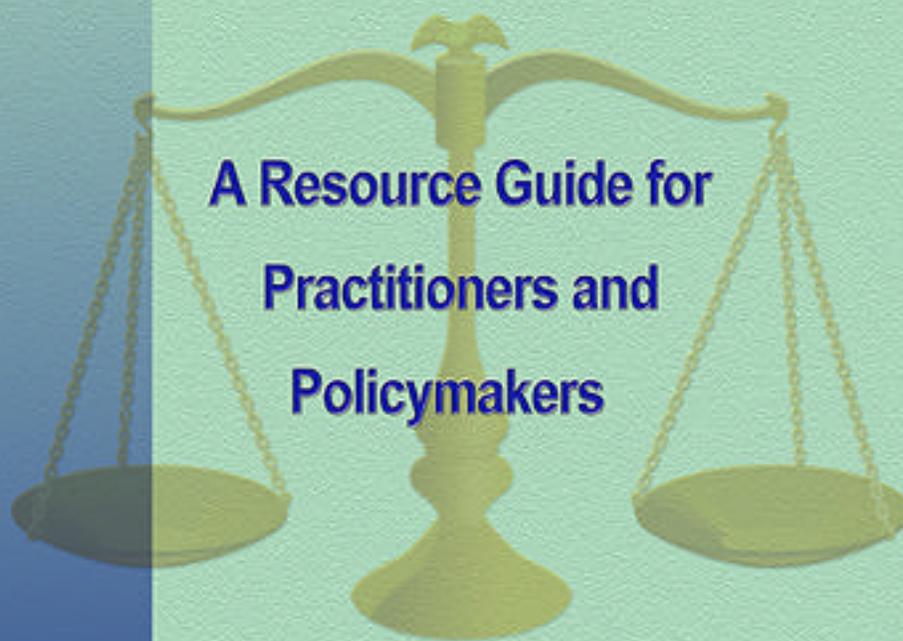




Compendium of Standards for Indigent Defense Systems



A Resource Guide for
Practitioners and
Policymakers

Volume IV
Standards for
Appellate Representation

**December
2000**

This document was prepared by the Institute for Law and Justice and supported by a contract with the Bureau of Justice Assistance, United States Department of Justice. The opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. The permission of copyright holders for the inclusion of copyright materials herein is gratefully acknowledged and such inclusion does not operate to waive in any context the rights of the copyright holders under the Copyright Act.

Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has

Gideon v. Wainwright to provide every criminal defendant charged with a serious crime with competent counsel.” Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar “to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices.” Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

The standards presented here do not necessarily represent the only acceptable models. Rather, they have been collected to give practitioners and policymakers examples of the range of current “best practices” developed at the state and local level, along with the recommendations of several national standards-setting bodies.

The Office of Justice Programs is making the *Compendium* available in hard copy, CD, and electronic formats. It is our hope that this resource will be used by State and local governments and agencies to compare standards from other jurisdictions and develop their own, thereby helping to assure the fulfillment of the Sixth Amendment and of *Gideon v. Wainwright*.

Mary Lou Leary
Acting Assistant Attorney General
Office of Justice Programs

Nancy E. Gist
Director
Bureau of Justice Assistance

Acknowledgments

The *Compendium of Standards for Indigent Defense Systems* was edited by Neal Miller of the Institute for Law and Justice and Peter Ohlhausen of Ohlhausen Research, Inc.

Grateful appreciation goes to former Assistant Attorney General Laurie Robinson for her support of the project and to the following individuals for their contributions to the development and production of the *Compendium*:

Advisory Board Members

Ms. Marea Beeman, Vice President, The Spangenberg Group

Professor Adele Bernhard, Pace University School of Law

Mr. Larry Landis, Director, Indiana Public Defender Council

Mr. Jim Neuhard, State Appellate Defender, State of Michigan

Mr. Paul Petterson, Indigent Defense Counsel, National Association of Criminal Defense Lawyers

Ms. Patti Puritz, Director, Juvenile Justice Center, American Bar Association

Ms. Jo-Ann Wallace, Chief Counsel, National Legal Aid and Defender Association

Mr. Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association

Professor Richard Wilson, Washington College of Law, The American University

Institute for Law and Justice Staff

Edward Connors, President

Joan Peterschmidt, Senior Project Management Associate

Office of Justice Programs Staff

Arnold J. Hopkins, Office of the Assistant Attorney General, Office of Justice Programs

