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Co-Chairs, Appellate Courts Committee

New York County Lawyers Association

January 17, 2018

RE: NYCLA Appellate Courts Committee
Proposals for Assignment-of-Appellate-Counsel Reform

Hon. Lawrence K. Marks
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, New York 10004
lmarks@nycourts.gov

Dear Judge Marks:

There is a serious appellate representation gap in New York criminal cases. Unlike a majority of states, New York does not (1) automatically extend an assigned-counsel order to the appellate stage; or (2) mandate an indigency determination upon sentencing. Further, while the constitutional right to counsel applies to the notice-of-appeal stage, it does not apply to the assignment-of-counsel application. Under this system, many defendants must attempt to apply for appellate representation on their own. If they fail, they will lose their right to appeal forever.

Our Committee writes to request that the Office of Court Administration—either through its rule-making authority or power to influence legislative reform—support measures that will end the representation gap. New York should automatically extend the assignment order to the appeal or *require* the sentencing court to make the "continued-indigency" determination. At a minimum, C.P.L. § 380.55, recently adopted to facilitate appellate counsel's assignment, should be amended so it can better accomplish its goal.

A.

The Legal Landscape

Under New York law, if an indigent defendant has been assigned counsel at the trial/plea stage, the defendant must reapply for appellate counsel. Ethical rules,[1] court rules,[2] and principles of good lawyering require assigned counsel to ensure that the client has an appellate lawyer. But all too often, "lawyer[s] fail to live up to prevailing professional standards,"[3] forcing their clients to navigate the process on their own.

To successfully navigate the assignment-of-counsel process, the lay defendant must understand the contours of the right to appeal and the critical value of requesting counsel. Specifically, the lay defendant must:

- know that the trial-assignment-of-counsel order does not carry over to the appeal;
- know an appeal is available (most criminal cases include an appeal waiver, which induces many defendants—*and even trained lawyers*—to mistakenly conclude that an appeal is unavailable);
- avoid falling prey to the commonly held, but mistaken, belief that an appeal is not in his/her interests (an appeal can often be a minimal- or no-risk prospect, even in plea cases, especially if the defendant raises excessive sentence or seeks dismissal);
- know that even if plea counsel advises against an appeal (a common occurrence), advice on this issue is not meaningful unless offered by an appellate attorney who has diligently reviewed the record; and
- know that the mere filing of a notice of appeal does not constitute a request for counsel.

If a defendant is sophisticated enough to understand all this, the defendant's quest does not end. The defendant must then personally apply

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[1] ABA Defense Function Standards 4-8.2 (b) (1993); ABA Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2 (a) (1980).

[2] Every Department's rules require counsel to inform the client of the right to poor-person relief on appeal. But only the Second and Fourth Departments require counsel to actually request such relief. *Compare* 22 N.Y.C.R.R. § 1015.7(a) (Fourth Department) *and* 22 N.Y.C.R.R. § 671.3(b)(3)-(4) (Second Department) *with* 22 N.Y.C.R.R § 821.2(a) (Third Department) *and* 22 N.Y.C.R.R. § 606.5(a)-(b) (First Department).

[3] *People v. Arjune*, __ N.Y.3d __, N.Y. Slip Op. 08159 (Court of Appeals Nov. 20, 2017) (Rivera., J., dissenting).

for counsel by filing a motion and (at least in the First Department) a notarized affidavit with the Appellate Division.[4]

Of course, many lawyers want to fulfill their ethical obligation to secure appellate representation for their clients. But even those attorneys endure burdensome procedures. Unlike the New York Court of Appeals,[5] the Appellate Divisions do not permit assigned counsel to file an affirmation confirming the client's continued indigency—even if the client has been incarcerated since the original assignment order. Instead, counsel must obtain a notarized affidavit from the client. That is not an easy task, especially for assigned-counsel plan (18-B) attorneys who only stay on the case for thirty days post-judgment. It is particularly difficult to secure a notarized affidavit from a client who is being moved post-sentencing—first from local jail to the DOCCS reception facility, and then to the permanent DOCCS facility. Institutional defense providers have similar difficulty tracking their clients post-sentencing.

