsel program;
- u. Any other duties necessary to carry out the purposes of this Chapter.

Sec. 186.81. Operations; Responsibilities of Assigned Counsel Program

- a. The Assigned Counsel Program shall ensure that attorneys on the Panel have access to non-attorney professional services such as investigative, expert witness, social work, interpreter, mental health, supervised visitation or any other professional service, as required to provide quality representation;
- b. The work of assigned counsel shall be periodically evaluated based upon objective criteria published by the Assigned Counsel Program;
- c. Each attorney new to the representation of indigent clients shall receive a mentor to assist the attorney to provide quality representation;
- d. All assigned counsel shall have access to appropriate substantive, procedural and practical training programs through the Westchester County Bar Association and any other organizations that provide legal training;
- e. Ensure creation of a “Second-Chair Program” for the panel whereby a less experienced attorney is paired with a more knowledgeable attorney to obtain necessary trial experience;
- f. Undertake efforts to ensure provision of adequate facilities for client meetings, equipment and legal research programs for panel attorneys. The Office of Assigned Counsel may work in conjunction with the courts, law enforcement agencies and the Westchester County Bar Association to provide these services;
- g. Develop appropriate resources for panel attorneys who may be handling complex litigation including matters requiring forensic expertise;
- h. Ensure that any attorney seeking appointment to the Panel through initial certification or recertification carry malpractice insurance.

Sec. 186.91. Rules and Regulations

The Administrator, with the approval of the Board of Directors, shall establish rules and regulations for the administration of the Assigned Counsel Program.

Sec. 186.101. Severability

If any clause, sentence, paragraph, subdivision, section, or part of this ordinance or the application thereof to any person, individual, corporation, firm, partnership, entity, or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such order or judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part of this ordinance, or in its application to the person, individual, corporation, firm, partnership, entity, or circumstance directly involved in the controversy in which such order or judgment shall be rendered.

§2. This Local Law shall take effect six (6) months after enactment.

Sdk-4/16/21



NYS Office of Indigent Legal Services

ILS Standards for Establishing and
Administering Assigned Counsel Programs
BLACK LETTER STANDARDS WITH COMMENTARY

July 1, 2019

**New York State Office of Indigent Legal Services
Standards for Establishing and Administering Assigned Counsel Programs
BLACK LETTER STANDARDS WITH COMMENTARIES**

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**New York State Office of Indigent Legal Services
Standards for Establishing and Administering Assigned Counsel Programs
BLACK LETTER STANDARDS WITH COMMENTARIES**

PART I. INTRODUCTION

1. Preamble

Well-designed, properly maintained, and adequately funded assigned counsel programs (ACPs or Programs) play a vital role in ensuring justice for clients who cannot afford to retain an attorney in criminal defense or family law matters. Every county in New York State depends upon assigned counsel to provide representation for public defense clients. In several counties, ACPs are the primary or sole providers of mandated representation. In most counties, where public defender offices or legal aid societies are the primary providers, the mandated representation of some eligible individuals presents conflicts of interest requiring the assignment of private attorneys.

For compelling reasons beyond conflicts of interest, the continuing involvement of the private bar is essential to the success of public defense. First and foremost, effective public defense requires a robust competition of ideas among practitioners with a broad range of perspectives. By bringing their experiences representing private clients to public defense, private assigned counsel may show staff attorneys new and different ways of doing things, thus helping to ensure that public defense practice remains rich and innovative. Further, private attorneys who represent public defense clients can serve as effective ambassadors to bar associations, legislatures, community groups, and others. They can educate the public and system stakeholders about the needs of the criminal and family justice system and promote funding and initiatives that will ensure quality public defense. Finally, when public defenders face unanticipated fluctuations in staffing and caseloads, the private bar can help achieve administrative stability and quality of representation.

County Law article 18-B, enacted in 1965, delegates to localities the responsibility for public defense services. Section 722 sets out the types of providers that counties may employ to fulfill the right to counsel. One permissible mechanism is a bar association program in which an Administrator rotates assignments and administers the services of private counsel. However, County Law § 722 provides no details as to the proper establishment of ACPs, so counties and bar associations have created and maintained programs with little guidance. To aid counties and ACP Administrators and to ensure quality representation, the State Office of Indigent Legal Services (ILS), in consultation with the ILS Board, promulgates these Standards for Establishing and Administering Assigned Counsel Programs (Standards), pursuant to Executive Law § 832.

These Standards draw from existing national, state, and local standards; developments in ACPs over the last half-century; and the experience and knowledge of the Standards Working Group and ILS staff. Materials consulted include: New York State Bar Association (NYSBA) Revised Standards for Providing Mandated Representation (NYSBA Revised Standards); National Legal Aid and Defender Association Standards for the Administration of Assigned Counsel Systems (NLADA ACS Standards); and standards promulgated by the New York State Defenders Association (NYSDA), including Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State (NYSDA Standards for Mandated Representation).

and by the American Bar Association (ABA). These Standards reference, and should be read in conjunction with, other relevant ILS standards listed in the Commentary to Standard 1.2, *infra*.

ILS has created these Standards to help ACPs ensure that panel attorneys can comply with all applicable individual representation standards and with New York Rules of Professional Conduct. There are many unique and challenging aspects of assigned counsel representation. For instance, where judges select attorneys to handle public defense cases, those attorneys may be concerned that zealous representation could discourage future assignments. Attorneys may sometimes feel pressure to consider the fiscal interests of the government, which may be adverse to the needs of clients. These pressures can be exacerbated for the many panel attorneys who depend on assignments as part of a solo or small law practice.

These challenges must not result in any compromise in the quality of representation provided to public defense clients or the independence of panel attorneys. *Gideon v Wainwright*, 372 US 335, 345 (1963), established the right of state criminal defendants to the “guiding hand of counsel at every step in the proceedings.” Implicit in that concept is “the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.” *Polk County v Dodson*, 454 US 312, 322 (1981). The government must adequately fund public defense services and structure ACPs so that lawyers can remain independent, meet their ethical obligations, and deliver quality representation. ILS and its Board will continue to work with stakeholders to secure the funding necessary for compliance with these Standards.

1.1. Applicability. These Standards apply to all existing and future systems in the state for the delivery of mandated representation by assigned counsel.

Commentary:

These Standards encompass criminal defense, family law, and appellate representation of assigned counsel clients. They are being issued at a time when state funding is being made available to counties pursuant to the statewide implementation of reforms (*see* Executive Law § 832 [4]) stemming from the settlement of a class action lawsuit regarding constitutional violations in the provision of mandated criminal representation in five named counties.¹ ILS will assist counties in utilizing such funding to develop or improve ACPs that adhere to these Standards.

1.2. Scope. These Standards are designed to guide ACPs to ensure that attorneys can comply with relevant performance standards in providing mandated representation.

Commentary:

Essential elements of the representation of individual clients are summarized in Standard 9.2, but are more fully covered in other standards, including: ILS Standards for Parental Representation in State Intervention Matters (ILS Parental Representation Standards), ILS Appellate Standards and Best Practices (ILS Appellate Standards), and ILS Standards and Criteria for the Provision of

¹Information about the Settlement in *Hurrell-Harring v State of New York* is available on the ILS website. <https://www.ils.ny.gov/content/hurrell-harring-settlement-information> (last accessed Feb. 22, 2019).

Mandated Representation in Cases Involving a Conflict of Interest (ILS Conflict Standards²); NYSDA standards, including Client-Centered Representation Standards (NYSDA Client-Centered Standards); NYSBA Revised Standards; ABA Criminal Justice Standards for the Defense Function (4th ed); and NLADA Performance Guidelines for Criminal Defense Representation (NLADA Performance Guidelines).

1.3. Purpose. These Standards set out the structure and components of ACPs necessary to ensure quality representation.

Commentary:

When ACPs have a proper structure and resources, quality representation can be provided. That has been proven by the Programs developed in *Hurrell-Harring* Settlement counties, as well as in other counties with effective ACPs. Such Programs offer models regarding how these Standards can guide counties in developing or improving ACPs that promote high-quality representation. The examples of ACPs cited throughout the Commentaries do not represent the only sound ways to implement these Standards, given inevitable change. The models we invoke will evolve over time; and as other Programs develop and progress over time, new and even more effective models will emerge. By building Programs with strong structures and quality-control measures, ACPs can enable panel attorneys to provide meaningful representation, while reducing the risk of wrongful convictions, as pointed out by a State Bar report.³ Further, strong ACPs can facilitate meaningful representation in family law matters.

1.4. Definitions.

1.4.a. Administrator. The organizational leader who administers the ACP and ensures that these Standards are met.

1.4.b. Assigned Counsel. A private attorney or attorneys, other than an attorney or attorneys employed by an institutional provider, paid by the government to represent public defense clients.

1.4.c. Assigned Counsel Program (ACP). An entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensures that those attorneys provide quality representation.

1.4.d. Clients. Persons entitled to representation in criminal defense and family law matters under County Law article 18-B.

²ILS Conflict Standards have applied to all trial-level mandated representation cases since Jan. 1, 2013. <https://www.ils.ny.gov/content/standards-and-performance-criteria> (last accessed Feb. 22, 2019).

³See Final Report of the NYSBA Task Force on Wrongful Convictions, Defense Practices Subcommittee Report and Final Proposals (NYSBA Wrongful Convictions Report), at 121-123 (expressing concerns about quality control regarding qualifications and performance of assigned counsel and the adequacy of resources for oversight, consultation, investigation, and case preparation).

