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DEFENDER BASED ADVOCACY (DBA)

STANDARDS

MARCH 2010

FOREWORD

These standards for Defender Based Advocacy (DBA) programs are the first of their kind in New York State and were developed by the NYS Division of Probation and Correctional Alternatives (DPCA) to provide guidance and promote best practices for DBA programs operating in New York State. These standards distinguish and define the role of DBA programs separate and distinct from the role of the defense attorney, yet recognize and establish certain exceptions where the DBA program also provides defense services, and acknowledges certain common areas of interaction.

DBA programs assist the courts, public officers, and others in identifying and avoiding the unnecessary use of incarceration by developing and submitting plans specific to each individual defendant and providing relevant information to defense attorneys, courts, other releasing authorities, and district attorneys which is critical to plea, sentencing, and release decisions. Typically, this information is conveyed through a written report that relies upon information drawn from many sources, including the defendant's criminal history, educational, vocational, employment, mental health, and substance abuse records, law enforcement documents, as well as interviews with individuals who have known and worked with the defendant. Through written and/or verbal advocacy efforts, DBA programs help improve state and local criminal justice systems by identifying appropriate defendants for alternatives to detention or incarceration and promoting the rights and dignities provided to every citizen. DBA programs serve the interests of justice that individual rights are not compromised by lack of knowledge, that complete and accurate information is available for decision-making purposes, and that persons convicted of one or more criminal offenses are treated fairly.

The significant contribution of DBA programs is the expanded capacity to screen defendants who can be appropriately managed within the community, prepare a needs-based assessment and a client-specific plan for community-based orders and conditions of release. The client-specific plan oftentimes includes recommendations for community-based supervision in lieu of incarceration, employment and/or treatment options geared toward the defendant's rehabilitation and successful re-entry into the community.

These standards for DBA programs funded by DPCA will guide practitioners, clarify and refine other salient program issues and promote greater uniformity to ensure that DBA programs throughout New York State strive to provide essential and quality services consistent with best practice and law. Lastly, these standards are issued with the intent that they continue to be evaluated by community correction professionals and that they are regularly reconsidered to ensure that they advance the highest quality of service to the state and local criminal justice system throughout New York State.

**NYS Division of Probation and Correctional Alternatives
Defender Based Advocacy Standards**

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I. INTRODUCTION

The New York State Division of Probation and Correctional Alternatives (DPCA) is the state agency within the NYS Executive Department with responsibility to exercise general supervision over the administration of probation and alternative to incarceration services throughout New York State. The State Director of Probation and Correctional Alternatives adopts and promulgates rules and regulations concerning methods and procedures used in the administration of local probation services and develops standards for the operation of alternative to incarceration programs.

Defender Based Advocacy (DBA) programs identify participants following arrest and prior to sentence. DBA programs prepare client-specific plans for the courts or other releasing authorities that impact detention and sentencing decisions. Sometimes these are referred to as reports or may be incorporated in a defendant's pre-sentence memoranda.

DBA programs provide courts, defense attorneys and district attorneys with information about defendants critical to plea and sentencing decisions. The client-specific plan is conveyed through a written report that relies upon information drawn from many sources, including the defendant's criminal history, law enforcement, family background, educational, vocational, employment, mental health, and substance abuse records as well as reports from advocates and interviews with individuals who have known and worked with the defendant. The DBA plan describes the personal circumstances and social history of the defendant and identifies the defendant's strengths as well as the need for educational and vocational training or mental health and substance abuse treatment. Where appropriate, the DBA program may also utilize other evaluations, such as mental health, psychological, forensic, or substance abuse. If the DBA program does not have staff which can perform such evaluations, referrals are made to organizations qualified to do so. Based upon all the information collected about the defendant, the DBA report proposes a plea and/or sentence that takes into account the need for victim restitution, community supervision, avoidance of future misconduct, and appropriate consequences that hold the defendant accountable while also promoting the defendant's "successful and productive re-entry and re-integration into society (see Penal Law (PL) § 1.05(6)).

