

## LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.

### ATTORNEY PERFORMANCE STANDARDS

June 2, 2011

Legal Assistance of Western New York, Inc. (LawNY) is committed to providing the highest quality legal work for low-income and vulnerable populations in Western New York. LawNY looks to the ABA Standards and New York State Rules of Professional Conduct for guidance and adopts the following professional standards for LawNY advocates.

#### **Standard 1: Establishing an effective relationship and a clear understanding with the client.**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.1 “On Establishing an Effective relationship and a Clear Understanding with the Client” (Appendix A)  
[https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/civillegalaidstds2006.pdf](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/civillegalaidstds2006.pdf)
- NY Rules of Professional Conduct 1.1 Competence, 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer, 1.3 Diligence, 1.4 Communication, and 1.16 Declining or Terminating Representation (Appendix B)  
[http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional\\_Standar.htm](http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm)

#### **LawNY Policy:**

To establish an effective professional relationship and a clear understanding with the client:

1. Advocates shall provide and explain the retainer agreement to the client when a decision to provide extended services is made . The advocate will explain the scope of representation, the means to achieve the client's objectives, and what the representation will not include. For cases involving counsel and advice or brief service and other cases that do not require a signed retainer agreement under LawNY policies, the advocate shall explain to the client the limited extent of the relationship and the services to be provided.
2. The advocate shall send an opening letter to the client explaining the scope of representation and what the advocate plans to do to pursue the client's objectives, unless not possible or practical. An opening letter may not be possible for cases involving only advice provided over the telephone or where immediate action is required by the advocate. Likewise, an opening letter may not be practical in cases involving domestic violence.
3. The advocate shall, whenever practical, send a closing letter to the client explaining the work performed on the client's case, the client's objectives that were accomplished, and that the representation has concluded.
4. If a case has been opened for a client and the office later decides to decline

representation, the advocate shall send a letter to a client explaining that the office has declined representation and why. A copy of the LawNY complaint procedure should be enclosed if it has not been provided previously.

With regard to providing clear and effective communication with the client regarding representation and providing diligent and competent legal representation, LawNY adopts the standards and rules listed above and provides the following instructions to advocates.

1. The advocate should respond to client questions and phone calls promptly.
2. For cases that involve long-term representation, the advocate should provide periodic updates regarding the status of the case to the client.
3. The advocate should advise the client of his/her responsibility to assist in preparing the case, for example, by providing documents, locating witnesses or physical evidence, cooperating with discovery requests and keeping records.
4. The advocate should explain to the client the importance of staying in contact with the advocate and informing the advocate of any changes in contact information, of receiving notices from courts or administrative agencies or contacts from opposing parties, and of changes in circumstances that might affect the case.
5. Advocates are encouraged to attend training sessions on cultural competence (to be arranged/developed by the Training Leadership and Diversity Committee).

**Standard 2: Client participation in the conduct of representation.**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.2 “On Client Participation in the Conduct of Representation” (Appendix A)
- NY Rules of Professional Conduct 1.1 Competence, 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer, 1.3 Diligence, 1.4 Communication, 1.14 Client with Diminished Capacity, 1.16 Declining or Terminating Representation, 2.1 Advisor, and 3.1 Non-meritorious Claims and Contentions (Appendix B)

**LawNY Policy:**

To abide by the client's decision regarding the objectives of representation, LawNY adopts the standards and rules listed above and provides the following instructions to advocates.

“The practitioner has authority to determine the appropriate course of action to be taken to accomplish the client’s objective, but should reasonably consult with the client.” (See Appendix A at Standard 7.2)

1. “As a general rule, a practitioner must defer to the client regarding the objectives for legal representation undertaken on the client’s behalf. Practitioners have a responsibility to identify reasonable outcomes that may be expected and strategic options for achieving them and to let the client decide on the desired outcome.” (see Appendix A at Standard 7.2)
2. The advocate must keep the client reasonably informed of the status of his/her case.