1.4.e. Counties. All 62 counties in the state: the 57 upstate counties and the five boroughs of New York City.

1.4.f. Independence. Freedom from improper influence and control by an outside entity, to ensure that ACPs and assigned counsel make decisions based solely on the interests of clients.

1.4.g. Judge. Judges, magistrates, and any other persons with adjudicative powers over clients eligible for mandated representation.

1.4.h. Mandated Representation. Government-funded legal representation that is constitutionally or statutorily required. “Mandated representation” is used interchangeably with “public defense representation.” As employed in these Standards, both terms encompass 18-B representation in family law litigation, regardless of the client’s party status.

1.4.i. Mentor or Mentoring Attorney. An experienced attorney who provides training, consultation, and guidance to less experienced attorneys on the panel.

1.4.j. Panel. The ACP’s list of attorneys eligible to receive assignments, which should be limited to those in good standing and with the requisite skills and training.

1.4.k. Quality Representation. Representation of clients in a professional, skilled, ethical, and client-centered manner.

1.4.l. Supervising Attorney. An attorney who assists the Administrator in ensuring that each individual assigned counsel provides quality representation.

1.4.m. Chief Defender. A leader of a Public Defender office, Conflict Defender office, Legal Aid Society or ACP.

PART II. COUNTY RESPONSIBILITIES

A. Establishment and Maintenance of an Assigned Counsel Program

2. General Policies

2.1. ACP Requirement. Each county should establish and maintain an ACP that complies with these Standards.

Commentary:

Adherence to these Standards is fundamental to providing quality public defense services and will factor strongly in ILS’s approval of ACPs, pursuant to its statutory authority under County Law § 772 (3) (b), (c), effective April 1, 2019). As set forth in Section 3 of these Standards, the ACP shall be established pursuant to governing law; shall operate under the guidance of an independent

governing Board; and shall be headed by an Administrator who implements the Program’s policies and duties. County Law § 722 provides alternate structures to deliver such services. A locality may use institutional providers to handle cases that present a conflict of interest as to the primary provider.⁴ However, setting up an “institutional provider only” system deprives counties, public defense lawyers, and their clients of the potential benefits of a well-run ACP. In the decades since *Gideon v Wainwright*, *supra*, was decided, experience in providing public defense services has demonstrated the value of institutional providers *and* formal ACPs in ensuring quality representation.⁵ Some cases will require appointment of lawyers from outside even multiple institutional providers. Moreover, as set forth in the Preamble, significant systemic benefits flow from the active participation of the private bar in providing public defense services.

County plans are generally strongest when they also include the services of a full-time public defender organization.⁶ Fully funded institutional providers can develop special expertise in public defense cases; provide client-centered representation by including investigators, social workers, and other necessary professionals on staff; and advocate for improvements in the criminal defense and family law systems. Nationally, all major urban jurisdictions include an institutional public defense provider, as do the vast majority of counties in New York State.

2.1.a. Regional Programs. Counties may agree to create a regional ACP to comply with these Standards and to promote the efficient delivery of services.

Commentary:

In many rural counties, too few attorneys are available for assigned cases, so the time and expense needed to develop an ACP that meets these Standards might appear to be too great. One solution is a regional program, whereby two or more neighboring counties pool resources to create one program with multi-county administrative responsibilities. This approach is most feasible in counties where many attorneys practice in both jurisdictions and/or where one of the counties has an established ACP that can administer the Program in the other county. The shared service agreement between Tompkins and Schuyler counties, created in implementing the *Hurrell-Harring* Settlement, provides a model approach and is consistent with statewide efforts to help municipalities identify opportunities for cost savings through inter-municipal cooperation, reorganization, and regionalization.⁷

⁴See *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 722 (2012).

⁵NLADA ACS Standards, Standard 3.1 (b) states: “Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with one or more other methods of providing representation.”

http://www.nlada.net/sites/default/files/nlada_standardsforassignedcounsel_1989.pdf

(last accessed Feb. 22, 2019).

ABA Standards for Criminal Justice, Providing Defense Services (ABA Defense Services Standards), Standard 5-1.2 (b) states: “Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.”

https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/criminal_justice_standards_defsvcs_blk/#1.2 (last accessed Feb. 22, 2019).

⁶ABA Defense Services Standards, Standard 5-1.2 (a).

⁷See New York State Department of State Division of Local Government Services website.

2.2. Quality Representation. Each ACP shall ensure the provision of professional, skilled, ethical, and client-centered legal representation for all clients.

2.3. Independence. Each ACP shall remain independent and free from improper influence and conflicts of interest.

2.3.a. Independent Office. The ACP shall not be part of a Legal Aid Society, Public Defender office, Conflict Defender office or County Attorney office.

2.3.b. Judicial Supervision. The ACP and individual assigned counsel should be subject to judicial supervision only in the same manner and to the same extent as applies to all other practicing lawyers.

2.3.c. Independent Function. The function of providing mandated representation—including the assignment, selection, funding, and payment of counsel—shall be independent.

Commentary:

Protecting the interests of assigned counsel clients is the paramount concern of the ACP. The Program and its attorneys must remain insulated from conflicts of interest, political influence, and other outside pressures that could compromise the integrity of the Program or the ability of counsel to provide quality mandated representation. The delegation of ACP administration to a Legal Aid Society, Public Defender, Conflict Defender or County Attorney presents a clear conflict of interest and diminishes the independence of the ACP.

The ACP may be structured as a nonprofit organization or county agency or in any other form that will allow it to remain free from improper outside influence and control. The administrative structure of the ACP, as set forth in Part III, will help safeguard the independence of the Program. Generally, the ACP Administrator, not a judge or court official, should select the individual attorneys to be assigned to each case, except in emergency situations or exceptional circumstances, as explained in Standard 8.1.e. This approach is designed to help ensure that representation is not inappropriately influenced by the selection process, while at the same time ensuring that assignments are fairly distributed. Further, absent a panel attorney's violation of the Rules of Professional Conduct or other relevant standard, the ACP should not interfere with the representation provided in assigned cases. The funding provided to ACPs must be based on the amount needed to allow for the sound administration of the Programs and to enable panel attorneys to deliver quality representation to all clients. The review of vouchers and payments to counsel must be independent and rest on services rendered and expenses incurred and other relevant considerations, not a desire to reduce county costs.

3. Required Structure

3.1. Governing Law. Each county should establish an ACP pursuant to a plan of a bar association within the county.

<https://www.dos.ny.gov/lg> (last accessed Feb. 22, 2019).

Commentary:

This Standard addresses the creation of ACPs pursuant to a bar association plan under County Law § 722 (3) (a) (i) (representation is to be furnished pursuant to a plan of a bar association in each county, or the city in which a county is wholly contained, whereby services of private counsel are rotated and coordinated by an Administrator). Having bar associations, rather than government units, establish ACPs helps ensure independence. Bar associations across the state have been establishing ACPs at least since the introduction of the legislation that became County Law § 722.⁸ Bar associations—whether at the local, state, or national level—encompass the experience of lawyers in many fields. Involving bar associations in the design of a plan for mandated representation helps ensure that this vital legal area is not marginalized.

3.2. ACP Board. To ensure that the management of the ACP is independent of all branches of county government, the ACP shall operate under the guidance of a governing Board.

Commentary:

An independent governing Board can help ensure that public defense services are insulated from inappropriate influences. *See* Preamble and Standard 2.3. Public defense standards have long called for ACPs to have independent boards. The NLADA ACS Standards include this requirement.⁹ The NLADA noted that independence might best be served by having appointments made by a variety of entities. The Board should reflect the broad experiences and knowledge necessary to ensure client-centered representation. Legal training alone is not enough. A range of expertise should be represented, and members of the client community could serve on the Board.¹⁰

3.2.a. Board Members. The majority of the Board’s members shall be attorneys who are not judges; and no members of the Board shall hold a position as a prosecutor, law enforcement or government official.

Commentary:

“To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems,” as declared in the ABA Ten Principles of a Public Defense Delivery System (2002) (ABA Ten Principles), Principle

⁸A letter of the Warren County Bar Association stated that, at a well-attended meeting on April 14, 1965, the Association voted to support the bill’s passage and adopted a plan for representation intended to bring about “early improvement in the quality of representation for indigent defendants in Warren County.”

⁹NLADA ACS Standards, Standard 3.2.1.

(a) The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board. (b) Most of the members shall be attorneys but none shall be judges, prosecutors or law enforcement officials. (c) Members shall not receive a salary but shall be reimbursed for reasonable, actual and necessary expenses. (d) Terms of office shall be staggered.

¹⁰*See* National Study Commission on Defense Services Guidelines for Legal Defense Systems in the United States (1976) (NSC Guidelines), Commentary at 73, note 3. “[I]t is recommended that at least one member of the Board not be an attorney; this person could represent the client community, or another non-legal segment of the community. Diversity of interests should ensure insulation from partisan politics.”

<https://www.justice.gov/atj/publication/guidelines-legal-defense-systems-united-states-report-national-study-commission> (last accessed Feb. 22, 2019).

1, Commentary.¹¹ For public defense lawyers to provide ethical representation, their assignment, supervision, and compensation must be unconnected to individuals and entities whose interests conflict with those of clients. Therefore, the Board should not include individuals who perform adversarial functions, such as criminal prosecution, law enforcement or state intervention in criminal or family matters where counsel may be appointed. Nor should Boards include officials whose duties to safeguard government interests might conflict with the goal of quality representation.