Those who work in DBA programs are encouraged to refer to standards promulgated by the National Legal Aid and Defender Association at:

www.nlada.org/Defender/Defender Standards/Defender Standards

And also standards promulgated by the National Association of Sentencing Advocates and Mitigation Specialists at:

www.nlada.org/Defender/Defender NASAMS/about nasams/about code.

II. STATUTORY AND REGULATORY AUTHORITY

Section 243(2) of the New York State Executive Law authorizes the State Director of Probation and Correctional Alternatives to exercise general supervision over correctional alternatives programs throughout New York State. The State Director further exercises general supervision over the administration and implementation of alternative-to-incarceration (ATI) service plans under the provisions of Article 13-A of such law. “Eligible programs” with respect to such plans are defined under Section 261(1) (b) to include programs “which serve to assist the courts, public officers and others in identifying and avoiding inappropriate incarceration.” These programs include “a comprehensive pre-arraignment program which screens all defendants and ensures that the court is fully advised of the availability of alternatives suitability and needs prior to its determination regarding the issuance of a securing order, or an effective bail review program; alternatives to post-adjudicatory incarceration programs...” Section 261(c) defines “Eligible alcohol and substance abuse programs” but distinguishes as to “providing services to offenders who have or have had a history of alcohol or substance abuse and who, having been charged with or convicted of a felony, are also at risk of incarceration as a pre-trial detainee, a determinate sentenced offender, an indeterminate sentenced offender, a probation violator, or a parole violator.” The term “inappropriate incarceration” is also defined to mean “instances where a person is or about to be confined or otherwise held in custody prior to trial on a criminal charge, or pursuant to a sentence imposed upon conviction for an offense, or pursuant to any criminal court order of commitment, and where the purposes of such confinement would be adequately served by an alternative-to-incarceration.” Defender Based Advocacy (DBA) programs perform a critical role within the state and local criminal justice system in helping identify and avoid unnecessary incarceration and advocate on behalf of suitable offenders for alternatives to incarceration and graduated sanctions.

The State Director is authorized to adopt general rules and regulations to regulate methods and procedures in the administration and funding of ATI programs. Such rules and regulations are binding upon all counties and eligible programs and, when duly adopted, have the force and effect of law.

DPCA’s responsibilities include, but are not limited to:

- Maintenance of program standards through the monitoring of local program performance in relation to the adopted standard;
- Assessment, refinement, development, and enforcement of statewide standards; and
- Provision of technical assistance to local programs.

III. ADMINISTRATIVE STANDARDS

A. General

Each DBA program shall:

1. Adhere to the standards prescribed herein, applicable laws, court or releasing authority orders and DPCA and other rules and regulations, where applicable;
2. Operate in such a manner that all defendants and courts/releasing authorities within their jurisdiction may be effectively served;
3. Maintain neutrality and independence from both prosecution or defense (where not serving as a defense attorney)¹ so that reliable, objective information can be provided to the courts/releasing authorities or probation for more informed decisions;
4. Maintain policies and procedures including, but not limited to, selection/exclusion criteria, offender monitoring, court/releasing authority/probation notification, and referral to human service

B. Data Collection and Reporting

Each DBA program shall:

1. Develop and maintain an information system that permits ongoing monitoring of the effectiveness of the program and evaluation of local practices;
2. If applicable, conduct periodic reviews to determine whether any program practices, especially those relevant to eligibility criteria, are reassessed in order to accomplish the objectives identified in Section VII of these standards; and
3. Submit data and other information as may be required by DPCA;
 - a. Immediately notify DPCA of unusual incidents involving the respective project(s), its participants or staff, that may or has resulted in media inquiry, negative publicity, or other public, victim, staff safety concerns.

¹ A DBA attorney acting as defense counsel shall present reliable and accurate information to the courts/releasing authorities or probation or parole.