“Clients should be informed immediately of any major developments, particularly if they require decisions about new or revised strategies. Clients generally should be provided copies of major correspondence and pleadings.” (see Appendix A at Standard 7.2)

3. “There are circumstances when a practitioner and client may disagree about the means to be used to pursue the client’s objective...The practitioner generally defers to the client with regard to a course of action that will result in an expense to the client or may adversely affect a third party. In the event that the practitioner and client cannot agree on a proper course, it is permissible for the practitioner to withdraw.” (see Appendix A at Standard 7.2)
4. The advocate shall consult with the client before accepting any settlement offers.
5. “A practitioner may not pursue a frivolous or malicious claim, allow a client to present false evidence, or aid a client in illegal activity. If a client suggests an improper objective or strategy, the practitioner is ethically obligated to explain the prohibitions against pursuing the objective or conduct. If the client persists, the practitioner may have to withdraw from the case.” (see Appendix A at Standard 7.2)
6. “Tactical and strategic decisions about the conduct of a case in general are left to the professional judgment of the practitioner, but the client must generally be consulted, particularly about major strategic choices or about actions that may detrimentally affect third parties. There are circumstances when a practitioner may take actions without consulting the client. Some actions are implicitly authorized in order for the practitioner to carry out the representation. At other times, circumstances may call for the practitioner to exercise immediate professional judgment and consulting a client may not be practical...The practitioner should in such circumstances keep the client reasonably informed of actions taken.” (See Appendix A at Standard 7.2)

Regarding representing clients with diminished capacity:

“The practitioner should seek to maintain a normal attorney-client relationship with all clients, but should be alert to the degree to which a client’s circumstance affects the individual’s capability to make legally binding decisions or to make sufficiently well considered decisions related to the representation. The practitioner may seek the assistance of family members or other specialized support to help communications with the client. It is important, however, that to the degree possible, the practitioner defer to the wishes of the client and not to a family member or other person who is assisting the client.” (See Appendix A at Standard 7.2)

“A practitioner who perceives a risk of substantial physical, financial or other harm to the client and who cannot adequately protect the client’s interests may take reasonable steps to protect the client, including consulting with others who can protect the client and, if necessary, seeking the appointment of a guardian ad litem, conservator or guardian.” (See Appendix A at Standard 7.2)

Refer to Standard 16 regarding representation of groups.

**Standard 3: The practitioner's responsibilities to protect client confidences.**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.3 “On the Practitioner's Responsibilities to Protect Client Confidences” (Appendix A)
- NY Rules of Professional Conduct 1.6 Confidentiality of Information (Appendix B)

**LawNY policy:**

To protect confidential information, LawNY adopts the standards and rules listed above and provides the following instructions to advocates.

1. No LawNY staff member shall disclose any information regarding a client or a client's case to any party without the client's consent after full disclosure to the client of the consequences of such disclosure, or unless permitted by law or implicitly authorized due to the nature of representation. Everything the client discloses, either orally or through documents, during the course of representation is confidential. The obligation to maintain confidentiality continues after the attorney-client relationship has ended. The obligation to maintain confidentiality also extends to an applicant whose case was not accepted.
2. No LawNY staff member shall disclose any documents from a client's file to a third party without the client's consent; some disclosure of confidential information is implicitly authorized in order for the advocate to carry out the objectives of the representation.
3. All law office staff shall:
  - exclude any third parties from meetings with the client unless the client consents after counseling regarding the risks of such attendance.
  - conduct interviews and phone calls with clients in a private setting where third parties cannot overhear the conversation.
  - protect client information from view of third parties.
  - avoid discussing a client's matter while in public.
  - provide interpreter resources according to LawNY policy.

**Standard 4: Initial Exploration and Investigation of the Client’s Legal Problem**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.4 “On Initial Exploration of the Clients Legal Problem” and Standard 7.5 “On Investigation”
- NY Rules of Professional Conduct 1.3 Diligence, 1.4 Communication, 1.6 Declining or Terminating Representation, 1.8 Duties to Prospective Clients, 2.1 Advisor, 3.1 Non-Meritorious Claims and Contentions, 3.9 Advocate in Non-Adjudicative Matters, 4.2 Communicating with Person Represented by Counsel, 4.3 Communication with Unrepresented Persons.

**LawNY Policy:**

“The practitioner should interview each client to explore the legal problem, elicit pertinent facts and circumstances, identify legal issues and the client’s objectives and inform the client about the steps needed to address the legal problem” (see Appendix A at

#### Standard 7.4)

“The practitioner has a duty to inquire fully into the factual and legal elements of the problem. For those situations where the provider is offering only limited representation, the practitioner may have to rely on the information that is provided by the client in the initial interview. It is, therefore, crucial for the practitioner to elicit as much relevant information from the client as necessary to assure that the advice or brief serve will be responsive to the circumstances of the client.” (see Appendix A at Standard 7.5)

