

Introduction

The National Legal Aid and Defender Association (NLADA) is a private, nonprofit, national membership organization dedicated to the provision of quality legal services to poor people in both criminal and civil cases.

Since 1911, NLADA has worked to ensure that poor people have the same access to quality legal services as those who can afford to retain counsel, and since 1958 has specifically included poor persons accused of crime in that goal. Yet, access to quality legal assistance is still denied to many persons in our criminal justice system. While governments have a constitutional duty to provide counsel to poor persons charged with criminal offenses, the poor frequently receive inadequate representation from their government-supplied lawyers. In other words, there are two systems of justice: one for the poor and one for those who can afford to hire counsel.

Assigned counsel – that is, private attorneys appointed in individual cases – is the primary method for delivery of defense services in about 50% of the counties in the United States. Defense services are also provided through defender offices and contracts with law firms or private organizations. While there are national standards governing the delivery of defense services by defender offices and contract systems, the only standards for assigned counsel systems are those contained in general defense services standards or employed in a few local jurisdictions. In most assigned counsel jurisdictions, the absence of standards has resulted in an absence of structure, quality control, training and support services. In fact, some assigned counsel “systems” amount to no more than an ad hoc assignment of attorneys by individual judges.

It is to remedy these deficiencies – and thereby improve the quality of representation provided by assigned counsel – that NLADA is promulgating these Standards.

These Standards represent what NLADA believes to be the ideal system for providing representation through assigned counsel. While financial, administrative and other considerations may prevent some jurisdictions using assigned counsel from immediately achieving this ideal, the Standards provide a model for improving representation of those who cannot afford to retain private counsel, and a goal that assigned counsel systems should work to achieve.

Standard 1. Scope

These Standards apply whenever private counsel, rather than defender offices or contracting entities are being assigned to provide representation for persons who are financially unable to retain counsel (as defined in Standard 2.3) and who are entitled to representation.

Standard 2.1 Provision of Quality Representation

- (a) Provision of quality representation to all persons eligible under Standard 2.3 is the overarching purpose of these Standards, and shall inform the creation and maintenance of all Assigned Counsel Programs.
- (b) Assigned counsel shall provide to their clients quality representation equivalent to that provided by a skilled, knowledgeable and conscientious criminal defense lawyer to paying clients.
- (c) Assigned counsel shall provide quality representation in all relevant legal proceedings involving their clients.

Standard 2.2 Independence from Judiciary and Funding Source

(a) The Assigned Counsel Program and individual assigned counsel shall be free from political influence and shall be subject to judicial supervision only to the extent that privately retained attorneys are.

(b) The Assigned Counsel Program shall operate under and enforce a clear policy protecting the integrity of the relationship between assigned counsel and his or her client.

(c) Assigned counsel shall reject any attempts at interference with the conduct of a particular case.

Standard 2.3 Financial Eligibility

(a) Any person who cannot retain private counsel without substantial hardship to that person, or to his or her family, shall be eligible to receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists.

(b) Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not interfere with assigned counsel's independence to advocate for his or her clients on any relevant matter, including the question of their financial status.

Individual assigned counsel shall not have responsibility for determining initial or continuing eligibility of clients.

(c) Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not require assigned counsel to make any disclosures of facts concerning his or her clients' financial status beyond those disclosures mandated by the binding ethical rules of the jurisdiction.

Standard 2.4 Contribution and Recoupment

- (a) Persons eligible for representation by assigned counsel (Standard 2.3) shall not be asked to contribute toward, nor to reimburse the jurisdiction for, the cost of assigned counsel.
- (b) Jurisdictions that do require payment by eligible persons of some portion of the cost of assigned counsel shall establish a procedure for determining the amount of contribution to be paid. This procedure shall be implemented prior to or early in representation by assigned counsel, and shall include a hearing on the ability of person to pay.
- (c) Any payment by or on behalf of a person represented by assigned counsel toward the cost of representation shall be made to a fund or through a mechanism established for that purpose, and not directly to assigned counsel. Assigned counsel shall not be responsible for collection of payment.
- (d) Payment toward the costs of representation by assigned counsel shall never be made a condition of probation or other sentence-related supervision.