- b. Submit to DPCA DBA Quarterly Reporting forms within thirty (30) days of the close of each quarter; April 30th, July 30th, October 30th and January 30th.

C. Training

1. Programs shall ensure that their employees are sufficiently trained to undertake the duties and responsibilities of the program. Contact DPCA's Alternatives-to-Incarceration (ATI) Unit for information regarding training that is currently available;
2. Training shall include timely orientation of all program staff regarding these standards, and shall seek to ensure that all employees perform their duties consistent with the provisions of these standards, applicable laws, and governing rules and regulations;
3. Programs shall, where feasible, initiate training to educate service providers and other members of the criminal justice system regarding the policies and practices of DBA programs.

D. Collaboration and Education

1. Programs shall take steps to ensure that the criminal justice community is informed as to DBA services offered in their jurisdiction;
2. Programs shall collaborate with the criminal justice community, including alternative-to-incarceration advisory boards or criminal justice coordinating councils, in promoting greater usage of DBA services, refining policies and practices with respect to program services;
3. Programs shall meet periodically with community representatives to ensure program practices address concerns of the community on matters involving DBA.

E. Revision of Standards

1. The DPCA shall periodically review and revise these standards based upon changes in the law and other informed sources of information;

2. Revised standards shall be issued by the State Director of Probation and Correctional Alternatives and shall take effect upon issuance, unless otherwise specified.

IV. APPLICABILITY

These standards are applicable to DBA programs funded by DPCA, wherein services are carried out relative to a criminal matter involving a Criminal Court, Board of Parole, or Local Conditional Release Commission.

V. PROGRAM GOAL

Any alternative-to-incarceration defender based advocacy program funded by DPCA shall be designed to promote public safety, reduce recidivism and enhance accountability. Additionally, ATI programs shall strive to facilitate successful community reintegration.

VI. PROGRAM OBJECTIVES

DBA program services shall strive to reach the following goals:

- A. Assist the referral source and courts through advocacy/encouragement of positive behavioral change and reduction of recidivism within the targeted client population;
- B. Work to help lower local detention and the NYS Department of Correctional Services (DOCS) incarceration rate through effective screening and identification of eligible program participants;
- C. Interview and assess all potentially eligible program participants;
- D. Prepare plans for all eligible program participants;
- E. Make appropriate referrals, as indicated;
- F. Facilitate client contact and participation with agencies providing direct services;
- G. Provide monitoring/case-management advocacy services, as appropriate;
- H. Comply with reporting requirements.

VII. PROCEDURAL STANDARDS

A. Eligibility Criteria

1. All DBA programs shall have clearly defined eligibility criteria;
2. DBA programs will screen all potentially eligible persons;
3. DBA programs shall accept for services individuals referred to the program pursuant to the legal authority of the courts or other referring justice agencies including: parole, probation, assigned counsel and the prosecuting attorney where not otherwise inconsistent with other legal reporting requirements.

B. Screen, Intake, Assess and Evaluate

1. It is recommended that DBA programs use a standardized risk and need assessment tool to assist with assessment processes, making informed recommendations and to guide case planning processes for those programs providing more intensive services.
2. DBA programs shall strive to identify appropriate clients through a well-defined objective screening/interviewing process that ensures the following:
 - a. Client eligibility criteria are met;
 - b. Standardized selection criteria are developed and applied uniformly;
 - c. Criteria does not discriminate against potential clients on the basis of age, race, color, gender, religion, creed, national origin, ancestry, marital status, political belief, disability or sexual orientation;
 - d. Reasonable accommodations shall be made to provide services to individuals with mental and/or physical disabilities or language barriers;
 - e. Selection criteria is periodically reviewed and modified, as needed, to reflect changes in the law, rules and regulations, and local practice and;

- f. Outreach is conducted with probation, parole, corrections, courts, counsel and/or other releasing authorities to afford equal opportunity to all potential clients.