We recognize that the NLADA ACS Standards, as cited in note 9, would prohibit judges from participating as members of an ACP Board. Further, ILS acknowledges valid concerns, including that, especially in small programs serving in small communities, a local judge can exert undue influence on policy issues; and that the presence of a judge on the Board can affect the perception of the Program as being committed solely to the provision of quality defense services. However, we also recognize the potential benefits of having a judge as a Board member. Among other things, judges can be effective ambassadors in dealing with other judges and legislators regarding the importance of strong public defense. In allowing for judges as Board members, this Standard concludes that a limited role is appropriate and does not contravene the overriding principle that the Board must be nonpartisan and supportive of high-quality representation for clients. This conclusion is supported by the experience of governing boards of effective ACPs in several New York counties, including Erie and Onondaga, as well as by our own experience with the ILS Board, which has three current or former judges among its nine members. Moreover, we note that the inclusion of a representative from the client community, as referenced in Standard 3.2, can be particularly helpful for Boards that include an active judge or judges to ensure that all perspectives relevant to quality representation are considered. If future experience raises valid concerns regarding judicial participation on Boards, we will revisit this Standard.

3.2.b. Board Supervision. The Board shall appoint the ACP Administrator and may supervise the operation of the ACP and establish policies to support implementation of these Standards.

3.2.c. No Interference. The Board shall not interfere with the representation of individual clients.

3.2.d. Insurance. The ACP shall insure the Board and the Administrator, for all insurable risks incident to the operation of the ACP, to a dollar amount specified by the Board. The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the ACP.

Commentary:

The ACP must obtain insurance to fully protect the ACP Board, Administrator, and staff for all insurable risks associated with the operation of the ACP. The Program could be sued for a risk that was uninsurable or for which the Program was not sufficiently insured. Therefore, in addition, the Board and Administrator should be fully indemnified for any liability flowing

¹¹https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last accessed Feb. 22, 2019).

from their ACP activities. As set forth in Standard 8.1.g, all attorneys seeking appointment to the ACP panel should have sufficient professional liability insurance coverage related to their representation of clients. In furtherance of such requirement, the ACP may wish to negotiate with an insurance carrier to provide not only the liability insurance relating to ACP governance, but also malpractice insurance for assigned attorneys, to offer favorable group rates to counsel.

3.3. Assigned Counsel Administrator. The Board shall appoint an Administrator to implement the policies and duties of the ACP.

3.3.a. Administrator Qualifications. The Administrator shall be an attorney licensed in the State of New York who possesses administrative experience and skill in the representation of criminal defendants and/or adults in family law matters and who demonstrates integrity and a commitment to quality representation of public defense clients.

Commentary:

Soon after the enactment of County Law article 18-B, the Judicial Conference offered guidance to counties in a November 16, 1965 memo regarding the establishment of public defense systems. “The administrator of a plan should be an attorney other than a judge, a county attorney, a public defender or a legal aid official.” Over 40 years later, then Chief Administrative Judge Jonathan Lippman wrote to the then President of the Cortland County Bar Association: “We have long required that the administrator of a plan should be an attorney other than a judge, a county attorney, a public defender or legal aid official.” These Standards will continue to adhere to the guidance provided by the Judicial Conference and Judge Lippman regarding Administrator qualifications.¹² Initially, it may not be feasible for all counties to have an attorney as ACP Administrator. In such circumstances, the ACP must employ a Supervising Attorney as it transitions to compliance with these Standards. *See* Standard 4.3.a.

3.3.b. Administrator Selection. The Administrator shall be selected based on merit; appointed for a stated term set by the Board; serve full-time where feasible; if full-time, shall not engage in the private practice of law; and may be dismissed prior to the expiration of his or her term only for good cause, following a hearing.

¹²National standards echo the views of the Judicial Conference and Judge Lippman regarding ACP Administrator qualifications. *See e.g.* NSC Guidelines, Guideline 2.14 (ACP should be administered by qualified attorney, licensed in jurisdiction where system operates, with experience in criminal defense and administration and ability to work cooperatively with other elements of criminal justice system, while retaining independence); *see also* NLADA ACS Standards, Standard 3.3.2 (administrator shall be attorney, licensed to practice in the jurisdiction where program operates, with experience in criminal defense and administration and possessing reputation for integrity and commitment to program principles). While the above standards do not address the training or experience Administrators should have regarding mandated parental representation, attorneys with appropriate parental representation expertise could serve as ACP Administrators.

3.3.c. Administrator Continuity. The ACP shall establish protocols to address personnel transitions in the operation of the Program.

3.3.d. Administrator Functions. The Administrator shall implement and ensure adherence to these Standards and ACP policies.

3.3.d.i. Delegating Duties. The Administrator may delegate day-to-day tasks to foster efficiency, but may not delegate ultimate responsibility for the Administrator's primary functions. The Administrator shall not delegate to a nonlawyer any duties for which legal training is needed.

3.3.d.ii. Spokesperson Role. The Administrator shall act as the spokesperson for the ACP in matters involving policy and the operation of the Program.

3.3.d.iii. Addressing Issues. The Administrator shall address matters that arise among the ACP, its attorneys, and other actors in the criminal justice and parental representation systems.

3.3.d.iv. Planning and Policy. The Administrator shall engage in planning and policy discussions with the county and other entities regarding decisions affecting the ACP, assigned lawyers, and public defense clients; and shall be responsible for preparing and submitting a proposed budget to the funding entity.

3.3.d.v. Assignment Process. The Administrator shall oversee the rotation and coordination of panel attorneys and implement a fair process for assignments.

Commentary:

While County Law § 722 (3) (1) (a) does not provide a definition of "rotated" and "coordinated," national standards and New York experiences provide guidance. The County Law's directive to rotate services was a harbinger of later national efforts to avoid the harms inherent in ad hoc appointments discussed in these Standards, Standard 2.3, Commentary. The first edition of the ABA Defense Services Standards noted, in the Commentary to Standard 5-2.3: "The principle that assignments should be rotated, except where special circumstances have placed the selection of a lawyer out of rotation, has been incorporated in the plan recently adopted in New York City...pursuant to Article 18-B..." Other standards followed suit. *See e.g.* NLADA ACS Standards, Standard 4.1 (e). This Standard makes explicit that ACP Administrators, no less than other Chief Defenders, have a systemic role to play in coordinating assigned counsel services. Standard 8.1.e. addresses situations in which assignments should be made out of rotation.

3.3.d.vi. Vouchers. The Administrator shall establish protocols for the review of assigned counsel vouchers for quality-review purposes and to ensure that attorney billing is accurate.

3.3.d.vii. Non-Attorney Professional Services. The Administrator shall approve applications for the provision of investigative, social work or other professional services; and shall review vouchers submitted for such services.

B: Provision of Necessary Resources

4. ACP Capacity

4.1. Facilities. Each county shall provide suitable facilities so that the ACP can carry out its duties under County Law article 18-B and meet these Standards.

4.1.a. Office Space. Each county shall establish an administrative office for its ACP. Such administrative office shall have a suitable location, and suitable space, technology, equipment, and supplies to facilitate independent, professional representation.

4.1.b. Technology. Each county shall provide its ACP with the technology necessary to effectively and efficiently administer the Program. Such technology shall enable the ACP to communicate efficiently with clients, courts, attorneys, and the public; to collect, analyze, and report on data; and to track caseloads.

Commentary:

The facilities, office space, equipment, technology, and supplies provided must allow the ACP to operate effectively and efficiently in a professional work environment; to carry on its activities independently from other entities, including other legal service providers within the same county; and to conduct confidential communications among management and staff. The Program should ensure that private meeting space is available to panel attorneys for in-person meetings with clients and confidential phone conversations with incarcerated clients. *See* Standards 4.4 and 4.6.

4.2. Necessary Services. Each county shall ensure that its ACP provides assigned counsel with access to the following services necessary for quality representation.

4.2.a. Supervision. Each ACP shall ensure that its panel is appropriately supervised by an attorney or attorneys.

Commentary:

Structured supervision is vital to quality representation. The supervision requirement is consistent with the reforms delineated in the *Hurrell-Harring* Settlement, which includes a mandate that affected counties adopt initiatives to improve the quality of indigent defense as to supervision. Statewide *Hurrell-Harring* reforms include supervision as a critical component of quality improvement. *See* Executive Law § 832 (4) (c). This Standard will help effectuate a critical NYSBA Task Force proposal, stating that Administrators should be provided with adequate resources to better monitor attorney performance and develop

structured supervision and consultation.¹³ The need for supervision is equally important in family law matters.

4.2.b. Mentoring. Each ACP shall ensure that every attorney new to the representation of public defense clients receives a mentor to help the attorney develop high professional standards and provide quality representation.

