INTRODUCTION

Why bother to read or use national criminal defense and public defender standards?

As a full time public defender or an assigned counsel attorney, your caseload never shrinks -- it multiplies and divides. You constantly battle to successfully juggle the demands of clients, the courts, and the cases themselves.

As a public defender supervisor/manager, you may not only be responsible for your own caseload, but you must also actively monitor your attorneys' cases and courtrooms. You are also somehow expected to find time to coach staff attorneys and to conduct case reviews and do performance agreements and evaluations while you struggle to maintain even current resource levels and support staff.

As a public defender trainer, you may squeeze your trainer role in between caseload preparation and courtroom appearances. It is frequently impossible to accurately evaluate staff training needs or to develop training programs with written training materials on a limited or nonexistent training budget. And let's not even mention staff complaints about training or being "forced" to attend presentations.

So, with all these overwhelming daily concerns, stresses, and problems, why should we force ourselves to read or use national criminal defense and public defender performance standards?

We read and use them because clients want to be represented well. We read and use them because national standards provide a way to understand what is expected to provide quality representation to our clients by those practicing criminal defense work nationally.
They set out what good performance is in today’s criminal defense practice. The underlying value of standards is good service to clients.

One definition of “standard” is “something established by authority, custom, or general consent as a model or example…something set up and established by authority as a rule for the measure of …value, or quality.” *Webster’s New Collegiate Dictionary* (1976).

"Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought." *Redefining Leadership for Equal Justice: Final Report of National Symposium on Indigent Defense 2000*, Office of Justice Programs, US Department of Justice at page 14.

The NLADA and ABA guiding principles establish the practice norms that have received national acceptance. The United States Supreme Court has also looked to national standards as guides to deciding what is reasonable criminal defense performance in the representation of a client.

**NLADA Criminal Defense Representation Standards**


NLADA’s *Performance Guidelines* give realistic meaning to the United States Constitution’s sixth amendment and to the state Constitutions’ guarantees of the right to counsel. They articulate the ultimate goal for all trial counsel: "zealous and quality representation."

**Institute of Judicial Administration/ ABA Juvenile Justice Standards**

Juvenile practice has also been the subject of national standards which present a statement of professional conduct specially applicable to the representation of juveniles involved in delinquency proceedings. These IJA/ABA standards include chapters relating to defense representation and to juvenile prosecution as well as to a broad statement directed to the administration of juvenile court proceedings, disposition, detention and corrections. All of these are important advocacy tools for the juvenile court and juvenile post-conviction litigator.

The IJA/ABA standards cover the following areas:
1. Standards Relating to Adjudication
2. Standards Relating to Appeals and Collateral Review
3. Standards Relating to Architecture of Facilities
4. Standards Relating to Corrections Administration
5. Standards Relating to Counsel for Private Parties
6. Standards Relating to Court Organization and Administration
7. Standards Relating to Dispositional Procedures
8. Standards Relating to Dispositions
9. Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition
10. Standards Relating to Juvenile Delinquency and Sanctions
11. Standards Relating to the Juvenile Probation’s Function: Intake and Predisposition Investigative Services
12. Standards Relating to Juvenile Records and Information Services
13. Standards Relating to Monitoring
15. Standards Relating to Police Handling of
Juvenile Problems
16. Standards Relating to Pretrial Court Proceedings
17. Standards Relating to Prosecution
18. Standards Relating to Rights of Minors
19. Standards Relating to Transfer Between Courts
20. Standards Relating to Youth Services Agencies

Capital Standards

In 1987 NLADA and in 1989 the ABA adopted national standards for the defense of capital cases that address the expectations for representation by trial and post-trial capital defense counsel. The ABA has recently revised them. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) are found at: http://www.abanet.org/deathpenalty/guidelines.pdf

ABA Criminal Defense Standards

The American Bar Association has a variety of standards related to the practice of criminal law. They include:

- Appellate Review of Sentences
- Criminal Appeals
- Defense Function
- Discovery
- Electronic Surveillance:
  - Technologically-Assisted Physical Surveillance
  - Private Communications
- Fair Trial & Free Press
- Guilty Pleas
- Jionder & Severance
- Legal Status of Prisoners
- Mental Health
- Post-Conviction Remedies
- Pretrial Release
- Special Functions of the Trial Judge
- Prosecution Function
- Providing Defense Services
- Sentencing
- Speedy Trial
- Trial by Jury

NLADA Training and Development Standards

The National Legal Aid and Defender Association has Defender Training and Development Standards (1997) that set out the necessity for defender programs to provide education for their staff, and a set of standards for having a system to develop and provide the needed education. Those national defender training standards are found at: http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards

The ABA Ten Principles of a Public Defense Delivery System (February 2002) http://www.nlada.org/DMS/Documents/1013106700.63 reiterate the essential requirement to provide comprehensive and systemic education for defenders. Principle Nine states: "Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."

Overall Structure of NLADA'S Performance Guidelines

The 1995 NLADA Performance Guidelines for Criminal Defense Representation do not define the duties of death penalty, post-conviction or appellate counsel. Although they are specifically directed to trial counsel, the Performance Guidelines offer a standard of performance that may be used to define effective assistance of counsel in briefs and at post-conviction hearings.

NLADA's Performance Guidelines are comprehensive but not exhaustive. The language allows for flexibility. While some actions are absolutely essential, others are left to counsel's considered judgment and discretion, and to the particularities of practice and law in the jurisdiction.
For example, it is essential for counsel to develop and continually reassess a theory of the case. It is also essential for counsel to make sure a client understands what rights are waived by a plea of guilty and understands the conditions and limitations of a plea agreement including the maximum sentence, sanctions and other consequences of the plea, and to make sure the full content of the plea is placed on the record. On the other hand, what pretrial motions should be filed rest in counsel’s considered judgment after reviewing the investigation and law and the circumstances of the case.

The Performance Guidelines are divided into nine sections which we have captioned as follows:

Guideline Section 1: Rule, Duties and Education/Training of Counsel

Guideline Section 2: Pre-Trial Release Proceedings

Guideline Section 3: Counsel's Duties of Initial Appearance, Preliminary Hearing, and with regard to Prosecution Requests for Non-Testimonial Evidence

Guideline Section 4: Investigation, Discovery, Theory of the Case

Guideline Section 5: Pre-Trial Motions

Guideline Section 6: Plea Negotiations

Guideline Section 7: Duties at Trial

Guideline Section 8: Sentencing

Guideline Section 9: Post-Sentencing Duties

Each Guideline Section contains multiple Guidelines, which, taken together, define the role, duties, and obligations of defense counsel. After each Guideline there are references to the "Related Standards" that include nationally recognized standards, codes that address an aspect of representation, statutes, regulations, and policy manuals developed by public defender and assigned counsel programs. The Commentary, supported by footnotes citing to primary legal and secondary materials, provides an explanation and rationale for each Guideline.

For all of us who are committed to the delivery of quality criminal defense services at the trial level, the Commentary and footnotes alone make the NLADA's Performance Guidelines a must read. The Commentary is thoughtful, well-reasoned and additional justification for demanding the resources and training opportunities to support a qualified staff. The footnotes also provide a treasure trove of information, documentation and case citations that all of us should find useful when confronting judges, prosecutors, legislators, the program funding source, and the press.

Overall Structure of ABA'S Death Penalty Performance Guidelines

The ABA’s revised 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are divided into ten sections, and address trial and post-conviction areas of litigation. There are 27 Guidelines:

1.1 Objective and scope
2.1 Adoption and implementation of a plan to provide high quality representation
3.1 Designation of a responsible agency
4.1 Defense team and supporting services
5.1 Qualifications of defense team
6.1 Workload
7.1 Monitoring; removal
8.1 Training
9.1 Funding and compensation
10.1 Establishment of performance standards
10.2 Applicability of performance standards
10.3 Obligations of counsel respecting workload
10.4 The defense team
10.5 Relationship with the client
Post-conviction duties are addressed in Guideline 10.15.1. That standard states that “Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to: 1. Maintain close contact with the client regarding litigation developments; and 2. Continually monitor the client’s mental, physical and emotional condition for effects on the client’s legal position; 3. Keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments; and 4. Continue an aggressive investigation of all aspects of the case.”