C. Client-Specific Plan

In preparation of a client specific plan:

1. DBA programs shall strive to conference the case with the defense attorney and other members of the defense team;
2. DBA programs shall strive to conduct in-person interviews with clients in an environment which is conducive to the privacy of the client and will protect the confidential nature of the information discussed;
3. Client-signed release forms² shall specify the information requested, the person/agency releasing the information and the time period, event or condition of expiration. When required, HPPA regulations shall govern;
4. DBA programs shall strive to conduct collateral interviews, whenever necessary and relevant, in order to gather additional information and to verify information already obtained;
5. DBA programs shall strive to consult with experts outside of their own field of knowledge for evaluation and assessment purposes and to obtain accurate and supporting documentation regarding specific issues;
6. DBA programs shall strive to become familiar with all statutorily permissible sentences, dispositions, sanctions, alternatives to incarceration, and DOCS or local correctional programming. Additionally, the DBA program should explore community resources to ensure appropriate programming and for support purposes;
7. DBA programs shall strive to prepare a comprehensive but concise written document containing information regarding: identifying

² There exists a new CASAS criminal justice form (TRS-49) and a re-disclosure form (TRS-1). For information on these forms see State Director's Memorandum #2009-5 on DPCA's website at [DPCA.state.ny.us](http://www.NYhealth.gov) For health-related forms, see the Department of Health website at <http://www.NYhealth.gov>

information and demographics, circumstances regarding offense behavior and events leading up to offense (if agreed upon by the defense team), family/developmental/social history, educational history, employment history, substance abuse history and treatment history, mental health history and treatment history, medical history and treatment, cultural identity factors, and any other relevant information regarding the client and his/her circumstances. The document shall contain a well-developed plan that will meet the needs of the client and community and focuses on restorative justice and re-entry issues. The document shall also focus on the penological goals, particularly the goal of re-integration as cited in PL§1.05(6);

8. The plan shall be prepared in a timely manner;
9. DBA programs shall strive to be adequately prepared in the event that staff testimony is required;
10. DBA programs shall strive to maintain regular contact with the client to provide support and knowledge so they are reasonably able to make informed decisions about their case.

D. Disposition

1. As a court in its discretion pursuant to CPL §400.10 may, before pronouncing sentence, hold one or more pre-sentence conferences in open court or in chambers in order to resolve any discrepancies between the pre-sentence report, or other information the court has received and the defendant's or prosecutor's pre-sentence memorandum submitted pursuant to Criminal Procedure Law Section §390.40 or assist the court in its consideration or any matter relevant to the sentence to be pronounced, the DBA program should consult with the defendant's attorney as to its involvement, if any.
2. DBA programs shall develop and implement case closing procedures which provide for:
 - a. Timely submission of the DBA document;
 - b. Detailed data collection regarding the case outcome/closing.

E. Pre-sentence Memorandum

1. DBA programs shall consider whether to prepare a defendant's pre-sentence memorandum as authorized by the Criminal Procedures Law (CPL§390.40).
2. Such memorandum may include information with respect to any matters described in CPL §390.30 and there may be annexed written statements by others in support of facts alleged in the memorandum. The client-specific plan, or portions of it, may serve as an effective pre-sentence memorandum.
3. DBA programs shall take the necessary/appropriate steps to ensure that a defendant's pre-sentence memoranda, which it prepares, are filed sufficiently in advance of sentencing to the court.
4. As CPL §390.40 empowers the prosecutor with the ability to file a prosecutor's pre-sentence memorandum which must be served on the defendant's attorney at least ten (10) days prior to the sentencing date, the DBA program shall consult with the defendant's attorney as to the content of any such memorandum.