Commentary:

Mentoring involves more experienced and highly qualified attorneys working closely with less experienced attorneys to foster their professional growth and development.¹⁴ It is a well-recognized means of helping new attorneys develop criminal defense or family law representation skills, acquire legal knowledge, build confidence and competence, and enhance professionalism.¹⁵ Mentoring also promotes a culture of collaboration among attorneys. The NLADA ACS Standards provide that assigned counsel systems “shall establish a policy with regard to the provision of mentors—more experienced, competent attorneys—to advise less experienced attorneys...”¹⁶ In its 2010 report on ACPs, the American Council of Chief Defenders (ACCD) highlighted, as a critical component of new attorney training, mentor programs in Erie County, New York, and Connecticut.¹⁷ In 2015, the Texas Indigent Defense Commission contracted with the NLADA to publish a handbook for creating mentor programs for ACPs. The Texas Commission explained that mentoring is a way to provide new lawyers with substantive skills and access to a network of public defense colleagues to call upon for support.¹⁸ The mentoring guide is a useful tool for any ACP seeking to establish a mentor program.¹⁹

¹³See NYSBA Wrongful Convictions Report, at 126; *see also* Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants (July 1, 1996, as amended May 2011), Section IV (A) (Supervision) (quality representation requires adequate supervision for lawyers and professionals providing support services; supervision should monitor compliance with client needs and court requirements).

¹⁴See e.g. Massachusetts Committee for Public Counsel Services, *Children and Family Law Program, Mentoring Program Manual* (Revised 2014), at 2. The Manual further describes mentoring as follows: “A mentor facilitates the mentee’s personal and professional growth by sharing the knowledge and insights that he or she has learned through the years. Through the mentoring process, the mentor and mentee work together to reach specific goals and to provide each other with sufficient feedback to ensure that these goals are reached.”

¹⁵See e.g. Texas Indigent Defense Commission & NLADA, *Indigent Defense Attorney Mentoring in Texas: A Guide to Establishing a Mentor Program* (Texas Mentoring Guide), at 3.

¹⁶NLADA ACS Standards, Standard 4.4.1.

¹⁷ACCD, Best Practices Committee, *Implementation of the ABA’s Ten Principles in Assigned-Counsel Systems: Preliminary Report* (September 2010) (ACCD 2010 Report), at 11. In its report, the ACCD noted that in Erie County, new panel attorneys are mentored by a full-time training attorney for eight to 10 months. In Connecticut, the statewide public defense program assigns and pays experienced private attorneys to mentor new panel attorneys during their first year of taking assigned cases.

¹⁸Texas Mentoring Guide, at 3.

¹⁹A link to the Texas Mentoring Guide and other supporting materials can be found at: <http://www.nlada.org/tools-and-technical-assistance/defender-resources/technical-assistance/indigent-defense-mentoring>.

A number of ACPs in New York have already developed mentoring programs. These include the Erie County program highlighted in the ACCD's 2010 Report.²⁰ More recently, ACPs in the *Hurrell-Harring* Settlement counties (Onondaga, Ontario, Schuyler, Suffolk, and Washington) have implemented mentoring programs, which range in size and formality, depending on the needs of the county's ACP. Westchester County recently implemented a pilot mentoring project modeled on these programs. The Onondaga County program, the largest and most formalized such program in the Settlement counties, includes eight to 12 mentors. New panel attorneys with minimal criminal defense experience are required to have a mentor for at least one year. Other attorneys are voluntarily mentored. Mentoring is also used for panel attorneys who need extra support or remediation. In Ontario County, which has a smaller panel, one mentor is available to all attorneys to brainstorm, answer questions, observe trials, and sometimes serve as a second chair. In both Onondaga and Ontario County, mentors have helped to discern training needs and have facilitated in-house continuing legal education programs. Mentoring has helped to improve the quality of advocacy, broken down barriers, and promoted a sense of collaboration among panel attorneys.

4.2.c. Consultation. Each ACP shall ensure that assigned counsel have access to resources to assist in addressing complex or systemic issues arising during individual representation.

Commentary:

Sole practitioners providing mandated representation, as well as their clients, will benefit significantly when ACPs develop appropriate resources for handling systemic or complex litigation and/or cases requiring forensic expertise. For example, the *Hurrell-Harring* Settlement counties have implemented consultation programs to assist panel attorneys in addressing such matters. The Ontario County mentor is available to field questions regarding complex litigation. At the Regional Tompkins-Schuyler ACP, experienced resource attorneys answer questions, discuss procedures and case strategies, shadow attorneys, and provide support and professional instruction. In Suffolk County, the ACP has contracted with an experienced criminal defense attorney to conference cases with panel attorneys. The Onondaga County ACP offers a cadre of resource attorneys, some with specialized skills, such as in sentencing, SORA advocacy, motion practice, and using experts. To encourage the use of consulting attorneys, ACPs employ various strategies, such as calling panel attorneys about particular cases and sending a weekly email newsletter that includes reminders about using the resource attorneys and stories about cases involving resource attorneys and successful outcomes.

4.2.d. Training. Each ACP shall provide its panel with access to appropriate substantive, procedural, and practical training programs.

Commentary:

Training is appropriate where it is designed to ensure that panel attorneys can provide client-centered representation, as described in Standard 9.2, as well as in ILS Conflict Standards, Appellate Standards, and Parental Representation Standards. This concept applies equally to Standard 12.2, *infra*.

²⁰ACCD 2010 Report, at 11.

4.2.e. Second-Chair Program. Each ACP shall create a Second-Chair Program to provide necessary trial experience to attorneys.

Commentary:

Second-Chair Programs are an effective resource to enable panel attorneys to obtain the trial experience necessary to provide competent representation. The pairing of less experienced and more advanced attorneys may occur in a few distinct ways. For example, a new attorney may serve as second chair to a more seasoned assigned counsel whose client's case is going to trial. In addition, a panel attorney with some misdemeanor or low-level-felony trial experience who is assigned to a more complex case or who wishes to begin receiving such assignments, may gain necessary trial skills via a second-chair opportunity. Finally, Second-Chair Programs are critical when an experienced panel attorney is assigned to a case involving a serious charge or complex issues. In such instances, the primary attorney can receive needed assistance from the secondary attorney, who can learn invaluable lessons in such role.

4.3. Staffing. Each county shall provide its ACP with suitable personnel to carry out its duties under County Law § 722 (3) and comply with these Standards.

4.3.a. Supervising Attorney. The Administrator shall be responsible for the supervision of assigned counsel, and such responsibility may be delegated to one or more supervising attorneys.

Commentary:

The *Hurrell-Harring* Settlement counties have transformed their ACPs by establishing supervisory attorney positions for quality oversight. The Programs in these counties, as well as the ACPs in Erie and Tompkins counties, provide examples that other counties can replicate. Counties with smaller panels may have an ACP Administrator also serving as the Supervising Attorney. Regional programs may elect to have, in each county, a supervising attorney who is familiar with local practice and the local defense bar. The responsibilities of the supervising attorney include: (1) developing and publishing criteria for periodically monitoring assigned counsel; (2) regularly monitoring the quality of representation; (3) developing procedures for certification, recertification and/or removal of assigned attorneys; (4) instituting training curricula; and (5) acting as a liaison between the judiciary and the Program, and between individual panel attorneys and the Program.

4.3.b. Administrative Staff. The ACP shall include staff responsible for providing administrative services, which may include, but not be limited to, clerical support, data management, and budget and finance support.

4.3.b.i. Hiring Staff. The Administrator shall be responsible for assessing the administrative staff needs of the ACP and shall oversee the hiring of such staff.

4.3.b.ii. Client's Rights. The ACP shall ensure that all staff comply with the Statement of Client's Rights. *See* 22 NYCRR § 1210.1.

4.3.c. ACP Staff Salaries

4.3.c.i. The Administrator's compensation should be set at a level commensurate with the attorney's qualifications and experience and the responsibilities of the position. There should be a parity of compensation as between the Administrator and any other Chief Defender in the county.

4.3.c.ii. The starting pay for ACP legal and administrative staff should facilitate the recruitment of qualified personnel. Salary levels thereafter should promote the retention of staff. All salary levels should reflect parity as to similar positions in the prosecutor's office or local public defense offices.

4.4. Client Communication. The ACP shall work with justice system and other officials to ensure that adequate confidential meeting space for client interviews is provided in courthouses, jails, and prisons. The ACP shall similarly work with officials to establish means by which incarcerated clients can have confidential communication with their assigned counsel by telephone or otherwise.

4.5. Full Partnership. The ACP should have a voice in the county's efforts to maintain and improve the justice system.

Commentary:

The ACP is a stakeholder and should have a voice in the county regarding systemic public defense issues. For example, designating representatives to serve on work groups within the justice system and providing information to policymakers are among appropriate actions by ACPs. The ACP should continually assess the adequacy of 18-B rates and advocate for increased rates when appropriate.²¹ Government funding of ACPs must be sufficient to provide reasonable compensation.²² The perpetual lag in increasing compensation rates is recounted in the 2006 Final Report to the Chief Judge of the State of New York by the Commission on the Future of Indigent Defense Services.²³ The problem was also addressed in the Interim Report to Chief Judge DiFiore issued by the Commission on Parental Legal Representation in February 2019.²⁴ Stagnant rates can drive lawyers off panels or into carrying excessive caseloads. The rates were last raised in 2004.²⁵ Administrators have a duty to document the need for increased rates and bring the issue to the attention of public officials who can effectuate change.

4.6. Ensuring Adequacy of Facilities for Representation. The ACP shall require that all panel attorneys have the facilities necessary to provide quality representation.

²¹Rates are set forth in County Law § 722-b.

²²NLADA ACS Standards, Standard 3.4. Commentary (ACP that inadequately compensates the attorneys who provide the actual representation will fail to deliver the quality representation envisioned by these standards).