1. The advocate should elicit as much relevant information from the client as necessary to determine whether advice or brief service will be responsive to the circumstances of the client or whether extended service and/or representation are necessary and within LawNY’s priorities.  
“If the provider is offering only advice or brief service, it is unlikely that the practitioner will be able to do substantial fact gathering or investigation beyond the initial client interview.” (see Appendix A at Standard 7.5)
2. The advocate should obtain all necessary paperwork including notices, petitions or any other legal document. The advocate will examine the documents for any filing deadlines, dates of pending appearances, time lines in which a response must be given, and statutes of limitation.
3. The advocate should explain to the client in lay terms the legal issues involved, the relevant law, the options available and the risks thereof, and the steps the advocate plans to take. The advocate will obtain all necessary releases from the client and, if applicable, advise the client what he/she needs to do or provide for the advocate.
4. The advocate should fully investigate the facts and circumstances surrounding the client’s legal problem, including facts that both help and harm the client’s case, in order to aid in analyzing the legal problem and developing the case strategy.
5. The advocate should gather information promptly upon undertaking a case for representation. The advocate may obtain this information by formal discovery requests from opposing parties, informal discussions with opposing party’s attorney(s), further questioning of the client, formal document requests, interviewing witnesses or other people with knowledge of the client’s situation, enlisting the help of experts to obtain information, and personal observations at the scene where the client’s legal issue arose.
6. The advocate should document all information gathered in an organized fashion and in a way that other advocates within LawNY can understand in the event that another advocate must take over the client’s case.

#### **Standard 5: Legal Analysis and Research**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.6 “On Legal Analysis and Research” (Appendix A)
- NY Rules of Professional Conduct 1.1 Competence

#### **LawNY Policy:**

“The practitioner should conduct a legal analysis of each client’s legal problem and research pertinent legal issues, when necessary and appropriate.” (See Appendix A,

Standard 7.6)

1. The advocate should research the client's legal issues to determine the theory of the case and the strategy for advancing that theory. The advocate may need to continue to research the client's legal issue, as new facts develop and as the client's circumstances change, so as to identify alternative theories and reevaluate the strategy.
2. The advocate should engage in thoughtful analysis of the client's legal problem, formulate the best arguments to make, identify the adversary's likely position, and shape the client's possible responses.
3. All advocates are encouraged to accept training in using electronic legal research tools. All advocates should also keep abreast of changes in the law and make sure that sources are current.

**Standard 6: Case Planning**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.7 "On Case Planning" (Appendix A)
- NY Rules of Professional Conduct 1.1 Competence

**LawNY Policy:**

1. The advocate should develop a strategy or course of action for handling the client's case and achieving the client's objectives. This strategy should either be formalized in writing or gleaned from the advocate's notes.
2. "Case planning should involve an open-ended evaluation of the facts presented and an identification of the legal issues that arise from those facts." (see Appendix A, Standard 7.7)
3. "Case planning should consider a number of factors that can affect the outcome of a case, including the following:
  - The state of the law regarding the issues involved, the particular facts in the case, and the relationship between the two;
  - The client's personal circumstances including, for example, the client's willingness and commitment to pursue a lengthy or uncertain strategy;
  - In appropriate circumstances, the existence of other members of low income communities who may have a stake in the outcome of the case."(see Appendix A, Standard 7.7)
4. The advocate should regularly review the case strategy and adjust as necessary in response to significant developments in the case. The advocate should consult the client when significant developments occur and allow the client to participate in making key strategic decisions.
5. The advocate should develop key steps for implementing the case strategy with a timetable for achieving goals. The advocate should identify facts that need further development, develop a plan for investigation and discovery, and research legal issues identified.

**Standard 7: Legal Counseling**

Applicable rules to follow regarding this standard include:

- ABA standard 7.8 “Legal Counseling” (Appendix A)
- NY Rules of Professional Conduct 1.1 Competence, 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer and 1.4 Communication (Appendix B)

**LawNY Policy:**

To effectively counsel the client, LawNY adopts the standards and rules listed above and provides the following instructions to advocates:

1. Throughout the representation process, the advocate will clearly explain to the client the options available, explaining the potential benefits and risks of each.
2. For full service cases, within the limits imposed by law and LawNY priorities, as well as within the advocate’s ethical obligations, the client will ultimately determine his/her objectives (for example, whether to settle on the terms offered or not).