Standard 2.5 Early Representation

- (a) It is the responsibility of the Assigned Counsel Program, along with other components of the criminal justice system, to ensure that counsel is provided to the accused at the earliest possible stage in the proceedings.
- (b) Upon request, counsel shall be appointed for persons who have not been taken into custody and who require representation for criminal proceedings.
- (c) Assigned counsel shall contact their new clients as soon as possible after appointment.

Standard 2.6 Duration and Continuity of Representation

(a) The duration of representation by counsel assigned under these Standards shall be until all appropriate avenues of relief, direct and collateral, are exhausted or until counsel is replaced by subsequent or substitute counsel.

(b) There shall be continuity of representation by assigned counsel at the trial stage. There shall be continuity of representation by assigned counsel on appeal, which shall be provided by different counsel than at the trial stage, except when the best interests of the clients dictate otherwise.

Standard 2.7 Waiver Safeguards

(a) All persons eligible for representation by assigned counsel shall be informed of that right.

(b) Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.

(c) The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

Standard 2.8 Standby Counsel

(a) If a person eligible for representation by assigned counsel waives counsel on the record, in favor of self-representation, standby counsel shall be appointed.

(b) Standby counsel shall be available to advise the pro se defendant on preparation and presentation of his or her case, and shall be prepared to represent the defendant if the waiver of counsel is withdrawn at any point.

Standard 2.9 Standards for Performance of Counsel

- (a) The Assigned Counsel Program shall identify, and enforce adherence to, minimum standards for the performance of counsel and shall assist counsel in meeting, and striving to exceed, those standards.
- (b) Assigned counsel shall meet, and strive to exceed, minimum standards for the performance of counsel.

Standard 3.1 Establishment of Legal Representation Plan

- (a) Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these Standards.
- (b) 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. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons (Standard 2.1).

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

- (a) Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.

(b) The plan shall delegate to assigned counsel a substantial portion of all eligible cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.

(c) None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

Standard 3.2.1 Creation of Board

(a) The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board.

(b) The majority 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.

Standard 3.2.2 Functions of Board

(a) The Board shall establish policy and exercise general supervision over the operations of the Assigned Counsel Program.

- (b) The Board shall also hire an Administrator (Standard 3.3.1).
- (c) The Board shall refrain from interference in the conduct of individual cases.

Standard 3.3.1 Position of Administrator

The Board shall appoint an Administrator who shall implement policy and manage the Assigned Counsel Program, except when the legal representation plan requires that the Director of the defender office also act as Administrator, and the plan provides for the independence of the Director/Administrator from the judiciary and funding source (Standard 2.2).

Standard 3.3.2 Qualifications of Administrator

- (a) The Administrator shall be an attorney licensed to practice in the jurisdiction or jurisdictions in which the Assigned Counsel Program operates. The experience of the Administrator shall include extensive work in the criminal defense field and in administration. He or she shall have a reputation for integrity and commitment to program principles.
- (b) The Administrator shall be appointed on merit alone and shall be dismissed only for good cause found upon a hearing before the Board.

Standard 3.3.3 Employment Status and Pay of Administrator

- (a) The office of Administrator shall be a full-time position whenever feasible; a full-time Administrator shall not engage in the private practice of law.

(b) The Administrator shall be appointed for a stated term of office and shall be compensated at a rate not less than the local presiding judge, chief prosecutor and, where applicable, the chief defender.

Standard 3.3.4 Functions of Administrator

The Administrator shall implement Program policy and manage Program operations.

Standard 3.4 Budget and Funding

(a) The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.

(b) The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.