**Performance Guidelines:**
**A Tool for Beginner to Know Criminal Defense Attorney's Functions**

Everyday, in courtrooms around the country, indigent defendants are represented by public defenders or assigned counsel who care about their work and the quality of their representation. Unfortunately, some defense advocates have not received sufficient training or adequate supervision to know or to understand all the tasks that must be accomplished to provide quality representation from initial appearance through post-sentence duties.

NLADA’S 1995 Performance Guidelines for Criminal defense Representation are not only a learning tool, but also an operations manual which offers a concrete statement of tasks for all phases of representation. Even if you have no training and no supervision, the Guidelines provide a full checklist of requirements, duties and considerations that every trial attorney must evaluate and, if appropriate, execute. An important use of performance standards is for the beginning attorney to read when asking, "what is my function day-to-day." The standards operate as the "manual" of practice.
**Performance Guidelines: A Tool for the Experienced litigator to Identify Areas for Improvement**

You may already know and do many of the representational tasks that are discussed in the Guidelines. However, there may be areas where you are less proficient. The Guidelines help identify those areas and provide clear guidance on the direction you should seek.

For instance, in many places, motion practice is not an active part of the attorney's representation plan. Guideline Section Five offers an excellent discussion of the decision to file pre-trial motions; the types of motions that may be considered; the filing and arguing of pre-trial motions; and the subsequent filing of pre-trial motions.

**Performance Guidelines: A Tool for the Litigator to Persuade Deciders**

As a litigator, you may motion the court or your office case supervisor for funds to hire an expert or an investigator. You consider the expert and/or the investigator essential for the defense of the case, but it is a constant, uphill battle for funds and resources. Use these national Performance Guidelines as additional justification for your request by citing to Guideline 4.1, which calls for expert assistance "when necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."

Another example is using the standard for the necessity of investigation to persuade a judge to provide a continuance to complete that indispensable investigation. Guideline 4.1 entitled, "Investigation" states in part: "(a) Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. ...." It goes on to provide what sources the investigative information may include.

Law school teaches us how to use statutes, caselaw, law review and other articles to support our arguments. Let's now incorporate national standards for defense representation and performance into our arguments for additional case resources. If these litigation Performance Guidelines help us to learn and grow as litigators, let's use them to improve judicial rulings and to educate our own supervisors and managers.

**Litigation Performance Standards: A Tool for Trainers**

As public defender trainers, we know that many trainers constantly search for ways to quickly and efficiently develop quality criminal defense advocates who excel as "courtroom persuaders."

The ABA Death Penalty Guidelines and the NLADA Performance Guidelines are first rate training tools for new and experienced lawyers. Here in one cohesive volume is a comprehensive statement of the tasks that our lawyers should consider and execute at every stage of the litigation process. Successful courtroom performance depends upon excellent preparation as well as courtroom advocacy skills. The two sets of Guidelines clearly explain all the preparation building blocks that facilitate a solid advocacy performance.

Public defender organizations have traditionally focused their training on courtroom trial skills. Programs send attorneys to the National Criminal Defense College or to NLADA’s Defender Advocacy Institute, or create their own in-house trial advocacy programs. If in-house training exists, it too favors trial advocacy skills programming.

While these programs provide an excellent learning experience, they ignore what remains a major part of our practice: plea negotiation and sentencing advocacy. Driven by changes in state sentencing laws (mandatory sentence statutes, guideline
sentencing, habitual offender statutes, sentence enhancements, and victim rights legislation), many defenders or assigned counsel increasingly engage in plea negotiation to limit the horrific sentence exposure that our clients face.