Kristine Orlando, Grants Program Specialist, Bureau of Justice Assistance

Contents

Introduction

List of Standards and Table of Key Elements

A. Appellate Offices

1. Separate Units, Offices, and Agencies
2. Appropriate, Adequate Facilities
3. Efficient Management Structure
4. Outreach to Court, Trial Attorneys, and Legal Community

B. Defender Administrative Process

1. System for Handling Conflict-of-Interest Cases
2. System for Case Assignment and Supervision
3. Written Procedures for Services to Inmates
4. System for Ensuring Complete Case Argument
5. Procedures for Oral Argument Preparation
6. Case Termination Duties

C. Caseload

D. Attorney Qualifications and Training

1. Selection, Qualifications, and Removal
2. Training

E. Performance

1. Determining Issues to Appeal
2. Diligence and Accuracy
3. Duty to Meet with Trial Lawyers
4. Duty to Meet with Client
5. Policy for Seeking Bail Release During Appeal
6. Assessing Postconviction Remedies
7. Miscellaneous Duties

Introduction

The *Compendium of Standards for Indigent Defense Systems* presents national, state, and local standards relating to five major aspects of indigent defense:

- Administration of defense systems (Volume I)
- Attorney performance (Volume II)
- Capital case representation (Volume III)
- Appellate representation (Volume IV)
- Juvenile justice defense (Volume V)

These standards are non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants. Some standards are aspirational, that is, a goal for the future; other standards are enforced by operating or funding agencies. The standards and rules collected here were issued by national organizations; state agencies; bar associations; public defender agencies; state high courts; and local court or bar associations.

The *Compendium* is intended to be useful for persons preparing to establish, review, or improve a public defense program or system. It should also be useful for persons dealing with funding sources; for agencies or organizations that are developing standards governing either criminal defense systems or individual attorney performance; and for academics and courts that need a reference point.

Sponsorship and Development

The *Compendium* was commissioned by the Bureau of Justice Assistance in the Office of Justice Programs of the United States Department of Justice. It was developed by the staff of the Institute for Law and Justice with guidance from an advisory board of practitioners and academics in the field of criminal defense systems. The assistance of the Spangenberg Group is also gratefully acknowledged, especially in helping identify state and local standards for inclusion in the *Compendium*.

Methodology

Once a standard was identified, ILJ staff sought permission from the sponsoring agency to reprint the standard here. The intent of the *Compendium* was to be as inclusive as possible. No effort was made to include only the “best” standards. If any standards have been left out, we apologize to the standards’ sponsors.

Each volume lists specific topics, such as provision of training or the need for adequate facilities, and then presents all the standards relevant to those topics. By and large, the selection of topics followed the topical headings used in the standards themselves.

The materials included in the *Compendium* go beyond standards themselves. In several instances, we have included court rules and agency operational policies that are the functional equivalent of standards. The inclusion of such materials points to the need to put standards into context. At the state level, standards do not exist by themselves. Their content is often shaped by state legislation and court rules, either of which may have been the force requiring the development of the standards. Thus, to understand state and local standards, some knowledge of the governing state law is required. By necessity, any state law that creates a defense services delivery mechanism also treats the issues of governance, structure, jurisdiction, funding, and many other topics often covered by standards. While this *Compendium of Standards for Indigent Defense Systems* includes a limited review of state laws, an exhaustive review is beyond its reach.

Implicit in the standards are the ethical requirements expected of all attorneys in all types of cases. In a sense, the standards are but commentary to certain overriding ethical principles: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for this representation” (ABA Model Rules of Professional Conduct 1.1, adopted 1983). Further, as the Model Code of Professional Responsibility (Canon 7) directs, “A lawyer should represent a client zealously within the bounds of the law.” What the standards do is identify how those principles can be achieved and measured in the indigent defense setting, no matter what type of indigent defense system is used.

These standards may be used either to evaluate an existing system (consisting of public defenders, contract firms, private assigned counsel, or a combination of such systems) or to compare or consider replacing one type of system with another.

The standards allow funders to determine whether providers of defense services are performing effectively and efficiently. For the clients, who can neither choose nor readily change their attorneys, these standards provide some measure of assurance that their lawyers will provide high-quality, zealous representation. Finally, these standards inform both funders and attorneys what services are required and what services need to be funded.