(c) The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

Standard 3.5.1 Insurance for Board and Administrators

(a) The Program shall insure the Board and the Administrator for all insurable risks incident to the Program to a dollar amount specified by the Board.

(b) The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the Program.

Standard 3.5.2 Insurance for Program Attorneys

All attorneys seeking appointment under the Program shall provide evidence of being adequately insured for all insurable risks to the Program caused by their representation of clients under Program auspices, to a dollar amount specified by the Program.

Standard 3.6 Office Space, Equipment, Supplies

The Program shall be provided with suitable space, equipment and supplies at appropriate locations, or with the funds necessary to obtain them.

Standard 4.1 Establishment and General Operation of Assigned Counsel Roster

(a) The Board, or at its direction the Administrator, shall categorize by levels of seriousness and difficulty the types of cases in the jurisdiction.

(b) The Board, or at its direction the Administrator, shall establish standards detailing the qualifications attorneys must have before being assigned cases at each level under paragraph (a), as described in Standard 4.1.1.

(c) The Board, or at its direction the Administrator, shall establish standards and procedures relating to attorney workload, as described in Standard 4.1.2.

(d) The Administrator shall establish a roster or rosters containing the names of attorneys who have applied to receive appointments from the Program and who have been found qualified to handle a given level of cases.

(e) The Administrator shall review all incoming cases, classify them by type and level of seriousness according to the categories established under paragraph (a), and assign them to available, qualified attorneys on the appropriate roster, in rotation. Departures from assignment by rotation of the names of available attorneys shall be made when such departure

will protect the best interests of the person to be represented and may be made when efficient administration of the Program so requires.

(f) If the Board determines that the number of attorneys to be included on a roster should be limited, the Board shall establish a procedure to ensure fairness in the selection of attorneys from all qualified attorneys who apply.

Standard 4.1.1 Qualifications of Attorneys

(a) The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.

(b) The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.

(c) An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

Standard 4.1.2 Workloads of Attorneys

(a) The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.

(b) The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorneys' obligation not to accept more work than they can effectively handle.

(c) The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney.

Standard 4.1.3 Publicizing the Program

The Administrator shall publicize the existence and functions of the Assigned Counsel Program to the practicing bar, to the criminal justice community, and to the public.

Standard 4.2 Orientation

The Administrator shall ensure that lawyers new to the Program receive a mandatory orientation on Program policies and procedures before they are assigned cases.

Standard 4.3.1 Entry-Level Training

(a) The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program.

(b) Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.

Standard 4.3.2 In-Service Training

- (a) The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.
- (b) The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.
- (c) The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.
- (d) The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

Standard 4.4 Supervision of Attorneys

- (a) The Board shall establish policies regarding supervision of assigned counsel working within the Program. These policies shall include a procedure for handling complaints from clients and others.
- (b) The Administrator shall be responsible for supervision.

Standard 4.4.1 Mentoring

- (a) The Board shall establish a policy with regard to the provision of mentors -- more experienced, competent attorneys -- to advise less experienced attorneys on a Program roster.
- (b) Mentors shall be compensated for mentoring services according to Board specifications.

Standard 4.4.2 Monitoring

- (a) The Administrator, under the direction of the Board, shall establish a system for monitoring the performance of the attorneys on the Program roster(s). Monitoring shall be done by the Administrator or his or her designee.
- (b) The standard against which Program attorneys are measured shall be that of a skilled, knowledgeable and conscientious criminal defense lawyer adhering to the performance standards established under Standard 2.9.
- (c) The Administrator shall publicize the criteria used in monitoring, and shall inform monitored attorneys of results upon request, upon the decision to impose penalties (Standard 4.5.1), or to seek removal (Standard 4.5.2) and otherwise in the Administrator's discretion.
- (d) The Administrator shall not have access to privileged work product, and shall not invade attorney-client confidentiality.