F. Competency with Diverse Populations

1. DBA programs shall strive to develop the knowledge, awareness and skills to deal with different cultural, racial, gender and ethnic populations and address diversity barriers.
2. DBA programs shall strive to utilize treatment providers that are sensitive and effective with appropriate populations when making referrals.
3. DBA programs shall strive to:
 - a. Ensure hiring, training practices and program services safeguard against discrimination by promoting cultural, racial, gender and ethnic competency;
 - b. Minimize language barriers through multi-lingual staff or appropriate referrals;

- c. Identify and network cultural, racial, gender and ethnic groups that can help support and improve client transition and re-integration;
- d. Include diverse community representation on their respective DBA boards or advisory groups;
- e. Offer materials, where available, which are multi-lingual and appropriately sensitive to diverse populations; and
- f. Review program statistics to ensure that DBA programming is adequately assisting the cultural, racial, gender and ethnic populations of the communities they serve.

VIII. ETHICS

DBA programs shall develop and adopt a code of ethics for all staff. The code of ethics should include, but not be limited to, the following:

1. Always maintain objectivity and integrity, respect the values, attitudes and opinions of others and provide services in an appropriate professional relationship;
2. Not discriminate based on race, creed, color, national origin, religion, age, gender, disabilities, ethnicity, sexual orientation, marital status, political belief, economic condition or any other basis proscribed by law;
3. Recognize the need for ongoing education, maintain current competence and improve expertise and skills;
4. Adhere to the legal codes and accepted moral behaviors which pertain to professional conduct;
5. Respect the integrity and protect the welfare of the person or group with whom you are working;
6. Embrace, as a primary obligation, the duty of protecting the privacy of participants and not disclose confidential information acquired, without appropriate lawful authorization, and maintain the confidentiality of records under your control;

7. Refrain from engaging in behavior that may give the appearance of impropriety such as requesting or accepting gifts or engaging in inappropriate relationships;
8. Disclose immediately any potential or perceived conflict(s) of interest to appropriate designated personnel.

DBA programs have a responsibility to exemplify a model of integrity, respect, efficiency and professionalism.

DBA program staff which are employed by a government agency are also subject to the provisions of Article 18 of the General Municipal Law (GML) concerning conflicts of interest. GML§806 sets forth a code of ethics.

DBA attorneys must also adhere to the “Rules to Professional Conduct” issued by the Chief Administrator of the Courts in New York State which have been promulgated as joint rules by the Appellate Division of the Supreme Court.³

IX. CONFIDENTIALITY

- A. DBA programs shall maintain confidentiality of DBA program records.
- B. In general, information obtained by DBA programs during the course of services shall remain confidential and shall not be disclosed unless authorized by New York State and/or Federal Law, DPCA contractual agreements and applicable rules and regulations governing program records, including, but not limited to, medical, drug and alcohol, mental health records and HIV related information (i.e. the Health Insurance Portability Accountability Act, 42 U.S.C. 290dd-2 and 42 C.F.R. Part 2, Public Health Law Article 27-F, and Mental Hygiene Law §33.13 and CPL §390.50(1)). Any disclosure of DBA information shall be limited to the minimum information necessary to carry out the purpose of such disclosure.
- C. DBA programs shall establish a written policy regarding the limited access to any offender’s files. Such policy shall include provisions permitting access, upon request, by the client or his/her attorney. This policy may

³ The New York State Bar Association has issued a preamble, scope and comments to accompany these rules. However, where a conflict exists, the rules control. For further information see <http://www.courts.state.ny.us/rules/jointappellate/index.shtml> and <http://www.nysba.org/content/navigationmenu/forattorneys/professionalstandardsforattorneys/revisednyruleofprofessionalconduct.pdf>

provide for appropriate exceptions from such disclosure, including information which has been secured from sources upon a promise of confidentiality of information which, if disclosed, would endanger the life or safety of any person, or would constitute an unwarranted invasion of personal privacy. This policy shall not deny access by the client and his/her attorney(s) to any statements made by such.