List of Standards and Table of Key Elements

Standards Included

National

American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function*, 1993

National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States*, 1976

National Legal Aid and Defender Association, *Standards and Evaluation Design for Appellate Defender Offices*, 1980

State and Local

Georgia Indigent Defense Council, *Guidelines for the Operation of Local Indigent Defense Programs*, 1999

Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, 1995

Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, 1999

Michigan Appellate Assigned Counsel System, *Minimum Standards for Indigent Criminal Appellate Defense Services*, 1981

Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases*, 1997

New Mexico Public Defender Department, *Performance Guidelines for Appellate Criminal Defense Representation*, 2000

New York City Indigent Defense Organization Oversight Committee, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants*, 1997

Washington Defender Association, *Standards for Public Defense Services*, 1989

Key Elements

Category	Standard	National Standards		State and Local Standards							
		ABA Defense Function	NLADA Appellate Defender	GA	IN	MA	MI	NE	NM	New York City	WA
A. Appellate Offices											
	Separate units, offices, and agencies		✓								
	Appropriate, adequate facilities		✓						✓		
	Efficient management structure		✓								
	Outreach to court, trial attorneys, and legal community		✓						✓		
B. Defender Administrative Processes											
	System for handling conflict-of-interest cases		✓				✓		✓		
	System for case assignment and supervision		✓							✓	
	Written procedures for services to inmates		✓								
	System for ensuring complete case argument		✓			✓				✓	
	Procedures for oral argument preparation		✓			✓	✓		✓	✓	
	Case termination duties									✓	
C. Caseload											
	Weighted caseload use		✓	✓	✓			✓			✓
D. Attorney Qualifications and Training											
	Selection, qualifications, and removal		✓						✓	✓	
	Training		✓		✓	✓			✓		

Category	Standard	National Standards		State and Local Standards							
		ABA Defense Function	NLADA Appellate Defender	GA	IN	MA	MI	NE	NM	New York City	WA
E. Performance											
	Determining issues to appeal	✓	✓			✓	✓		✓		
	Diligence and accuracy	✓					✓				
	Duty to meet with trial lawyers		✓						✓	✓	
	Duty to meet with client		✓			✓	✓		✓	✓	
	Policy for seeking bail release during appeal		✓			✓			✓		
	Assessing post-conviction remedies	✓				✓			✓		
	Miscellaneous duties	✓	✓			✓	✓		✓		

A. Appellate Offices

Included in this section are standards relating to the following topics :

1. Separate units, offices, and agencies
2. Appropriate, adequate facilities
3. Efficient management structure
4. Outreach to court, trial attorneys, and legal community

1. Separate Units, Offices, and Agencies

Commentary. Specialization, scheduling, case overloads, and the need to review the performance of trial counsel are a major part of postconviction review. Appeals often last for years and might involve litigation in state and federal courts, along with hearings in the trial courts. It is extremely difficult to match appellate research demands with the equally daunting demands of trial practices. Statewide and major countywide defender offices have developed their own appellate divisions and specialized appellate defender offices in over 40 states; as a result, trial counsel rarely conduct the appeal.

The only standard that discusses the relationship of the appellate function to the trial function is the NLADA *Guidelines for Legal Defense Systems in the United States*. These guidelines stress the importance of separating the two functions. In contrast, other standards found in *Compendium* Volume I, “Standards for the Administration of Defense Services,” imply that the trial attorney will ordinarily be responsible for handling any appeal, should that be necessary.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 4.3 Relationship of Appellate and Trial Functions; Task Allocation

The appellate and postconviction functions should be independent of the trial function in order to accomplish free and unrestricted review of trial court proceedings.

Where the appellate office is part of a defender system which includes both trials and appeals, the appellate function should be as organizationally independent of the trial function as is feasible.

- (a) Counsel on appeal should be different from trial counsel and capable of exercising independent review of the competence and performance of trial counsel.
- (b) An appellate defender should not have responsibility for any trial work while in an appellate capacity and should remain in appellate work for a substantial period of time in order to provide continuous representation to a client throughout the appellate process.
- (c) While the appellate function should be separate from the trial function, under certain circumstances the trial attorney should be permitted to handle the appeal provided that there is an independent review of the record by appellate personnel.