Using NLADA's *Performance Guidelines* as a beginning definition of the skills and tasks necessary for meaningful negotiation (*Guideline Section Six*) and for successful sentencing advocacy (*Guideline Section Eight*), we must add these skill sessions to our training agenda. We need to deal with the reality of case disposition for many clients. Good negotiation skills do not develop by osmosis. They must be nurtured and developed just as we work on courtroom advocacy skills. On too many occasions, we ignore or fail to recognize the many ways that our advocacy and preparation for sentence hearings may impact the presentence report and the sentencing judge's decision. These *Guidelines* define pro-active sentencing advocacy that makes it one of the best sections for all attorney levels.

Pro-active sentencing advocacy often means that we must actively seek programming that is an alternative to jail or prison. While some defender organizations employ alternative sentencing specialists or social workers who assist the attorney and who work with the client from evaluation to courtroom presentation, many defender offices do not have funding or sufficient funding to meet client demand. Again, let's use these national *Guidelines* (*Guideline 8.1*) as cited justification in a motion to the court for the necessary funds to hire an alternative sentencing specialist.

*Performance Guidelines: A Tool for Defender Organization Managers and Supervisors*

NLADA's *Performance Guidelines* are a must read for everyone who has a managerial or supervisory function in an office.

The *Performance Guidelines* are powerful to use in the efforts to persuade funders to provide sufficient money to meet the national standard of practice. "Zealous and quality representation" requires sufficient funding for lawyers and for professional and administrative support staff as well as experts and alternative sentencing advocates, assuming that the latter must be paid by the defender program and not by court order. "Zealous and quality representation" does not mean budget bloat. This representation goal defines what is basic and necessary for a lean professional legal program which has the ability to adequately service its clients.

These *Guidelines* also assume that our attorneys and staff receive sufficient, ongoing training, and that they are kept up to date on relevant areas of substantive law, procedure and practice. No defender program may adequately accomplish this task unless it provides an in-house training program with qualified trainers who have sufficient time and resources to plan programs, to create information/training materials, and to disseminate that information within the organization. NLADA's *Performance Guidelines* provide additional justification for the funding to create or to improve a continuing in-house legal education program.

Some defender programs have used these *Guidelines* as an "aspirational" goal to which they are moving. Others have employed the *Performance Guidelines* as an "operations manual." In either case, if our managers have a responsibility to train and to supervise attorneys whom they must also evaluate, then we need a quality checklist definition of the representation tasks that our trial attorneys must accomplish at all levels of representation. NLADA's *Performance Guidelines* provide a definition which programs may adopt in whole or in part or which they may use as reference in drafting their own guidelines or standards. Beyond just an individual program's adopted Performance Standards, a few defender programs have gone to either their state's appellate courts or to state bar associations,
seeking Court or Bar adoption or endorsement of uniform *performance guidelines for criminal defense representation* to guarantee at least a minimal level of defense representation.

Managers and supervisors may also use these two sets of *Guidelines* as a policy tool to oppose or to support procedural practice changes initiated by the legislature, the courts, or the prosecution.

For instance, many jurisdictions are moving to institute video arraignments at initial appearance. Whether you decide to accept or to oppose this change, mold these new procedures in ways that protect our clients. Insist upon the funding of additional, necessary attorney and administrative staff. *Guideline Section 2, Pre-Trial Release Proceedings,* and *Guideline Section 3, Counsel's Duties at Initial Appearance,* provide ample justification for your argument that a meaningful right to counsel must be maintained at initial appearance video proceedings.

Standards provide practical assistance to the supervisor working with staff attorneys to insure conformance to ethical rules. The ABA Model Rules of Professional Conduct, as revised in 2002 by the ABA based on the work of the Ethics 2000 Commission, [http://www.abanet.org/cpr/ethics2k.html](http://www.abanet.org/cpr/ethics2k.html), continue to encourage review by other professionals and require supervisors to insure the ethical performance of their attorney employees.

In fact, the revised ABA Model Rule 5.1(a) adds responsibility for supervision beyond partners to “a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm.”

ABA Model Rule 5.1(b) imposes ethical responsibilities on a supervisor to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

The subordinate lawyer's ethical duties are set out in ABA Model Rule 5.2. Model Rule 5.2(a) states that an attorney is "bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person."