New York's burdensome regime is an outlier. A majority of states and the federal appellate courts automatically carry over the assigned-counsel order to the appeal.[6] Further, while New York does not guarantee the right to counsel at the assignment-of-counsel stage,[7] the ABA rules require trial-level counsel to do what good lawyers are supposed to do: ensure that their clients have appellate counsel.[8]

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[4] *See also* Proposed Uniform Rules of Appellate Procedure, Rule 3.0(D)(1) and (D)(4) (requiring an affidavit proving indigency).

[5] New York Court of Appeals Rule 500.21(g)(2).

[6] At least 27 states automatically carry over the assignment order. *See* **(1)** Alabama App. Proc. Rule 24(b)(1)**; (2)** Alaska App. Proc. Rule 209(b)(4); **(3)** Arizona Crim. Proc. Rule 31.5(a); **(4)** Arkansas App. Proc. Rule 16(a); **(5)** Colorado App. Proc. Rule 12(b); **(6)** Hawaii App. Proc. Rule 24(b); **(7)** Idaho App. Proc. Rule 45.1(b); **(8)** Iowa Ct. Rule 2.29(5)-(6); **(9)** Kansas Admin. Regs. § 105-3-9(a); **(10)** Kentucky Crim. Proc. Rule 3.05(2); **(11)** Maine Crim. Proc. Rule 44(a)(2); **(12)** Maryland Crim. Proc. Rule 4-214(b); **(13)** Massachusetts App. Proc. Rule 3(e); **(14)** Mississippi App. Proc. Rule 6(b); **(15)** Montana Code § 46-8-103(1); **(16)** Nebraska Rev. St. § 29-3903 and § 23-3402; **(17)** New Jersey Stat. Ann. § 2A:158A-5; **(18)** North Carolina Gen. Stat. § 7A-451(b)(6); **(19)** Pennsylvania Crim. Proc. Rule 122 (B)(2); **(20)** South Carolina App. Ct. Rule 602(e); **(21)** Tennessee Rules Crim. Proc., Rule 37(e)(3); **(22)** Utah Code Ann. § 77-32-304(1)(a)-(b); **(23)** Vermont App. Proc. Rule 24(a)(2); **(24)** Virginia Code Ann. § 19.2-159(C); **(25)** Washington Sup. Ct. Crim. Rule 3.1(b)(2); **(26)** Wisconsin App. Proc. Rule 809.30(2)(a); **(27)** Wyoming Crim. Proc. Rule 44(b)(8).

The United States Supreme Court and the Second Circuit similarly automatically extend the order. United States Supreme Court Rule 39(1); 2d Cir. R. 4.1(a).

Finally, unlike New York law, C.P.L. § 380.55, Illinois mandates an indigency determination after the sentence. Ill. Sup. Ct. Rule 607(a).

[7] *People v. West*, 100 N.Y.2d 23 (2003).

[8] See fn. 1, *above*.

B.

C.P.L. § 380.55

Recognizing the appellate-representation gap, the Legislature recently enacted C.P.L. § 380.55 in 2016. That new statute allows trial courts to, in their "discretion," "entertain" an application for assignment of appellate counsel if counsel chooses to make one. C.P.L. § 380.55's purpose was to streamline the process by allowing sentencing courts to certify continued eligibility for assigned counsel instead of requiring an Appellate Division motion.

Unfortunately, C.P.L. § 380.55 is not being widely utilized for numerous reasons:

First, while the Legislature's intent was likely to cover both trial and plea cases, the statute's passing reference to representation of a defendant "at trial" has likely led many to believe the statute covers only convictions after "trial." In a system where 95% of convictions stem from pleas, this misinterpretation severely limits the statute's practical use.