Where the appellate defender office is separate from the trial office, it is essential to ensure the following coordination:

- (a) Appellate counsel should contact and fully discuss the appeal with trial counsel; and
- (b) The trial defender office should have the capacity to process interlocutory and emergency appeals.

Where paraprofessionals and law students are utilized in the appellate process, the defender assigned to a client should establish a personal relationship with the client through personal interviews and continued contact.

A copy of all pleadings affecting the merits of the case filed for a client by the defender should be automatically forwarded to the client. Because the client is not present at most appellate proceedings, the client should be informed of the occurrence of all substantial hearings, rulings and decisions affecting the case.

The responsibility for handling a case on appeal should be borne by the attorney. The attorney should supervise all supporting staff who work on a case.

The following services and facilities should be available to appellate defender offices:

- (a) Adequate resources for the hiring of expert witnesses and investigative services;
- (b) Administrative personnel to maintain docket control cards, open files, accumulate all court records before the case is assigned to a defender, and set up initial appointments with and explain the appellate process to clients;
- (c) Word processing systems and equipment; and
- (d) An adequate library and brief-bank with access to a complete resource library.
 - (1) Adequate personnel should be available to operate the library and maintain and index the brief-bank.
 - (2) Individual staff attorneys should be provided with a functional working library for their own offices.
 - (3) All slip sheet opinions released by the jurisdiction's appellate courts should be obtained by the office upon release, indexed and immediately distributed to the appellate attorneys.

2. Appropriate, Adequate Facilities

Commentary. Effective appellate advocacy requires more than effective advocates. Specifically, appellate work requires working conditions conducive to long hours of reading records and research materials, extensive library and on-line research, and significant amounts of writing and editing. The two standards here are directed at ensuring the adequacy of the facilities and the library used by the attorneys.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard II. Criteria for Assessing the Efficacy of the Legal Representation

...

G. Facilities

1. Office Space

- a. *Area for staff.* Generally 150 sq. ft. should be allocated for each full-time or equivalent staff member.
- b. *Privacy.* Each attorney should be provided an individual, private, fully walled office in which to work; investigators, social workers, and paralegal personnel should have available private office space in which they can interview persons.
- c.
 - i. The appellate defender office should generally not be located in a government office building or in the same building as the prosecutor, but should be located in an area which is accessible to public transportation, is amenable to client visits, and is convenient to the primary appellate court.
 - ii. The appellate defender should be located in a building which has easy access to the public and which ensures the security of office personnel.
 - iii. The appellate defender office should have the appearance of a professional law office, and not a government agency. The appellate defender and all staff should work towards minimizing the institutional appearance of the office and maximizing its professional appearance.
 - iv. Adequate space should be allocated in the appellate defender's office for library, waiting rooms, conference space, and lounge areas for staff.
 - v. The appellate defender office should have adequate heating, air conditioning, and lighting to perform its required duties.

2. Library

- a. Where such materials are published, each attorney in the appellate defender office shall be provided:

- i. One complete set of state statutes and court rules ;
 - ii. One set of statutes annotated, covering those statutes and rules governing criminal and appellate law and procedures;
 - iii. Those sections of the state digest and/or state legal encyclopedia covering criminal law;
 - iv. A directory of all attorneys, judges, and prosecutors in the jurisdiction; and
 - v. A dictionary.
- b. *At a minimum*, each appellate defender shall have an in-house library with at least the following material:
- i. A complete set of:
 - 1) United States Supreme Court decisions ;
 - 2) All published state appellate court decisions ;
 - 3) Federal Reporter;
 - 4) State Statutes Annotated;
 - 5) State Digest;
 - 6) State legal encyclopedia;
 - 7) Law reviews published in the state ;
 - 8) Either *Am. Jur.* or *C.J.S.*;
 - 9) Pattern criminal jury instructions for the state ;
 - 10) Federal Digest;
 - 11) State *Shepards Citations*;
 - 12) Current ABA Standards for Criminal Justice; and
 - 13) Current prison, parole, and probation regulations for that jurisdiction.
 - ii. One set of all published state appellate court decisions since 1960 for every ten attorneys.
 - iii. Current *Criminal Law Reporter*.
 - iv. Legal Dictionary
 - v. One standard treatise on:
 - 1) criminal substantive law;
 - 2) criminal procedure; and
 - 3) criminal evidence.
- c. Priority should be given to expanding the law library beyond this minimum collection.