**Standard 8: Negotiation**

Applicable rules to follow regarding this standard include:

- ABA standard 7.9 “On Negotiation” (Appendix A)
- NY Rules of Professional Conduct 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer and 1.4 Communication (Appendix B)
- 45 CFR Part 1636—Client Identity and Statement of Facts (LSC regulation)

**LawNY Policy :**

When considering the best way to proceed in a client's case, the advocate should consider the use of negotiation as a means to resolve the client's legal issue(s), taking into consideration the following guidelines:

1. The basic test of the appropriateness of negotiation is whether it is likely to achieve the client's objective without unacceptable risks.
2. Negotiation should not substitute for a more forceful and possibly time-consuming strategy such as litigation, if the more forceful strategy could yield a significantly better result for the client.
3. Before engaging in pre-litigation negotiations the advocate should consider whether such negotiations may harm the client’s case. Such circumstances may include:
  - When advance notification of a potential lawsuit may subject a client to physical abuse or other retaliation from the adversary;
  - When premature notification of the intent to sue may cause a defendant to leave the jurisdiction or to transfer assets in anticipation of an adverse ruling from the court;
  - When informing the adversary may lead to preemptive action by the adversary that will impair the client’s ability to present the case in the most desirable forum;
  - When an immediate court order is necessary to protect the client's rights or interests;

- When a client is seeking relief that cannot be legally obtained through compromise and agreement with the adversary, such as when relief may depend upon resolving the constitutionality of a statute and the defendant does not have the authority to admit the statute's illegality.
4. Before entering into pre-complaint negotiations in a case that LawNY may file affirmatively, the advocate must be sure to comply with 45 CFR Part 1636 and obtain a written statement of facts signed by the plaintiff, enumerating the particular facts that support the complaint.
  5. Before deciding to forgo attempts at negotiation prior to filing suit, the advocate should consider whether an attempt at negotiation is a *de facto* prerequisite to filing suit.
  6. The advocate shall not enter into a negotiated settlement agreement with an adversary without the explicit permission of the client to agree to the proposed terms of the settlement.
  7. It is the advocate's responsibility to ensure that any agreement obtained through negotiation is reduced to a clear written statement that covers all material issues and anticipates enforcement problems that may arise. Where appropriate, the agreement should provide for an enforcement mechanism in the event of non-compliance.

### **Standard 9: Alternative Dispute Resolution**

LawNY staff should look to the ABA Standard and New York State Rules of Professional Conduct for guidance in cases involving alternative dispute resolution.

### **Standard 10: Litigation**

Applicable rules to follow regarding this standard include:

- ABA Standard 7:11: "On Litigation"
- NY Rules of Professional Conduct: 1.1 Competence, 1.3 Diligence, 3.1 Non-Meritorious Claims and Contentions, 3.2 Delay of Litigation, 3.3 Conduct before a Tribunal, 3.4 Fairness to Opposing Party and Counsel, 3.5 Maintaining and Preserving the Impartiality of Tribunals and Jurors

### **LawNY Policy:**

The advocate should proficiently and zealously engage in litigation when it is determined to be the most effective way to resolve the client's problem.

#### **A. Litigation strategy**

1. Advocates should consider the advantages and disadvantages of litigation over other modes of representation.
2. Before embarking on a course of litigation, the advocate should be diligent in investigating all relevant facts and researching all legal theories to fully assess the strengths and weaknesses of the case, should be prepared to undertake necessary discovery, and must be aware of procedural devices available to assert and protect client's interests.



3. The advocate should develop a clear, long-range strategy for pursuing or defending the client's interests in the litigation where possible, well before the pleadings are filed. Where possible, the significant steps of the litigation should be planned for maximum advantage to the client. The strategy should be continually updated in light of new developments in the case and in the governing law. Long-range planning should include the following considerations:
  - a. Identification of facts that must be obtained through discovery and other means
  - b. Identification of legal issues to be researched
  - c. Identification of defendants in affirmative litigation
  - d. Choice of forum
  - e. Whether to demand a jury trial
  - f. Choice of possible causes of action or defenses
  - g. Choice of potential remedies
  - h. Assessment of adversary's probable responses to the client's claim and how they may be countered
  - i. Anticipation of the adversary's tactics and plans to counter them
  - j. Assessment of collateral matters that may impact the litigation, such as potential physical harm to the client in domestic violence cases
  - k. Consideration of the availability of attorneys' fees and their possible impact on the outcome of litigation
  - l. Estimate of the program's resources that will be necessary and that are available to pursue the client's objective
  - m. Estimate of the cost of the litigation to the adversary and possible impact of such costs on the adversary's position
4. An advocate should not approach litigation with the expectation that the case will be settled, but should be ready to go to trial.
5. The advocate should consult the client frequently during the course of litigation regarding all major strategic decisions and should keep the client informed of the status of the case and obtain specific client approval before a settlement offer is made or accepted.
6. For cases that may be subject to appeal, the advocate should make a sufficient record to preserve the issues for appeal.
7. The advocate should fully advise the client of the effect, if any, of receipt of a monetary award or settlement upon any government benefits that the client receives or is likely to receive during the course of the litigation and should plan the course of the litigation accordingly.
8. Except as permitted by LawNY policies and LSC regulations, the advocate
  - a. may not accept a fee-generating case for litigation
  - b. may not initiate or participate in any class action
  - c. may not represent any party or participate in any way in litigation related to redistricting
  - d. may not defend an individual charged with or convicted of illegal drug activity in an eviction proceeding brought by a public housing agency on the basis of such illegal drug activity
  - e. may not participate in civil litigation on behalf of any individual incarcerated in a local, state or federal penal facility to challenge the conditions of incarceration