²³Kaye Commission Final Report, at pp 8-12. http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf (last accessed Feb. 22, 2019).

²⁴http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf (last accessed June 5, 2019).

²⁵L 2003, ch 62, pt. J, § 2.

4.6.a. Confidential Client Communication Facilities. The ACP shall ensure that assigned counsel have access to meeting facilities and equipment as needed to ensure client confidentiality, including a means for clients to contact the attorney by telephone without the client having to incur burdensome charges.

4.6.b. Legal Research Capacity. ACP services and facilities shall ensure that assigned counsel have access to adequate research resources. The ACP is not obligated to provide these support services directly, but should strive to do so where feasible.

5. Timely Representation

5.1. General. The ACP shall implement systematic procedures to ensure the prompt assignment of counsel for all persons eligible for mandated representation.

5.1.a. Assignment During Eligibility Determination. Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

5.1.b. Subsequent Appearances. Eligible persons shall have counsel at every court appearance.

5.2. Counsel in Criminal Cases. Counsel shall be provided as soon as possible to any persons who are subject to state action due to allegations of criminal conduct. The ACP, working with other components of the justice system, shall ensure the provision of counsel at first appearance. Upon request, the ACP shall provide counsel prior to the initiation of formal charges, when it appears that such charges, and mandated representation, are imminent.

Commentary:

Representation is required at arraignment, usually the first court appearance in a criminal case, which, like a bail hearing, is a critical stage of a criminal prosecution, as held in *Hurrell-Harring v New York*, 15 NY 3d 8, 20 (2010). Early entry of counsel can impact the entire criminal case. Arraignment is often the attorney's first opportunity to meet the client and advocate for him or her. At arraignment, important decisions are made, particularly regarding the client's liberty. Preventing pretrial detention is often the key to obtaining a favorable ultimate outcome. Avoiding the disruptions in housing, employment, and family life caused by detention can allow the client to better assist in the defense. Counsel entering the case early may also protect the client from making incriminating statements; commence a prompt investigation; and ensure preservation of evidence. Counsel may identify and address the client's immediate needs, such as maintaining medications or child care, as well as long-term needs, such as substance abuse treatment or income support. All these actions can affect the case, as well as the client's personal life. The assignment of counsel should not be contingent on the filing of formal charges. Instead, upon the request of the suspect, counsel should be assigned any time an individual has reason to believe criminal prosecution may commence. This includes when an investigation is initiated; before grand jury

testimony; or any time that contact with law enforcement might result in the filing of charges against the individual. Numerous standards address the importance of the early entry of counsel.²⁶

5.3. Counsel for Litigants in Family Law Matters. The ACP shall provide counsel, upon request, to any person legally entitled to representation in family law matters; and the Program should make representation available during the investigatory stage of a child protective matter.

Commentary:

Litigants have the right to assigned counsel in a broad range of family law proceedings involving “the infringements of fundamental interests and rights, including the loss of a child’s society and the possibility of criminal charges.” *Matter of Ella B.*, 30 NY2d 352 (1972); Family Court Act § 261. Assigned counsel is available in cases involving child custody and visitation, abuse/neglect, foster care placement and review, termination of parental rights, a destitute child, adoption, paternity, family offenses, contempt of court for willful violation of a prior court order, and any other proceeding in which the judge concludes that the U.S. Constitution or New York State Constitution requires the assignment of counsel. *See* Family Court Act § 262; SCPA 407; Judiciary Law § 35 (8). Prompt access to counsel by Family Court litigants is important, whether the case is between private litigants or is commenced by the state against an individual, such as a child abuse or neglect case (“state intervention case”). Timely access to counsel helps individuals decide whether to initiate litigation or how to respond to it; protects due process rights of parents, children, and families; and ensures that judges have the comprehensive information needed to render sound decisions.

Representation at preliminary proceedings can affect the progress and outcome of the entire case and is particularly crucial to effective representation in state intervention cases. Without timely access to counsel, the client is severely disadvantaged. During the investigatory stage of a state intervention case, counsel can: seek to ensure that local social services agencies comply with the law; expedite the provision of appropriate services to the client; prevent unnecessary removal of children; and sometimes avoid the initiation of a court proceeding altogether. The importance of timely access to counsel in state intervention cases was emphasized in the Interim Report of the Commission on Parental Legal Representation.

Representation may start upon the request of an individual seeking to commence, or respond to, a Family Court proceeding in which assigned counsel is mandated. In a state intervention matter, upon request, representation may begin when a child protective services (CPS) investigation is

²⁶*See e.g.* ILS Conflict Standards, Standard 5 (a) (mandated representation should begin when suspect invokes right to counsel during investigatory stage); ILS Criteria and Procedures for Determining Assigned Counsel Eligibility, Standard XII (eligibility determination should be made as soon as possible for persons who are subject of an investigation); NYSBA Revised Standards, Standard B-1 (representation should be available upon request during investigation), Standard B-3 (counsel shall be available when person reasonable believes process will commence that could result in proceeding where representation is mandated); ABA Ten Principles, Principle 3 (counsel should be assigned as soon as feasible after arrest, detention or a request for counsel).

initiated; after a child has been removed from the individual's custody due to CPS action; or in any situation where contact with CPS might result in filing of child abuse or neglect charges. If a court proceeding is initiated, meeting with the client sufficiently before the initial hearing—a “critical stage” of a child protective case—is necessary for the attorney to adequately protect the client's rights and advance his or her goals. Relevant parental representation standards urge access to counsel at the earliest possible stage of a state intervention case.²⁷ Also relevant are the standards regarding early access to counsel set forth in the Commentary to Standard 5.2 of these Standards.

6. Duration and Continuity of Representation

6.1. Duration of Representation. The ACP shall ensure that all clients receive legal representation throughout the matter for which representation was approved.

Commentary:

Clients should be represented continuously during the case. The same attorney should represent the client throughout the trial court proceedings and thereafter, until a new attorney is assigned for an appeal.²⁸ Similarly, counsel's representation should continue at least until a family law client receives an order of disposition.²⁹ As set forth in Standard 9.2.n, trial counsel must take steps to protect the client's appellate rights. The attorney assigned to the direct appeal should represent the client throughout the appeal. In a criminal case, this will typically encompass representing the defendant until the appeal has been decided and there has been a disposition as to any post-conviction proceedings. After resolution of the appeal in the intermediate appellate court and any collateral proceedings, appellate counsel should take steps to protect the client's rights to further appeal and should continue to represent the client until all available appellate remedies have been exhausted.

6.2. Continuity of Representation. The ACP shall ensure representation by the same attorney throughout the trial level, unless the needs of the client or unavoidable circumstances require otherwise.

7. Budget and Funding

7.1. General. Each ACP shall be provided with sufficient funding to carry out its functions under County Law § 722 (3) and to ensure quality representation.

²⁷See e.g. ILS Parental Representation Standards, Standard I (detailing representation that should be provided prior to court intervention); ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 4 (attorney shall actively represent parent in pre-petition phase, if permitted); and High Quality Legal Representation for All Parties in Child Welfare Proceedings, pages 6-7, US HHS, Administration for Children and Families, Children's Bureau (Info Memo ACYF-CB-IM-17-02, Jan. 17, 2017).

²⁸See ABA Standards for Criminal Justice, Standard 21-2.2 (a) (counsel should continue to represent defendant until decision has been made as to appeal and, if appeal is taken, to serve defendant until new counsel is substituted); ILS Parental Representation Standards, Standard J-1 (same attorney should represent client throughout case, unless client's needs dictate otherwise).

²⁹ILS Parental Representation Standards, Standard J-2, Commentary (representation does not end until final orders have been entered and client decides not to appeal; appeal has been taken and application for assignment of appellate counsel has been made; or counsel has been relieved from representing client).

Commentary:

Quality representation by counsel in criminal and family law matters ensures the proper functioning of our justice system. Without adequate funding, these Standards cannot be met, and effective assistance cannot be provided.³⁰ In 2006, the Kaye Commission³¹ concluded that “New York’s current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state’s constitutional and statutory obligations to protect the rights of the indigent accused.” A complete overhaul of the system was recommended, including creation of a statewide public defense system overseen by an independent governing body, as well as adequate funding provided by the Legislature from the State’s General Fund.³² Similarly, in its Interim Report, the Commission on Parental Legal Representation recommended that the State pay for all costs associated with parental representation in child welfare matters to ensure quality representation and eliminate disparities among localities.

In 2015, the *Hurrell-Harring* Settlement required the state to pay for specified improvements in public defense in criminal cases in five counties. In 2017, the state authorized ILS to prepare plans for counsel at first appearance, caseload relief, and quality improvement to expand statewide the reforms taking place in the five *Hurrell-Harring* counties. The state is obligated to pay for those reforms.³³ The FY 2018-2019 state budget included funding to implement the first year of those statewide reforms.³⁴ While the state now plays an important new role in public defense, the counties retain primary responsibility for funding it. Thus, ACPs and Administrators have an ongoing responsibility to work with relevant governmental entities to obtain the funding needed to meet these Standards. *See* Commentary to Standard 4.5.

7.1.a. Periodic Review. Each county shall conduct periodic evaluation and review of the ACP budget and communicate the fiscal and programmatic needs of the ACP to ILS.

7.1.b. Compliance with all ILS Standards. The ACP and the county shall make known to ILS the state funding needed to comply with these and all other ILS standards.