- d. Each appellate defender shall identify those complete law libraries convenient to its offices which contain regional and state reporters, Federal Supplement, all major law reviews, and such standard references as *A.L.R.* and *Words and Phrases*. The appellate defender shall endeavor to work out procedures for the staff to use such materials during working and non-working hours and, where appropriate, to withdraw materials from the library.
3. Other Research Aids
 - a. Briefbank
 - i. Each appellate defender office shall have an index of briefs such as will allow other staff members and other researchers to have access to briefs completed by the office.
 - ii. Each office shall have a procedure for requiring the cataloging of briefs done by the office.
 - iii. Each office shall have a procedure for requiring the cataloging of motions/research done by the office.
 - b. Automated Research Devices
 - i. Where funds are available, each appellate defender should determine the feasibility of using automated research equipment to do legal research.
 - ii. The automated equipment should be put in a location that is accessible to all staff members, but disrupts the research of other staff members as little as possible.
 - iii. The office should develop procedures to ensure the utilization of the automated equipment by staff members.
 - iv. The office should monitor the cost efficiency of all automated equipment within the office to determine whether it is sufficient for the office's purpose.
 - c. Unless it would seriously disrupt the operation of defender office, the appellate defender should make its library, brief bank, and research tools available to other public defenders and members of the private bar.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.7 Research resources

- (a) The appellate division shall maintain an in-house law library and provide counsel with such computerized research tools as are necessary to fulfill the division's mission of providing quality appellate representation.

(b) Appellate counsel shall know how to utilize these resources, and should be given any necessary training in this regard.

3. Efficient Management Structure

Commentary. An effective appellate defender office must be run like any other office, with operating procedures to guide staff personnel decisions. The office must also have a management information system that can help measure workload and control how that workload is dealt with. Since these standards were written, litigation, legislation, and the courts have shown significantly increased concern over appellate delay and excessive caseloads. In addition, dramatic changes have occurred in office management use of computers. Appropriate availability and use of computers is implicit in the latter standards.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

A. Regular Office Procedures

1. Every appellate defender office shall have written office procedures covering the internal operation of the office.
2. These written procedures shall be provided to all staff members.
3. Staff members shall be familiar with the procedures which are set forth in the written procedures.
4. The office shall adhere to the written procedures.
5. The written procedures of the office shall include hours of operation, compensation policy, promotion procedures, vacation, sick leave, staff meetings and interaction, forms for legal documents, hiring and discharge proceedings and procedures, discipline procedures, grievances procedures, and all similar matters relating to the operation of the office.
6. Each appellate defender office shall have standard forms for the perfection and pursuit of appeals and for such other proceedings as are routinely taken in postconviction or appellate cases. Such form books shall be available to all attorney and secretarial personnel within the office and shall be utilized, in the most appropriate manner possible, to increase the efficiency and productivity of the office.

B. Management Information Systems

1. The appellate defender shall determine what types of information need to be gathered for the day-to-day operation of the office, for the long term needs of the agency, and for case tracking.
2. The office shall determine whether the information being gathered meets the needs of the office.

3. The office shall review the manner in which the data are collected to determine whether it is efficient or whether the efficiency can be improved through an enhanced management system or through automation.
4. The office shall adopt a weighted caseload system for all cases entering the office to ensure a fair distribution of cases and accurate information on caseloads.

4. Outreach to Court, Trial Attorneys, and Legal Community

Commentary. This standard combines the general duty of the defender office for outreach (see *Compendium* Volume I, “Standards for the Administration of Defense Services”) with the requirement to work together with the other members of the appellate court workgroup.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

...

H. Feedback

1. With Appellate Courts
 - a. The appellate defender and his or her staff shall establish regular lines of communication with judges on the appellate court and with appellate court staff to determine whether the office is providing representation in a manner acceptable and appropriate to the court.
 - b. The appellate defender shall establish procedures for the disposition of administrative matters which arise on an emergency basis and to avoid confrontation with court staff.
2. The appellate defender should establish a cordial, and professional, relationship with the appellate court prosecutor so that mutual problems can be solved administratively or with a concerted effort.
3. The appellate defender should have on-going contact with the criminal defense bar in the jurisdiction.
4. The appellate defender should have contact with the private bar generally within the jurisdiction.
5. The appellate defender should reach out to the client community, and particularly to the community of institutionalized persons, to provide assistance, information.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.5 Contact with courts and prosecutors

- (a) The Appellate Defender and his/her staff shall establish regular lines of communication with appellate court judges and staff to facilitate the provision of quality representation.