5.2(b) states that a subordinate attorney does not "violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Model Rule 5.1 creates “new independent duties for…supervisory lawyers…. Supervisors…are required to supervise the junior lawyers' compliance with ethical standards as well as their professional performance…. These steps include educational efforts, the institution of routine procedures for surfacing and solving ethical problems, and, in general, the creation of an atmosphere of attention to matters of professional ethics…. A supervisory lawyer violates Rule 5.1(a) or (b) by failing to take reasonable precautions against violations of the Rules by others.” Geoffrey C. Hazard, Jr., W. William Hodes, *The Law of Lawyering,* (3d edition 2003), Section 42.2. This includes the failure of the subordinate lawyer to competently represent a client as required by ABA Model Rule 1.1.

Model Rule 5.2 “recognizes that lawyers in subordinate positions are not always able to maintain full freedom of action in their professional lives, but does not grant any lawyer immunity from professional discipline.” *The Law of Lawyering,* Section 42.2.

The supervisor advising a subordinate attorney not to prepare for or to attend a client's sentencing hearing is clearly an unreasonable and ethically questionable resolution and inconsistent with the Performance Guidelines section on sentencing representation.

However, when an attorney feels overwhelmed with caseload and questions
her "competency" to perform for all clients, it may well be a "reasonable resolution" of a questioned professional duty for the attorney to continue current caseload representation with more direct case mentoring from the supervisor and to maintain service to the clients while the supervisor stops all new case assignments to that attorney pending a management audit of the subordinate's practice procedures: are support, investigative and paralegal staff fully available to the attorney and wisely used to advance client communication, case preparation, and trial performance? Does the attorney have the computer/technology skills to fully utilize the public defender systems technology and Internet systems to advance legal and fact research, communications, etc.? These are just some that issues that need to be explored for final resolution of a challenging situation.

Courts have taken note of these ethical obligations. In KBA v. Devers, 936 S.W.2d 89, 91 (Ky. 1997) the Court held that "...a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct," and suspended a supervising attorney for 3 years for, among other violations, failing to meet this ethical supervision duty.

In Matter of Yacavino, 494 A.2d 801 (N.J. 1985) an attorney employed by a law firm in a satellite office was suspended for 3 years because he failed to properly handle an uncomplicated adoption and created two false orders.

Significantly, the Court in Matter of Yacavino went out of its way to discuss the "disturbing" aspect of the lack of supervision of the attorney by senior attorneys in the firm. According to the disciplined attorney, he was "left virtually alone and unsupervised." The firm's partners rarely came to the satellite office, and nobody asked for status reports from him.

The New Jersey Supreme Court said it would no longer tolerate this "sink or swim" attitude, citing the duties of supervisors under ethics Rule 5.1. The Court said supervising attorneys are expected to provide "collegial support and guidance." The Court also called for "a systematic organized routine for periodic review of a newly admitted attorney's files" citing In re Barry, 447 A.2d 923 (J.J. 1982) (Clifford, J. dissenting).

The United States Supreme Court has looked to litigation performance standards as a guide in assessing whether an attorney's assistance has been ineffective.

In Wiggins v. Smith, 123 S. Ct. 2527 (2003) the Court looked to the prevailing national litigation standards in holding that the defense investigation in this capital case was deficient in failing to investigate mitigation beyond the PSI and the social service department records.

The Court stated, "Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Id., at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." Strickland, supra, at 688, 104 S.Ct. 2052; Williams v. Taylor, supra, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set
of sources. Cf. id., 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions”).” Wiggins at 2536-37.

There are other reasons to understand and implement standards. Public defender administrators may be subject to civil liability under 42 U.S.C. Section 1983 for constitutional deprivations of effective assistance of counsel in the allocation of resources to public defenders. Standards help avoid such liability.

The 9th Circuit Court of Appeals ruled in Miranda v. Clark County, Nevada, 319 F.3d 465, 466 (9th Cir. 2003) (en banc) that the "head of a county public defender's office, as administrative head of an organization formed to represent criminal defendants, may be held accountable under 42 U.S.C. Section 1983 for a policy that leads to a denial of an individual's right to effective representation of counsel."