- f. must comply with restrictions on soliciting cases as set forth in LawNY policy, LSC regulations, and ethical rules
- g. may not initiate or participate in litigation involving an effort to reform a state or federal welfare system, as defined by LawNY policies and LSC regulations
- h. shall not initiate or participate in litigation for the purpose of assisting in causing the suicide, euthanasia or mercy killing of any individual, as defined by LawNY policies and LSC regulations.

## **B. Pleadings**

1. Pleadings should:
  - a. clearly set forth all necessary elements that are required by applicable law;
  - b. be formatted in compliance with pertinent court rules;
  - c. be filed in a timely manner, taking into account statutes of limitations and required response times;
  - d. never include frivolous claims.
2. The advocate should determine the level of specificity necessary in the pleadings based on tactical considerations, court rules and applicable law.
3. When representing a defendant, the advocate should raise all appropriate affirmative defenses and/or compulsory counterclaims that might otherwise be waived.
4. Where it is not possible to make a thorough factual investigation before filing affirmative or responsive pleadings because factual information can only be obtained through formal discovery or where immediate action is necessary to protect the client's health or safety or to safeguard important rights, the pleadings should be prepared and filed based on available facts and preliminary research, and amended or supplemented as necessary if new facts come to light as a result of discovery or further research.
5. The advocate may not file a complaint unless the client is identified in such complaint or in a separate written notice to the defendant, and a Statement of Facts is on file, as required by LawNY policies and LSC regulations (45 CFR Part 1636).

## **C. Motion practice**

1. The advocate should file appropriate motions as part of the litigation strategy.
2. Motions may be filed for the following purposes, among others:
  - a. to educate the court regarding the factual and legal basis for the case;
  - b. to protect the client's interests;
  - c. to control the pace and direction of the litigation;
  - d. to maintain effective pressure on the adversary.Appropriate motions include procedural motions to compel discovery, and substantive motions for preliminary relief, motions for summary judgment and/or motions to dismiss.
3. The advocate should be knowledgeable of and comply with all court rules and statutes regarding motion practice.
4. All motions and responses should be well researched and cogently argued.
5. Motions should not be filed for frivolous or insufficient reasons.

#### **D. Discovery**

1. The advocate should routinely use both formal and informal discovery in litigation to obtain necessary information in a timely manner and useful format.
2. The advocate should be knowledgeable about applicable statutes and court rules for discovery.
3. The advocate should make a discovery plan that identifies the facts and information that must be obtained to effectively litigate the case, from whom these facts and information are most likely to be available, and what is the least costly but still effective method to obtain the necessary facts and information, and develop a time frame for pursuing discovery.
4. The advocate should be aware of the evolving law governing discovery of computer databases, e-mails, and other electronically stored information that may be pertinent to the client's case.
5. Informal discovery, document discovery, interrogatories and requests for admissions should be used prior to depositions.
6. The program should electronically store model discovery documents to allow easy access and adaptation by advocates with similar issues.
7. An advocate should carefully prepare for a deposition of an adversary. During a deposition the advocate should seek to elicit unambiguous responses to questions, with follow up as necessary to clarify ambiguities and pursue new avenues of inquiry opened by the questioning.
8. Prior to defending the deposition of a client or client's witness, the advocate should fully prepare the client or witness for the deposition.
9. An advocate should be prompt in responding to an adversary's discovery request, and should respond in an honest and forthright manner, but should make every effort to prevent improper discovery that could be damaging to the client's interests.

#### **E. Trial practice**

1. The advocate should prepare appropriately for trial and should be well versed in the facts and law of the case. If an advocate has little time to prepare because of late notice of the trial, and the matter is factually or legally complex, he or she should seek to postpone the trial in order to prepare adequately.
2. The advocate should be acquainted with the rules of evidence, procedure, and local practice, and prepared for jury selection, examination of witnesses, introduction of evidence, oral argument, opening and closing statements, preparation of jury instructions, and preservation of the record for appeal.
3. The advocate should plan the flow of the trial and should determine the timing and sequence for presentation of testimony and other evidence so the fact finder will have a compelling and cogent picture of the client's case.
4. Whenever practical, the advocate should fully prepare witnesses in advance to assure that when they testify they are able to recall important facts and to reduce any anxiety they may feel about the trial.
5. If possible, the advocate should familiarize him/herself with the environment in which the trial will occur and the technology which is used in court.
6. The advocate should anticipate the adversary's strategy and be prepared to counter