- (b) The Appellate Defender should establish a cordial and professional relationship with the Director of the Criminal Appeals Division of the Attorney General's office so that mutual problems can be solved administratively or with a concerted effort.
- (c) Appellate counsel should act in a professional and dignified manner in all dealings with judges and prosecutors.

B. Defender Administrative Process

Administrative policies and procedures are essential to effective and efficient management. The standards included here set policies and procedures for many of the most significant responsibilities in the defender organization.

This section addresses the following topics:

1. System for handling conflict-of-interest cases
2. System for case assignment and supervision
3. Written procedures for services to inmates
4. System for ensuring complete case argument
5. Procedures for oral argument preparation
6. Case termination duties

1. System for Handling Conflict-of-Interest Cases

Commentary. Conflicts are of particular concern in appellate cases. There is the usual concern about conflicts between codefendants and the possibility of conflicts because of representation of witnesses or victims with interests contrary to those of the defendant. In addition, there is the added concern about appellate counsel's raising on appeal the ineffectiveness of trial counsel's performance. These issues will not arise until the appellate counsel is well into reviewing the record (frequently not filed until many months after the trial), reading the record, holding discussions with the client, and in some instances conducting an investigation. Large caseloads may further delay the process. In some states, the delay is measured in years. If substitutions occur at that point, new counsel will need to start over, increasing the delay.

The last form of conflict occurs where the trial and appellate counsel are the same and it is determined that ineffective assistance of counsel occurred at trial. A lawyer cannot ethically raise that issue on himself or herself, and a substitution will have to be requested. Again, as stated elsewhere in the *Compendium*, policies on separate counsel on appeal can reduce or eliminate this concern.

Well-thought-out and well-followed policies on conflicts and representation of codefendants will significantly reduce or eliminate these concerns. See, generally, *Compendium* Volume I, "Standards for the Administration of Defense Services."

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

...

E. Procedures for Handling Conflict of Interest Cases

1. Each office shall have a written definition of situations which constitute a conflict of interest, requiring the assignment of outside counsel. Those situations shall include:
 - a. When the appellate defender is appointed to provide representation to codefendants, absent extraordinary circumstances warranting joint representation and the consent of all clients involved;
 - b. When the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation;
 - c. When two or more clients have entered pleas of guilty or have advanced defenses at trial which were not inconsistent, but assert for the first time after conviction that one or more of the clients were more culpable than others;
 - d. When it is necessary for the appellate attorney to interview or examine in a

postconviction evidentiary hearing another client of that office in an effort to substantiate information provided by the first client; or

- e. When, in the pursuit of an appeal or postconviction hearing, it is necessary to assert for the first time that another client of the office committed perjury at trial.
2. If a conflict of interest exists, it exists for the entire office, and assigning the case to another attorney within that entire agency will not cure the conflict.
3. As soon as a case is identified as meeting the definition of “conflict of interest case” the case shall be immediately identified and assigned to counsel outside the defender office. The office shall adopt a procedure for ensuring a prompt review of each case to make a timely decision as to whether a conflict of interest is probable.
4. The procedure followed by the office shall be adequate to obtain independent counsel in a timely manner.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

1. Counsel shall, to the best of his or her ability, act as the defendant’s counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.
2. Counsel shall not represent more than one of multiple codefendants on appeal regardless of whether the codefendants express a preference for joint representation and there is no apparent conflict of interest.
- ...
20. Counsel shall not seek or accept fees from the defendant or from any other source on the defendant’s behalf other than those authorized by the appointing authority.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.4 Conflicts of Interest

- (a) The appellate division shall adopt a procedure for ensuring a prompt review of each case to make a timely decision as to whether a conflict of interest is probable. Individual counsel must be alert to all potential and actual conflicts of interest that would impair counsel’s ability to represent a client.
- (b) Counsel shall seek the Appellate Defender’s opinion regarding any potential conflicts. The Appellate Defender shall make the final determination as to whether the potential conflict warrants withdrawal.