The Court acknowledged that under Polk County v. Dodson, 454 U.S. 312 (1981) that the individual public defender who was performing the conventional roles of an attorney for a client that such a lawyer was not a state actor and not subject to Section 1983 liability. Polk County left open the question of whether there may be liability for "administrative and possibly investigative functions." Polk County, 454 U.S. at 324 - 25.

In Miranda v. Clark County, Nevada the plaintiff, who was convicted of capital murder, sentenced to death and who served 14 years, had his conviction overturned by a state court because the public defender provided ineffective assistance of counsel for failing to investigate his case. Nevada did not retry Miranda who maintained his innocence. The public defender who represented Miranda at his initial trial had been a lawyer for just over a year and had never tried a murder case. That defender interviewed 3 of the 40 witnesses given to him by the defendant and did not subpoena any of them to trial. Miranda also alleged that two policies caused him to receive deficient representation.

One policy provided that defendants who flunked a polygraph received minimal resources for preparing for trial. The second policy was to assign the least experienced counsel to capital cases with no training or experience in capital litigation.

The 9th Circuit assumed, “for purposes of this case, that [the attorney’s] conduct was deficient and to the detriment of his client.” Miranda at 468. The Court held that the individual public defender was not liable under Section 1983 since he was representing the client and not the county or state and was therefore not, as a matter of law, a state actor under Polk County.

However, the 9th Circuit held that the chief public defender administrator who was responsible for allocating the finite resources and making policies on the use of resources was subject to liability under Section 1983 since such action was state action, as the administrator was not representing an individual client.

The 9th Circuit determined that the policy that allocated fewer resources to clients who did not pass the polygraph is a "policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt…. This is a core guarantee of the 6th Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. Gideon, 372

The 9th Circuit also held that assigning untrained and inexperienced attorneys to represent capital clients did allege a ground that was sufficient to create a "claim of 'deliberate indifference to constitutional rights' in the failure to train lawyers to represent clients accused of capital offenses." *Miranda* at 471.

Defender systems that have standards and provide education of their staff reduce their possible exposure to liability under Section 1983.

Another important use of standards is that of a device for confronting the litigator who is not performing at the necessary level and who is resistant to feedback on his performance. When a managing attorney fulfills the ethical obligation of supervision, that attorney often faces a difficult, resistant lawyer, who may not have a considered motion practice, or good client relationships, or a well documented and constructed case files. The supervisor often has difficulty with the resistant lawyer who responds with, "who says I need to do those things? I get good results. Nobody is complaining." National standards reinforce the supervisor’s and the agency’s position that the attorney’s performance falls below a nationally accepted norm. That can be a powerful persuasive communication.

Standards may also be used to improve the litigation level in an office in a particular area. Pretrial release is very important to all our clients. It is especially important to clients charged with a misdemeanor, as many of them will have their case effectively completed when released, as time served will be the lengthiest sentence option the Court will practically consider. It is an area some defenders do not litigate as vigorously as some private criminal defense attorneys. The *NLADA Performance Guidelines* are clear on the pretrial release responsibilities of the litigator.

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release states: "The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client."

Guideline 2.3 Pretrial Release Proceedings states:

"(a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.
(b) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.
(c) If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.
(d) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs."

**Conclusion**

Why read or use NLADA’s *Performance Guidelines for Criminal Defense Representation (1995)*, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003), and other national
standards? Because clients want quality representation. Because, whether you are a public defender trial or post-trial attorney or assigned counsel, trainer, supervisor/manager, or chief defender you can make these standards work for your clients and for you.

As an educational, supervisory, policy, persuasive and political tool, using national standards of practice makes sense for all of us and for our clients. "Zealous and quality representation" is neither a fantasy nor a dream. Standards help make that goal a reality.

Phyllis H. Subin, Esq., LLC
4801 Montano Rd. NW
Suite A6/PMB141
Albuquerque, New Mexico 87120
(505) 385-6335
subinnmwip@aol.com

Ed Monahan
Deputy Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
502-564-8006
emonahan@mail.pa.state.ky.us

(c) 2003 by Phyllis Subin and Ed Monahan