- or rebut any damaging evidence or testimony that the adversary is likely to present.
7. The advocate should anticipate disputes regarding the admissibility of evidence, and should be ready to present appropriate arguments for admission of every item of evidence which he or she expects to present or for exclusion of evidence he or she expects the adversary to present.
  8. The advocate should be aware of possible factual and legal bases for appeal from an adverse judgment, and should preserve such issues for appeal. (S)he should create a record at the trial level that will sustain positions taken on appeal. The advocate should make timely objections and offers of proof when necessary to assure the reviewability of issues that may affect the outcome of the appeal.
  9. In complex cases, if program resources allow, effective trial practice can be enhanced if more than one advocate is involved in preparing the case and presenting it at trial. A less experienced litigator can benefit from working with more experienced co-counsel.

#### **F. Enforcement of orders**

1. The advocate and program should make clear to the client at the outset of representation that the client may not automatically be represented in enforcement of orders or judgments. When it becomes evident that the case may involve enforcement of an order or judgment, the program will make a decision regarding whether representation will include enforcement of the order or judgment.
2. When the program decides that enforcement of the order or judgment will not be included in the representation of the client, the advocate should make this decision clear to the client. The advocate should confirm this decision in writing, stating that the client has been informed that the representation does not include enforcement of orders. The advocate should also counsel the client regarding the self-help remedies available for enforcement of orders or otherwise how to enforce an order *pro se*.
3. If the program agrees to include enforcement of orders in the representation of the client, the advocate should make enforcement strategies part of case planning. The relief sought in pleadings and at trial should be structured with an eye to enforceability and with specific plans for follow-up.
4. The advocate should prepare, file and serve any orders required following judgment or settlement in a timely manner. If the program has agreed to include enforcement of orders in the representation of the client, the advocate should take reasonable steps to assure that the adversary complies with the order, judgment or settlement and that the client receives any monetary relief ordered or agreed to. The advocate should be prepared to initiate a separate enforcement or contempt proceeding to enforce an order or settlement if it is necessary to obtain meaningful relief for the client.
5. In the event that the enforcement of a remedy becomes a costly endeavor beyond the resources of the program to pursue, the advocate may enter into an agreement with the client limiting what the advocate will do to enforce the order or settlement, and if otherwise consistent with the advocate's ethical duty to the client, may withdraw from representation.

#### **G. Appeals**

1. The advocate and program should make clear to the client at the outset of representation that the client may not automatically be represented on appeal.
2. The advocate should counsel the client regarding his or her right to appeal, the time limit for appeal, and the advisability of pursuing or defending an appeal. The discussion should include whether the issues are appealable, the likely outcome on appeal, the length of time the appeal is likely to take, and the potential benefits and risks of appeal, including the risk that an appellate court could reverse findings favorable to the client if the adverse party appeals a partially favorable judgment.
3. If the client decides not to pursue an appeal, the advocate should confirm this decision in writing, stating that the client has been informed of the time limit for appeal.
4. The decision whether to represent a client on appeal should be made by the program as required by program policies and LSC regulations.
5. If the client wishes to appeal but the advocate or the program decides not to provide representation, the advocate should give the client timely notification of that decision to assure that the client has sufficient time to seek alternative counsel and take other appropriate steps. If necessary, the advocate should assist the client in filing a notice of appeal to assure that the right is not lost while the client seeks other counsel.
6. If the advocate believes there is merit to an appeal that the program has declined to undertake, (s)he may refer the client to another source of assistance, such as an organization dedicated to work in the substantive area involved in the case, and may assist the attorney handling the appeal in tasks such as file-gathering or creation or reconstruction of the record.
7. Appellate advocacy should be conducted proficiently and zealously. The advocate must be fully aware of all deadlines for filing notices of appeal, docketing papers, motions, briefs, and abstracts and transcripts of the record, and must comply with the requirements regarding form and style of briefs and other documents. Where possible, an advocate with substantial appellate experience should be assigned to handle appeals. Advocates who are less experienced should seek assistance from experienced appellate advocates on staff, from state, regional and national advocacy centers or from members of the bar who may volunteer to assist.

### **Standard 11: Administrative Hearings**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.12 “On Administrative Hearings” (Appendix A)
- NY Rules of Professional Conduct: 3.3 Conduct Before a Tribunal, 3.9 Advocate in Non-Adjudicative Matters (Appendix B)

### **LawNY Policy:**

Practitioners should approach administrative hearings with a dedication to high-quality legal work on behalf of the client.