7.1.c. Budget and Record-Keeping. The ACP shall prepare and submit a detailed budget to the county funding authority and shall maintain records and accounts of expenditures in accordance with accepted accounting practices and relevant laws and regulations.

7.1.d. Voucher Review. The county and ACP shall not delay the payment of vouchers or reduce the amount paid to reduce costs.

³⁰NYSBA Revised Standards, Introduction, final paragraph at 4 (it is vital that funding is adequate to enable providers to meet or exceed standards). ILS Conflict Standards, Standards 3, 4, 5, and 6 (counties must ensure that mandated legal services providers have access to and use as needed investigative and assistance of experts and have time and resources needed to ensure meet performance standards and can spend sufficient time with clients to establish a meaningful client-attorney relationship).

³¹The Commission was created by, and reported to, then Chief Judge Judith S. Kaye.

³²Kaye Commission Final Report, at iii; 2, 4.

³³L 2017, ch 59, Part VVV, amending County Law § 722-e and adding Executive Law § 832 (4).

³⁴The FY 2019-20 Executive Budget proposal, released on January 15, 2019, recommends full funding for the second year of statewide implementation of reforms.

PART III. ACP RESPONSIBILITIES

A. General Responsibilities

8. Operational Responsibilities

8.1. Attorney Panels. The ACP shall create panels of attorneys who have demonstrated the skill, experience, and commitment needed to provide quality representation to public defense clients.

8.1.a. Differentiated Panels. To ensure the competence necessary for a given case, the ACP shall create specific types of panels based upon the category and complexity of the case.

8.1.b. Qualifications. The ACP shall create standards and a process for attorneys to apply to participate on the panel, including specific criteria for acceptance onto any subpanel.

8.1.c. Regional Recruitment. While recruitment for the panel may begin with the local bar association, all qualified attorneys shall be considered; and the opportunity to participate in the panel should be publicized to all attorneys within the ACP's county or region.

Commentary:

Counties with few available attorneys and/or large geographic size, as well as those establishing a regional ACP, should not unduly restrict panel membership based on geographical considerations. Qualified out-of-county attorneys should not be excluded if their participation ensures appropriate client access and timely court appearances. *See* Standard 2.1.a, Commentary. While criteria for placing attorneys on panels may reflect local needs, they must be consistent with, and ensure compliance with, these and all ILS standards.

8.1.d. No Fee. The ACP shall not charge a fee for applying to, or remaining on, a panel.

8.1.e. Administrator Assignments. The selection of assigned counsel for a case should be made by, or at the direction of, the Administrator; should ensure that the ability, training, and experience of panel attorneys are matched to the complexity of the cases to which they are assigned; and should not be made by a judge or court official, except in an emergency, in exceptional circumstances, or when an initial assignment of counsel in one court is continued by a judge in a court to which the case is transferred.

Commentary:

As set forth in Standard 3.3.d.v., assignments should not be made on an ad hoc basis, and the ACP Administrator shall oversee the rotation of panel attorneys and ensure a fair assignment process. This Standard addresses the mechanics of the process and exceptions to the rotation rule that apply to ensure a proper match between case and client or to allow for assignment by

a judge. A Program Administrator may select panel attorneys to individual cases or may provide a list of qualified attorneys from which courts may assign counsel on a rotational basis. Zealous representation should be encouraged, and patronage should be discouraged. This standard is consistent with County Law § 722 (4), which requires courts to assign counsel in accordance with a plan conforming to the requirements of § 722 and permits courts to exercise their inherent authority to assign counsel if a county lacks an 18-B plan. Special circumstances may require an assignment out of rotation. These circumstances include conflicts of interest, previous representation of a client, or special expertise needed to ensure that an assigned attorney possesses qualifications commensurate with the complexity of a given case.³⁵ Judicial appointment should only occur on an interim basis, when no plan has yet been established, or in other exceptional circumstances, but not as the default or permanent mode of assignment.

8.1.f. Geographic Areas. To ensure that assigned counsel are available at first appearance for every client, the ACP may establish geographic areas in which each assigned attorney may accept cases.

Commentary:

ACPs must often address geographical challenges. The Administrator should consider the county's size and terrain, as well as the location and number of courts. One method used by Administrators to address geographic challenges is dividing the county into distinct geographic zones and designating specific panel members who reside in each zone to cover both off-hour arraignments and regular appearances in the courts of each zone. This system can help reduce mileage costs and ensure that panel attorneys are not overburdened and can timely appear for all types of court proceedings.

8.1.g. Malpractice Insurance. The ACP should require all attorneys seeking appointment to the panel to provide evidence of adequate malpractice insurance coverage.

Commentary:

Professional liability insurance can be expensive, and the expense may be difficult to absorb for newer attorneys. Further, criminal defendants asserting malpractice insurance claims must surmount high hurdles. *See Dombroski v Bulson*, 19 NY3d 347 (2012) (plaintiff must have at least colorable claim of actual innocence and establish that conviction would not have resulted absent defense counsel's negligent representation and that pecuniary loss resulted). However, some legal malpractice claims against defense counsel are viable. *See e.g. Arnold v Devane*, 123 AD3d 1202 (3rd Dept 2014); *Brownell v LeClaire*, 96 AD3d 1336 (3rd Dept 2012). Moreover, a less onerous

³⁵*See e.g.* ABA Ten Principles, Principle 6 (defense counsel's ability, training, and experience match complexity of case).

www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last accessed Feb. 22, 2019);

NYSDA Board of Directors, *Governing Principles for Public Defense Services* (2000) (public defense system must assure that complexity of case is matched to ability of attorney).

https://cdn.ymaws.com/www.nysda.org/resource/resmgr/PDFs--Resolutions/00_GoverningPrinciplesAdopte.pdf (last accessed Feb. 22, 2019);

standard applies in Family Court cases. *See e.g. Chaudhuri v Kilmer*, 158 AD3d 1276 (4th Dept 2018) (to recover damages in a legal malpractice action against counsel in custody matter, plaintiff had to establish that attorney failed to exercise ordinary reasonable skill and knowledge commonly possessed by member of legal profession; that failure was proximate cause of actual damages to plaintiff; and that plaintiff would have succeeded on the merits of underlying action, but for attorney's negligence). Criminal and Family Court clients should not bear the risk that no insurance coverage will be available if they have a viable claim. Therefore, to protect such clients and provide client-centered representation, panel attorneys should carry malpractice insurance covering their assigned counsel representation. *See* Commentary to Standard 3.2.d (recommending that ACPs consider negotiating to provide for group rates on malpractice insurance for panel attorneys).

8.2. Requirement that Eligible Clients Receive Representation. The ACP shall utilize applicable ILS Eligibility Standards.

8.3. Procedures for Compensating Panel Attorneys. The ACP shall establish and maintain procedures for compensating assigned counsel.

8.3.a. Full Compensation. The ACP shall compensate assigned counsel for all hours necessary to provide quality legal representation.

8.3.b. Prompt Payment. The ACP shall develop and implement procedures for compensating panel attorneys that ensure prompt payment.

8.3.c. Additional Payment. On the matter to which counsel is assigned, he or she shall not seek to be privately retained to represent the client, shall not agree to be privately retained upon request of the client, and shall neither seek nor accept payment from a client or any other person. Noncompliance with this rule is a ground for removal from the panel. Assigned counsel should not seek nor accept payment from a client or any other source to supplement fees and expenses for non-attorney professional services authorized by the ACP.

Commentary:

County Law § 722-b (4) provides: "No counsel assigned hereunder shall seek or accept any fee for representing the party for whom he or she is assigned without approval of the court as herein provided." Three Appellate Division Departments have relevant rules. The First Department rule states that an assigned attorney shall not "in any manner" accept payment in any form from the person being represented or any other person, except where expressly allowed by statute or by court order.³⁶ The Fourth Department has a similar rule.³⁷ The Second

³⁶22 NYCRR § 603.30.

<http://www.nycourts.gov/courts/AD1/Committees&Programs/DDC/part603.shtml#s60329>

(no attorney assigned for a criminal defendant shall demand, accept, receive or agree to accept or receive any payment or reward or any promise thereof from the defendant or any other person, except as expressly authorized by statute or court order) (last accessed Feb. 22, 2019).

³⁷22 NYCRR § 1015.9.

<http://www.nycourts.gov/courts/ad4/Clerk/AttyMtrrs/Part-1015-Attorneys.pdf>

Department has stricter requirements, omitting the exception for a court order, prohibiting an assigned attorney from accepting a retainer from a client in the assigned or any other case, and requiring removal from the panel of attorneys who violate the rule.³⁸

8.3.d. Interim Vouchers. Procedures for compensating assigned counsel should include policies allowing for the payment of interim vouchers for fees and expenses.

Commentary:

This Standard applies to complex and lengthy cases where interim vouchers will support an attorney's ability to represent clients and/or help the ACP plan its budget.

8.3.e. Post-Disposition Work. Policies for compensating assigned counsel shall allow for payment of vouchers in cases requiring post-disposition work.

Commentary:

This standard reinforces ethical principles and appellate standards that prevent an attorney from abandoning a client during the period between the entry of judgment and the assignment of an attorney to handle the appeal. A trial attorney should be permitted to file a supplemental voucher for legal work done during this period, pursuant to Standard 6.1. Such approach will mean that panel attorneys and their clients are not at a disadvantage as compared to institutional providers.