- D. At the time of the initial interview, the client shall be clearly advised of the potential uses of the information offered and/or secured from treatment providers so that he/she may make a voluntary decision whether to participate in referred services. Applicable consent forms authorizing release of medical records shall be presented to the client for review and signature, where applicable. Wherever feasible, the client shall execute a criminal justice consent form to facilitate disclosure to elements of the criminal justice system which have made participation in a drug and/or alcohol program a condition of the disposition of any criminal proceeding against the defendant or of the individual's probation, parole or other release from custody. This form allows for the sharing of information as to the participant's progress to the prosecuting attorney, the court granting release or probation or parole officers who are supervising such individuals until final disposition of the client's case.
- E. DBA attorneys, where serving as defense counsel, shall adhere to special rules governing confidentiality of information as contained in Rule 1.6 of the New York Rules of Professional Conduct. Among its provisions, it allows a lawyer to reveal or use confidential information to the extent that they he/she reasonably believes is necessary:
1. To prevent reasonably certain death or substantial bodily harm;
 2. To prevent the client from committing a crime;
 3. To withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by him/her to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
 4. Where permitted or required under these rules or to comply with other laws or court orders.

- F. Where not restricted, the DBA program may disclose information under the following circumstances subject to any enumerated limitations with respect to release:
1. To public health authorities or other appropriate governmental authorities for purposes of reporting child abuse or neglect (see 45 CFR §164.512(b)(1)(ii));
 2. To a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition if the covered entity is authorized by law to notify such person, as necessary, in the conduct of a public health intervention (see 45 CFR §164.512(b)(1)(iv));
 3. To a governmental authority, including a social service or protective service agency, authorized by law to receive reports of such abuse, neglect, or domestic violence, upon reasonable belief that an individual is a victim of abuse, neglect or domestic violence. In such cases there must be prompt notification to the individual that a report has been or will be made in certain instances (see 45 CFR §164.512(c));
 4. For judicial and administrative proceedings subject to specific requirements and limitations, including in response to an order of a court or administrative tribunal in response to a subpoena (see 45 CFR §164.512(e));
 5. For a law enforcement purpose to a law enforcement official if certain conditions are met, as applicable. (i.e. information sought is relevant and material to a legitimate law enforcement inquiry) (see 45 CFR §164.512(f)(1));
 6. In response to a law enforcement official's request for information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person certain personal information may be released (see 45 CFR §164.512(f)(2));
 7. In response to a law enforcement official's request for information about an individual who is or is suspected to be a victim of a crime in certain instances. (see 45 CFR §164.512(f)(3));
 8. For reporting a crime in emergencies to alert law enforcement that certain information may be disclosed (see 45 CFR §164.512(f)(6));

9. To individuals or agencies designated by the client/participant, upon specific written authorization; or
 10. To other individuals or agencies as recognized by HIPAA Regulations (see 45 §CFR Part 164).
- G. To prevent or lessen a serious and imminent threat to the health or safety of an individual or the public, in cases in which DBA staff has specific information leading to a belief that the offender intends to harm law enforcement authorities, particular individuals (e.g. victims), or the community at-large, the program shall inform the court and/or appropriate law enforcement agency of the nature of the potential harm. Such notification is subject to any restrictions imposed by law (i.e. Public Health Law §2785 governing court authorization for disclosure of confidential HIV related information). The program shall disclose only such information as is necessary to fully advise of the nature and source of the potential harm and to assist in locating the offender (see 45 CFR §164.512(j)).
- H. No person, public or private agency receiving information from a DBA program may re-disclose such information, except as is necessary to accomplish the purpose for which such information was disclosed by the DBA program. All contracts and written communications between the DBA program and individuals or organizations agreeing to provide supportive services for the custody or care of DBA participants must contain a non-disclosure clause. This clause shall obligate such individual or organization to adhere to the confidentiality provisions of this section.
- I. DBA programs shall develop written policies and procedures governing confidentiality and access to DBA records consistent with relevant laws, rules and regulations and contractual agreements and shall designate an appropriate staff person to ensure that staff are familiar with and adhere to these policies and procedures.
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