1. To ensure high-quality legal work in each case, advocates shall:

- a. investigate the facts of the case;
  - b. analyze the legal basis of the claim and research the law and administrative/ agency rules governing the case;
  - c. assess the strengths and weaknesses of the case; and
  - d. develop a strategy for presenting the case.
2. The advocate should develop a good understanding of the hearing practice in the respective administration forum. The advocate should:
    - a. present the case in a manner appropriate to the level of formality required by the administrative hearing, and
    - b. use the flexibility in formality to the client's benefit, when appropriate and respectful.
  3. At the hearing, the advocate should present the legal and factual basis for the client's claim in a way that supports a favorable resolution and establishes a record for appeal. The advocate should follow the administrative rules regarding evidence and legal arguments. The advocate should:
    - a. prepare witnesses and the client to testify;
    - b. counsel the client regarding the positive and/or negative effect of his/her testimony, as appropriate;
    - c. present evidence and legal arguments in support of the client's claim;
    - d. consider filing a legal memorandum in support of the client's claim;
    - e. be prepared to counter adverse facts;
    - f. submit additional evidence and legal arguments if necessary; and
    - g. be aware of and adhere to deadlines.
  4. The advocate should communicate clearly with the client regarding whether representation will be provided in an appeal or judicial review of an unfavorable decision. Regarding appeals of administrative agency decisions, the advocate should follow the guidelines outlined above in Standard 10 G. Appeals.

### **Standard 12: Legislative and Administrative Advocacy by Practitioners**

Applicable rules to follow regarding this standard include:

- ABA Standard 7:13: "On Legislative and Administrative Advocacy by Practitioners" (Appendix A)

When advocating before legislative and administrative bodies, a practitioner should proficiently and zealously present the interests of clients and low income communities.

### **LawNY Policy:**

1. LSC restrictions, as adopted by LawNY's Board of Directors, prohibit LawNY practitioners from engaging in certain forms of legislative and administrative advocacy. Those restrictions are set forth in LawNY's policy regarding "Prohibitions on Advocacy Efforts Intended to Influence Certain Legislative and Administrative Activities; Prohibited Advocacy Training, Participation in Public Demonstrations and Related Activities, and Organizing (45 CFR 1612). This policy also outlines

- legislative and administrative advocacy that is permissible.
2. Before engaging in legislative or administrative advocacy, the practitioner shall meet with the managing attorney or deputy director to ensure that the planned activities are permissible, and to determine the best strategy to pursue the client's objectives.
  3. To the extent that a LawNY practitioner is permitted to engage in legislative and administrative advocacy, the practitioner shall follow the general standards for representation set forth above.

### **Standard 13: Practitioner's Responsibilities in Limited Representation**

Applicable rules to follow regarding this standard include:

- ABA Standard 7:14: “On Practitioner's Responsibilities in Limited Representation” (Appendix A)

A practitioner may limit the scope of representation provided to a client if the limitation is reasonable under the circumstances and the client knowingly consents.

#### **LawNY Policy:**

The advocate may provide limited representation to clients according to the general standards for representation set forth above. The agreement to provide limited representation must be outlined and documented in the retainer agreement, as well as explained to the client in person or in an opening letter, if practical. The advocate should ensure that the client understands the scope of the limited representation, how the advocate plans to pursue the client's objectives, what legal work or legal matters are excluded, and the duration of the limited representation. Both the client and the advocate shall sign the retainer agreement, a copy of which shall be provided to the client.

### **Standard 14: Transactional Representation**

Applicable rules to follow regarding this standard include:

- ABA Standard 7:15: “On Transactional Representation” (Appendix A)

The practitioner should proficiently and zealously represent clients in transactional matters to accomplish their objectives.

#### **LawNY Policy:**

In addition to adversarial representation, transactional representation is an important component to the provision of legal services, especially for older citizens, persons with HIV/AIDS, and those who desire a power of attorney or will. The advocate may provide transactional representation to clients according to the general standards for representation set forth above. The agreement to provide transactional representation must be outlined and documented in the retainer agreement, as well as explained to the client in person or in an opening letter, if practical. The advocate should ensure

the client agrees to and understands the scope of the transactional representation, what the transactional representation will include, how the advocate plans to pursue the client's objectives, what legal work or legal matters are excluded, and the duration of the transactional representation. Both the client and the advocate shall sign the retainer agreement, a copy of which shall be provided to the client.