8.3.f. Expenses. The ACP shall advise assigned counsel as to which expenses are reimbursable and shall promptly authorize reimbursement for all reasonable out-of-pocket expenses.

8.3.g. Changes in Procedures. The ACP shall distribute prompt, clear information regarding payment or reimbursement procedures to panel attorneys and shall provide prompt, clear information regarding any changes in such procedures.

8.4. Administrative Responsibilities for Panel Attorneys. The ACP shall establish clear, fair guidelines regarding the administrative responsibilities of panel attorneys.

8.5. Access to Appropriate Non-Attorney Professional Services. The ACP shall ensure that individual assigned counsel have access to the non-attorney professional services needed at every phase of the case.

8.5.a. Range of Services. Such professional services shall include access to investigatory, expert, social work, mental health, interpreter, and other relevant services.

8.5.b. Direct Services. The ACP is not obligated to provide these services directly, but should strive to do so where feasible.

(last accessed Feb. 22, 2019).

³⁸22 NYCRR § 691.16. <http://www.nycourts.gov/courts/ad2/pdf/Part691.pdf>

(last accessed Feb. 22, 2019).

8.6. Quality Assurance Procedures. The ACP shall develop and implement comprehensive quality assurance procedures, as set forth below.

B: Quality Assurance Provisions

9. General Provisions

9.1. Compliance with Applicable Standards. The ACP shall ensure that assigned counsel are aware of, and comply with, all applicable performance and ethical standards.

9.2. Client-Centered Representation. The ACP shall ensure that assigned counsel provide client-centered representation, which, at a minimum, shall include:

9.2.a. Contacting clients as soon as possible after appointment.

9.2.b. Promptly meeting with clients (whether in detention or not) prior to a court appearance, and as needed, in a space that complies with Standard 9.2.e.

9.2.c. Accepting telephone calls from clients, including from detention facilities.

9.2.d. Timely responding to client inquiries.

9.2.e. Ensuring that client privacy and the confidentiality of communications are protected.

9.2.f. Communicating relevant information about the case to the client in a timely and respectful manner, and using clear and understandable language, so that the client can make informed decisions.

9.2.g. Discussing relevant documents with the client and providing copies upon request.

9.2.h. Collaborating with the client to achieve the best possible result, consistent with the client's objectives.

9.2.i. In criminal matters, pursuing alternatives to incarceration where appropriate; providing accurate information about sentencing; reviewing the presentence report with the client; acting to correct errors in that report; and filing a defense presentence memorandum where appropriate.

9.2.j. With respect to Family Court cases, providing accurate information about dispositions; reviewing any (pre)dispositional report with the client; acting to correct errors in such report; and, where appropriate, filing a memorandum on behalf of the client advocating an appropriate disposition.

9.2.k. Utilizing appropriate non-attorney professional services, such as investigators, expert witnesses, sentencing advocates, and social workers.

9.2.l. Determining, and explaining to clients, the collateral consequences of any course of action, and where appropriate, using the existence of these consequences to achieve better plea negotiations.

Commentary:

The collateral, or “enmeshed,” consequences of a conviction can impact nearly every aspect of a criminal defendant’s life, including immigration status, family, housing, employment, education, public benefits, and finances.³⁹ Since such impact can be more significant than the sentence imposed, professional standards require defense attorneys to advise clients of such consequences.⁴⁰ In *Padilla v Kentucky*, 599 US 356 (2010), the U.S. Supreme Court held that the defendant received ineffective assistance where the deportation consequence of the guilty plea was clear, but defense counsel failed to advise him such risks. The *Padilla* analysis transcends the immigration realm and applies to a wide range of other consequences flowing from criminal convictions.⁴¹ While it is not always possible to avoid immigration and other consequences of a conviction, creative plea negotiations may help to ameliorate adverse outcomes or serve as a rationale for a lesser sentence. Thus, defense attorneys are most effective when they determine the potential collateral consequences of a conviction; advise their clients accordingly; and use the consequences as leverage for better case dispositions.⁴² Collateral consequences also flow from child welfare investigations and may include being listed on the State Central Register of Child Abuse and Maltreatment, which can affect employment opportunities and the ability to become a foster parent or adopt a child.

9.2.m. When representing adolescent and young adult clients—whether charged with criminal or delinquent behavior or facing loss of the opportunity to parent their children—developing expertise in adolescent development, custody and care of youth, and other unique needs of these clients.

³⁹See e.g. NYSBA, Special Committee on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety* (2006), at 443 (noting that “collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life—family, shelter, work, civic participation, and financial stability”).

⁴⁰See e.g. ABA Criminal Justice Standards for the Defense Function (4th ed), Standard 4-5.4; NYSBA Revised Standards, § 1-7(e); NLADA Performance Guidelines. §§ 6.3, 8.2.

⁴¹McGregor Smyth, *Collateral No More: The Practical Imperative for Holistic Defender in a Post-Padilla World... Or, How to Achieve Consistently Better Results for Clients*, 21 St Louis Univ L J 139,143 (2011). In his *Padilla v Kentucky* concurrence, Justice Alito noted that this “case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.” *Padilla*, 599 US at 377.

⁴²When representing non-citizen clients facing immigration issues, defense attorneys should consult with the Regional Assistance Immigration Center (RIAC) located in their region.

<https://www.ils.ny.gov/content/regional-immigration-assistance-centers> (last accessed Feb. 22, 2019).

Commentary:

Increasing attention to the emotional, social, and physical differences between adolescents and adults has led to changes in the justice systems;⁴³ and no doubt more changes will come.⁴⁴ The most significant systemic change has been the 2017 Raise the Age (RTA) legislation.⁴⁵ By October 2019, this law will divert many 16- and 17-year-olds from the adult system to Family Court.⁴⁶

In all types of proceedings, panel attorneys must be aware of their young clients' unique characteristics and needs, which may affect the client-attorney relationship, the legal posture of the case, and the best possible outcome. Attorneys must gather information needed to raise salient issues—from the ability of young clients to understand and validly waive rights to the consideration of age in fashioning appropriate dispositions.⁴⁷ The need for expertise on youth is not limited to representation of those 17 years and younger: relevant adolescent characteristics may continue to age 25.⁴⁸ So in all stages of representation—from developing a theory of the case⁴⁹ to advocating for the best possible disposition⁵⁰—counsel should consider age-related issues and consultation with experts on this topic.

⁴³Gary Gately, *Experts: Brain Development Should Play Bigger Role in Determining Treatment of Juvenile Offenders*, Juvenile Justice Information Exchange (Dec. 17, 2013), <https://jjiie.org/2013/12/17/experts-brain-development-should-play-bigger-role-in-determining-treatment-of-juvenile-offenders/> (last accessed Feb. 22, 2019).

⁴⁴See e.g. Caren Harp, *Adolescent Brain Science: Proceed with Caution*, Juvenile Justice Information Exchange (May 8, 2017); Katie Hiler, *Research Suggests a New Reason for Teens' Risky Behavior*, Science Friday (Sept. 11, 2017), <https://www.pri.org/stories/2017-09-11/research-suggests-new-reason-teens-risky-behavior> (last accessed Feb. 22, 2019).

⁴⁵L 2017, ch 59, part WWW.

⁴⁶Misdemeanor charges will be heard in Family Court from the outset. Nonviolent felony charges will begin in a Youth Part of adult court, with most then moving to Family Court. Violent felony charges will remain in adult court, unless removed to Family Court.

⁴⁷See e.g. Materials from the 26th Annual Maureen Kearney Rowley CJA Panel Training Seminar (Philadelphia, PA, May 12, 2017), *How Adolescent Brain and Behavioral Development Can Affect Competency, Culpability, and Other Determinations in Criminal Court*.

<http://pae.fd.org/files/ABBDP.pdf> (last accessed Feb. 22, 2019); Rebecca Harkness, Sue Abrams, & Abby Eskin, *Building a Safety Net for Teen Parents in Foster Care: California's Approach*, Child Law Practice (ABA May-June 2017),

https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol1-36/may-june-2017/building-a-safety-net-for-teen-parents-in-foster-care--californi.html (last accessed Feb. 22, 2019); and see Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L Rev 89 (2013).

<https://scholarship.law.nd.edu/ndlr/vol85/iss1/3/> (last accessed Feb. 22, 2019).

⁴⁸See e.g. Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development for Juvenile Justice?* (2006), at 1, 3.

https://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf (last accessed Feb. 22, 2019).

⁴⁹See e.g. NLADA, Performance Guidelines, Guideline 4.3.

<https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/NLADAPerformanceGuidelines.pdf> (last accessed Feb. 22, 2019).

⁵⁰See *id.*, Guidelines 8.3, 8.6, and 8.7.

9.2.n. Taking all necessary steps to protect, preserve, and enforce clients' post-conviction, post-disposition, and appellate rights.