Limiting the statute to "trial" appeals would also violate Article VI § 4(k) of our State Constitution. Article VI § 4(k) categorically guarantees the right to appeal trial *and* plea convictions, drawing no distinction based on the nature of the conviction.[9] As our high court has reminded us, Article VI § 4(k) "was intended to render inapplicable the general rule that the right to appellate review is purely statutory."[10] Discriminating against "plea" appeals by making it harder for plea defendants to obtain appellate counsel (for no legitimate reason whatsoever) would thus not only be bad policy—it would be unconstitutional.

Second, in connection with the roll-out of the new statute, a December 14, 2016 OCA memo advised sentencing judges to ask if counsel has discussed an appeal with the client, including whether "meritorious grounds" exist for the appeal. This memo has chilled defense lawyers from using the statute. Attorney-client discussions about an appeal are privileged and not a matter for discussion with the sentencing court, especially in plea cases. Defense attorneys do not welcome a judge's commentary on the judge's own rulings. For this reason, institutional defense providers, as a policy matter, are likely loathe to incorporate C.P.L. § 380.55 into their protocols.

The appeal's apparent merits are also irrelevant at the *assignment* stage. The right to appellate counsel requires the State to ensure that an attorney—

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[9] N.Y. Const. Art. VI § 4(k); *People v. Callahan*, 80 N.Y.2d 273, 284 (1992); *People v. Pollenz*, 67 N.Y.2d 264 (1986).

[10] *Pollenz*, 67 N.Y.2d at 269.

post-assignment—diligently reviews the record to *locate* appellate issues. Indeed, under court rules, trial counsel must file a notice of appeal and/or seek assignment of appellate counsel regardless of the appeal's apparent merits.[11]

C.

The Proposed Reform

The Committee recommends that, like the majority of states and the federal courts, New York should: (1) automatically extend the assigned-counsel order to the appeal; or (2) require the sentencing court to determine continued indigency at sentencing.

The first proposal—the approach of numerous states and the federal system—would end this problem forever. And it would recognize that a poor defendant will rarely acquire enough money to hire appellate counsel during the pendency of the case (especially if the defendant is incarcerated).

The second proposal—*mandating* that the sentencing judge address continued indigency[12]—is more cumbersome than the federal rule. But it would allow the court to assess any change in circumstances that may have arisen during the case's pendency. And this approach would prevent cases from languishing in the representation gap.

This reform is essential to the fair administration of justice. Under these proposals, an appeal's merits, not a defendant's ability to navigate the assignment-of-counsel process, will control entitlement to appellate relief. That's how it should be.

D.

At a Minimum, Current Procedures Should Be Improved.

Short of the sensible reforms proposed above, we propose an interim solution: eliminate the notarized-affidavit requirement in the Appellate Division if counsel was assigned at the plea/trial stage. The following language could be added to C.P.L. § 380.55:

> Where counsel has been assigned to represent defendant in a criminal proceeding because defendant is financially unable to retain counsel, the appellate court may assign counsel without further proof of eligibility if counsel provides a sworn

[11] 22 N.Y.C.R.R. § 606.5(b), 671.3(b)(3)-(4), 821.2(a), 1015.7(a).

[12] *Compare* C.P.L. § 380.55 (giving courts discretion to entertain the application if sentencing counsel chooses to make it).

representation that the defendant continues to be eligible for assignment of counsel.

This is the rule of our High Court.[13] If it works for the Court of Appeals, it can work for the Appellate Division.

Additionally, the Proposed Uniform Rules should be amended to clarify that: (1) C.P.L. § 380.55 applies to pleas *and* trials; and (2) the court is not permitted to inquire into anything other than the defendant's *indigency*—the merits of the appeal and attorney-client communications are off limits.

* * *

Thank you for your consideration of this proposal. The members of our committee would welcome an opportunity to discuss it with you further. [14]

Sincerely,

Matthew Bova and Scott Danner
Appellate Courts Committee Chairs

[13] *See* New York Court of Appeals Rule 500.21(g)(2).

[14] The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed are those of the Appellate Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.