### **Standard 15: Representation of Groups and Organizations**

Applicable rules to follow regarding this standard include:

- ABA Standard 7:16: “On Representation of Groups and Organizations” (Appendix A)

The practitioner should proficiently and zealously represent groups and organizations to respond to the legal needs of the communities served by the provider.

#### **LawNY Policy:**

The advocate may represent groups and organizations as long as the group or organization is financially eligible for services pursuant to LSC regulations and LawNY's Board approved policies, and according the general standards for representation set forth above. The agreement to provide representation to a group or organization must be outlined and documented in the retainer agreement, as well as explained to the group in person or in an opening letter if practical. The advocate must be cognizant of who has authority to speak on behalf of the group or entity, and who may decide the goals and objectives of representation. The advocate should ensure the client group agrees and understands the scope of representation, what the representation will include, how the advocate plans to pursue the group's objectives, and what legal work or legal matters are excluded, and the duration of the representation. Both the advocate and the authorized representative(s) of the group shall sign the retainer agreement, a copy of which shall be provided to the group.

#### **Class Actions**

While employed by LawNY, an individual may not initiate or participate in a class action. Individuals may not be involved at any stage of a class action prior to or after an order granting relief, including acting as *amicus curiae*, co-counsel or otherwise providing representation in a class action.

If the program is representing a client in an action that was not filed as a class action, and another party moves to have the case certified as a class action, it will not be deemed a class action until the court certifies it as such.

Participating in a class action does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial activities including efforts to remain informed about, or to explain, clarify, educate or advise others about, the terms of an order granting relief.



A class action would not include other forms of action, even if they result in relief that benefits numbers of clients or resolves issues that affect others in addition to the client. For example, this limitation does not apply to mandamus or to injunctive or declaratory relief actions.

Certain situations are not within the definition and are thus not prohibited by this rule. For example, staff may advise clients about the pendency of a class action or its effect on the client and what the client would need to do to benefit from the case.

### Group Income and Asset Eligibility

Only individuals and groups determined to be financially eligible under 45 C.F.R. 1611 may receive legal assistance. The policies enumerated under the regulations do not apply to individuals or groups for whom service is wholly supported by funds from sources other than LSC.

To be financially eligible for legal assistance supported in whole or in part by LSC funds, an applicant's assets must be at or below the appropriate LawNY asset ceilings, or the asset ceiling must be waived.

For a group, corporation, association or other entity to be financially eligible for LSC-funded legal assistance, it must provide LawNY with information regarding the resources available to the group, showing that it lacks, and has no practical means of obtaining, funds to retain private legal counsel. Such information should include the group's income and income prospects, assets and obligations.

A group is eligible for LSC-funded legal assistance if the group is primarily composed of individuals who would be financially eligible for LSC-funded legal assistance, as determined by the financial or other socioeconomic characteristics of the persons comprising the group or its operating body; or if one of the group's principal activities is the delivery of services to those persons in the community who would be financially or socioeconomic characteristics of the persons served by the group, and the legal assistance sought by the group is related to such activity.

### **Standard 16: On Maintenance of Professional Competence**

Applicable rules to follow regarding this standard include:

- ABA Standard 7.17 “On Maintenance of Professional Competence” (Appendix A)
- NY Rules of Professional Conduct 1.1, Competence.

### **LawNY Policy:**

To ensure competent and high quality legal work by LawNY advocates, the advocate should:

1. seek legal education, training and other means of professional growth;
2. stay current on changes in the law; and
3. stay current with emerging issues that affect low income or other vulnerable persons and their communities, as well as strategies for responding to them.

Advocates are responsible for keeping abreast of the law and developments in the law. Each LawNY attorney is responsible for maintaining his/her license by complying with Continuing Legal Education requirements needed for continued registration with the New York State Office of Court Administration.

To ensure that the advocate is current with changes in the law, with emerging issues, and complies with CLE requirements, the advocate should:

1. take advantage of trainings offered;
2. advocate for trainings in particular areas of interest;
3. participate in task forces, e-mail list serves, and other professional network sites that offer exposure to knowledge and skills pertinent to the advocate's area of work;
4. seek out mentoring relationships within LawNY and offer mentoring to junior advocates; and
5. seek out and accept appropriate supervision.

Advocates should consider pursuing professional development within LawNY offices including taking on leadership and management responsibilities. Advocates are encouraged to reach out to low income and vulnerable legal communities as well as the local community regarding the legal needs of LawNY clients.

The Training, Leadership and Development committee of LawNY is responsible for developing CLE courses, and presenting trainings for LawNY advocates (including AmeriCorps paralegals) and the legal community. Advocates are encouraged to take advantage of these training and leadership/professional development opportunities.