Commentary:

This topic merits special attention to clarify trial counsel's role and avoid common lapses in preserving clients' appellate rights. When a trial court judgment or order has been rendered, trial counsel should explain such outcome and inform the client of the right to appeal. This duty applies with equal force in criminal cases in which the judgment of conviction was based on a plea of guilty and there was a purported waiver of the right to appeal, and in criminal cases where the judgment followed a trial. Further, this duty applies when intermediate orders have been entered in Family Court Act article 10 proceedings, as well as when final orders of disposition have been rendered in any family law proceeding. If the client decides to appeal, trial counsel must file a notice of appeal or move for permission to appeal if an appeal as of right does not lie. In addition, counsel must inform the client of the right to poor person relief. If the client wishes to seek poor person status and assignment of appellate counsel, the assigned trial attorney should take all appropriate steps to achieve such relief. In criminal cases, trial counsel may use CPL 380.55 or submit a poor person application. In Family Court cases, counsel may certify indigency under Family Court Act § 1118. While Appellate Division Department rules differ regarding counsel's duty to achieve the assignment of appellate counsel, counsel should take all possible steps on behalf of a client who is unable to afford appellate counsel. Trial counsel's representation should continue until appellate counsel is assigned, as noted in Commentary to Standard 6.1.

Appellate counsel's duty of representation encompasses the direct appeal and any appropriate post-conviction or post-disposition proceedings initiated, as set forth in ILS Appellate Standards, Standard 20. Counsel should explain the outcome of the appeal or collateral proceeding and notify the client of the right to further appeal. If the client wishes to pursue a further appeal to the New York Court of Appeals, appellate counsel must make a motion for leave to appeal in a criminal case and, in a family law case, file a notice of appeal or seek leave to appeal, as appropriate. If the client continues to be indigent, poor person relief granted by the Appellate Division continues for the purpose of filing a notice of appeal or making an application for leave to appeal to the Court of Appeals (22 NYCRR 500.21 [g]). Appellate counsel should exhaust all appropriate appellate remedies, as set forth in ILS Appellate Standards, Standard 16.

10. Attorney Capability

10.1. Knowledge and Experience. The ACP shall establish and maintain systems to ensure that assigned counsel have sufficient knowledge and experience to provide quality representation to clients.

10.2. Assessment of Attorneys. The ACP shall develop and maintain systems to (a) determine which levels of cases are appropriate for each attorney; (b) recertify panel attorneys; and (c) identify the training needs of panel attorneys.

11. Attorney Caseload

11.1. Attorney Caseloads. The ACP shall establish and maintain systems to ensure that caseloads comply with ILS Caseload Standards.⁵¹

11.1.a. Evaluation of Attorney Caseload. In assigning cases to panel attorneys, the ACP shall take into consideration: (a) the types of cases being handled; (b) the qualifications and experience of the attorneys; (c) the distance between the attorney's office and the courts or other relevant sites; (d) the time needed to interview clients and witnesses; (e) the attorneys' total workload, including the extent of the attorney's private practice; and (f) any other relevant factors.

11.1.b. Review of Attorney Caseload. The ACP shall review attorney caseloads on a regular basis.

12. Training

12.1. Orientation. For new panel members, the ACP shall provide a mandatory orientation, which should include a discussion of expectations for quality representation and administrative procedures.

12.2. Initial Training. The ACP shall ensure that panel attorneys receive appropriate training prior to any case assignments. The ACP may directly provide, or financially support, this training, but is not required to do so.

12.3. Ongoing Training

12.3.a. Obtaining CLE Training. The ACP shall ensure that all assigned counsel obtain continuing legal education (CLE) and other training needed so that their skills and knowledge will enable them to provide quality representation. The ACP should encourage panel attorneys to utilize national, regional, state, and local sources of training.

12.3.b. Mandated Representation Topics. The ACP shall ensure that all assigned counsel allocate a significant portion of their mandatory CLE credit requirement to courses related to the subject matter of the mandated representation they provide.

12.3.c. Monitoring CLE Programs. The ACP shall monitor CLE programs attended by assigned counsel.

⁵¹ILS, Determination of Caseload Standards pursuant to § IV of the *Hurrell-Harring v. The State of New York Settlement* (2016), <https://www.ils.nv.gov/files/Hurrell-Harring/Caseload%20Reduction/Caseload%20Standards%20Report%20Final%20120816.pdf> (last accessed Feb. 22, 2019). *See also* Executive Law § 832 (4) (b).

12.3.d. Providing Affordable Programs. The ACP shall ensure that assigned counsel have access to high-quality free or affordable CLE and other training programs relevant to their work.

Commentary:

Almost 30 years ago, NLADA issued standards stating that ACP Administrators “shall be responsible for preparing, in accordance with Board specifications, an entry-level training program,”⁵² as well as “periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills.”⁵³ ACP Boards are called upon to “establish regulations requiring [panel] attorneys to attend a specified number of training units per year.” The Board and Administrator are directed to “encourage attorneys to participate in training sessions beyond the mandatory training units required by the Board.” Among the many related standards cited by NLADA was a provision in the ABA Defense Services Standards. A year later, the ABA issued the Third Edition of those standards, which states: “The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services.”

More recent standards specific to New York provide that local plans or programs should provide for the effective training, professional development, and continuing education of all attorneys, other professionals, and staff involved in public defense.⁵⁴ Continuing legal education and training programs shall be made available and affordable for attorneys and staff providing mandated representation, and public funds shall be provided to enable all attorneys and staff to attend such programs.”⁵⁵ ILS has stated that public defense attorneys and programs should require entry-level and continuing training relevant to mandated representation cases.⁵⁶ Whether developing their own training program or taking advantage of other available programs, ACPs must ensure that every panel attorney receives the training needed to deliver quality representation. Standard 7.1 contemplates that sufficient funding will be provided for the requisite training of panel attorneys.

13. Supervision and Mentoring

13.1. Use of ACP Resources. The ACP shall ensure that assigned counsel are aware of, and utilize, the services described in Section 4.2 of these Standards.

⁵²NLADA ACS Standards, Standard 4.3.1.

⁵³*Id.* at Standard 4.3.2 (b).

⁵⁴NYSBA Standards for Mandated Representation, Standard VI.A.

http://66.109.34.102/ym_docs/04_NYSBA_StandardsProvidingConstitutionallyStatutorilyMandatedRepresentation.pdf (last accessed Feb. 22, 2019).

⁵⁵NYSBA Revised Standards, Standard F-2.

<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644> (last accessed Feb. 22, 2019).

⁵⁶ILS Conflict Standards, Standard 7(d).

<https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf> (last accessed Feb. 22, 2019).

14. Performance Review and Remediation

14.1. Performance Review and Remediation Policies. The ACP shall provide assigned counsel with meaningful, periodic evaluation of their work, based on objective criteria, and shall publicize the criteria applied.

14.2. Complaint Procedures. The ACP shall establish procedures for the receipt, investigation, and resolution of complaints from clients, client family members, co-counsel, opposing counsel, the judiciary, and any other relevant source.

14.3. Remediation. The ACP shall establish policies for remediation to be employed when an attorney's performance fails to satisfy applicable criteria and standards.

Commentary:

Quality oversight must include a review of attorney performance, as well as procedures for addressing substandard performance.⁵⁷ The need for oversight is just as important for ACP programs as it is for institutional providers. Thus, the NLADA ACS Standards call upon ACPs to establish a system for monitoring attorneys' performance based on publicized criteria.⁵⁸ Further, programs should establish policies and procedures for remediation.⁵⁹ Similarly, the NYSBA Revised Standards provide that ACPs must provide periodic performance evaluations based on objective criteria⁶⁰ and must have procedures for addressing client complaints⁶¹ and imposing appropriate remediation.⁶² Quality oversight can guide the professional development of panel attorneys. Several ACPs have recruited experienced attorneys to identify serious performance issues and offer support and remediation to struggling attorneys. Setting a high bar for performance—when accompanied by the resources and supports needed to reach that bar—cultivates pride among panel attorneys and enhances the Program's ability to recruit committed panel attorneys. Several mechanisms exist for quality oversight.

Current examples of performance review and remediation approaches employed by ACPs, set forth below, can provide guidance to other Programs in the development of their own policies and procedures:

Performance Review and Remediation Policies: The Erie and Onondaga County ACPs have recertification processes involving small committees of lawyers who review about one third of the panels each year. Both attorney review programs set forth criteria to be considered, such as: effective client communication; knowledge of the law; filing of appropriate motions; effective representation at pretrial, trial, and sentencing proceedings; and preservation of the clients' appellate rights. Attorney review procedures should incorporate the average time spent on cases

⁵⁷ABA Ten Principles, Principle 10 ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards").

⁵⁸NLADA ACS Standards, Standard 4.4.

⁵⁹*Id.*, at Standard 4.5.

⁶⁰NYSBA Revised Standards, Standard J-5.

⁶¹*Id.*, at Standard J-7.

⁶²*Id.*, at Standard J-6.

and various aspects of cases; observations of judges and other attorneys; legal writing samples; client feedback; and an assessment of complaints.

Complaint Procedures: A procedure for addressing complaints ensures that the ACP timely learns of potential problems and instills a sense of trust in the Program. The Onondaga County ACP's Handbook sets forth a model complaint process. The Executive Director reviews all complaints to identify serious problems that may warrant suspension or removal from the panel. Most complaints can be handled by contacting the attorney and engaging in problem-solving. For the few serious complaints, Onondaga County uses a more formal complaint review process. A three-member Complaint Advisory Committee communicates with the attorney, provides opportunities to respond, and determines the appropriate action to take.

Remediation: In Onondaga County, if the Complaint Advisory Committee finds that the complaint allegations are valid, several responsive measures are available, including: counseling; training or mentoring or both; limitations in the types of cases assigned; suspension; and removal. The process is designed to promote remediation and support and to thus encourage attorneys to voluntarily contact the ACP for assistance before problems develop.