Standard 4.5 Disciplinary Policies and Procedures

- (a) The Board shall establish policies and procedures for imposition of penalties, including removal from the Program roster, on attorneys for failure to observe Program policies and rules, including failure to provide the quality representation mandated by these Standards.
- (b) No attorney shall be removed from a case in which representation has already begun except with the consent of the client and in accordance with the governing ethical and judicial rules of the jurisdiction.

Standard 4.5.1 Penalties Less than Removal

The Board may permit, and the Administrator may establish, a schedule of penalties less than removal from the Program roster(s) for failure to comply with Program rules, policies, or

required performance. Such penalties shall be coupled with a requirement that the attorney correct the deficiencies in question.

Standard 4.5.2 Removal from Program Roster(s)

(a) Where an attorney has failed to correct deficiencies for which penalties under Standard 4.5.1 have been imposed, or where egregious deficiencies in performance have occurred, the Administrator shall give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. Such notice shall be given within a period of time established by the Board (or as part of the legal representation plan).

(b) Where the alleged actions or inactions of the attorney involve a pattern of failing to provide competent representation to clients, or the Administrator has cause to believe that the attorney cannot provide competent representation to new clients, the Administrator may suspend assignments to the attorney immediately.

(c) After notice has been given, the Administrator (or the Board, or a Removal Committee of the Board if the Board has so directed) shall, unless the attorney consents in writing to removal, conduct a hearing to determine whether cause exists for removal of the Attorney from the Program roster(s). The decision to remove or retain the attorney shall be made in writing.

(d) Where the decision to remove is made by the Administrator or a Removal Committee, the attorney shall have the right to appeal the decision to the Board, whose decision shall be final.

(e) Where removal has been for failure to provide competent representation to one or more clients, the Administrator may seek, in court, substitution of counsel in cases already assigned

to the attorney in question, if there is reason to believe competent representation is not being provided in those cases.

(f) Unless removed from pending cases by the court in which the cases are lodged, an attorney removed from the Program roster(s) shall complete work in cases to which he or she was already assigned at the time of removal, and shall be entitled to compensation in the usual manner. If substitution of counsel is granted, the Program shall compensate the attorney for work done up to the date of removal unless ordered by the court not to do so.

Standard 4.5.3 Reinstatement After Removal

(a) The Board shall establish a procedure for consideration of a removed attorney's application for reinstatement to the Program roster(s).

(b) The procedure should include a requirement that the attorney demonstrate that the deficiencies which led to removal will not be repeated.

Standard 4.6 Support Services

The Assigned Counsel Program shall ensure that the many support services necessary for the effective defense of clients are available to assigned counsel at every phase of the cases to which counsel are assigned.

Standard 4.7.1 Assigned Counsel Fees

Reasonable compensation shall be provided to assigned counsel, at a rate commensurate with that paid for other contracted government legal work (*e.g.* work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.

Standard 4.7.2 Method of Compensation

- (a) Attorneys shall be compensated at an hourly rate, with no distinction between rates for services performed in and outside of court.
- (b) The amount of compensation sought shall be reviewed by the Administrator and approved unless there is cause to believe the amount is unwarranted.
- (c) Maximum fee limits shall not be established. Where they exist, they shall be subject to exception, upon approval by the Administrator acting within guidelines established by the Board.
- (d) Periodic billing and payment during the course of counsel's representation shall be provided for, at least in lengthy cases.

Standard 4.7.3 Payment of Expenses

- (a) The Board shall establish policies as to expenses which will be reimbursed (including reasonable and necessary travel and long-distance and client collect telephone calls) and those which will not.
- (b) Routine office expenses and out-of-pocket expenses shall be paid for by assigned counsel without reimbursement from the Program. The Administrator, with the guidance of the Board, shall approve reimbursement of extraordinary amounts which were reasonable, actual and necessary.

4.7.4 Only Authorized Compensation

Assigned counsel shall neither seek nor accept payment from a client, or from any source on behalf of the client, that is in addition to the fees and expenses authorized by the Program.