- (c) If counsel withdraws due to a conflict, counsel shall immediately inform the client and shall arrange for and cooperate with new counsel.

2. System for Case Assignment and Supervision

Commentary. Vertical prosecution principles can be used at both the trial and appellate levels as a means of establishing performance accountability and quality. Both the NLADA and New York City standards require a management system for case assignment to the appellate office attorneys. The NLADA standards also require managerial supervision. See also *Compendium* Volume I, “Standards for the Administration of Defense Services.”

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

. . .

C. Assignment, Management, Supervision and Case Flow

1. Each appellate defender shall develop a procedure for the assignment of cases to the lawyers within the office. Such procedures may include either assignment at the time that case is assigned to the office *or* when the complete trial record and transcripts have been received.
2. When cases are not assigned to a specific attorney until the record is received, the appellate defender shall immediately inform the client of this fact and ensure that the client has a person within the office to contact prior to the receipt of the court record.
3. Cases shall not be reassigned to another attorney within the office unless:
 - a. The first attorney leaves the defender office permanently or for a significant period of time.
 - b. The first attorney’s workload is such to deny the client prompt handling of the case; or
 - c. The chief defender determines there to be an irreconcilable conflict between the first attorney and the client which prevents a normal attorney/client relationship *and* the client has not previously requested a change of counsel.
4. Attorneys who transfer from the appellate division of defender office to another division shall retain all appellate cases in which he/she has already interviewed the defendant or read the trial transcript.
5. Clients may request a specific attorney within the appellate defender office to handle his/her case, and the chief appellate defender shall consider such request, but the assignment of the case is within the discretion of the chief defender based upon the following factors:
 - a. The attorney’s workload and schedule;
 - b. The attorney’s ability to provide prompt and high quality representation in that specific case; and

- c. The attorney's and the office's previous contact with the client.
- 6. The appellate defender shall adopt procedures for monitoring the flow and movement of cases to determine:
 - a. Any inappropriate delays in individual cases;
 - b. Any attorneys who are not handling cases in an appropriate timeframe;
 - c. Any systematic delays which can be identified and corrected; and
 - d. Assignment of cases and anticipating future caseloads.

Such monitoring shall occur on a monthly basis and shall be the responsibility of a specific supervisory attorney designated by the chief defender.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

VIII. Case Management and Quality Control

...

B. Evaluation Criteria

...

- 2. Case Management and Quality Control Criteria for Appellate Organizations
 - (a) The defense organization should have adequate procedures for identifying and categorizing cases to ensure that more experienced lawyers are assigned to more complex cases.

3. Written Procedures for Services to Inmates

Commentary. A corollary to standards that would authorize publicly funded legal services for postconviction proceedings challenging convictions is to authorize services for other legal complaints, such as those regarding conditions of confinement (see *Compendium* Volume I, “Standards for the Administration of Defense Services”). The NLADA standards also authorize assistance to non-clients for purposes other than case representation.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

D. Scope of Representation

...

9. The appellate defender shall have the discretion to assist prison inmates and others seeking redress of institutional grievances, and shall have the discretion, where resources are available, to provide representation to such persons in appropriate litigation challenging the conditions of such confinement.
10. The appellate defender shall assist non-clients in seeking appropriate postconviction remedies, including seeking counsel on appeal, obtaining the necessary forms for filing motions in state and federal courts, and explaining to prison inmates the law as it relates to the facts of each case. The appellate defender should take whatever steps are necessary to ensure that non-clients are provided appropriate representation either by the appellate defender or by other counsel, where such representation appears to be in the defendant’s best interest and supported by arguable legal bases.

4. System for Ensuring Complete Case Argument

Commentary. The standards relating to case preparation address document collection, deadlines, and preparation of briefs.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

E. Timing of Postconviction Representation

1. The appellate defender shall cooperate with the trial courts, appellate courts, trial public defenders and private attorneys to ensure that all appeals desired by criminal defendants are timely pursued. The appellate defender should further directly assist defendants in filing the necessary jurisdictional documents to perfect appeals in a timely manner.

...

G. Staffing

1. In order to ensure quality representation and to adequately support requests for staffing and funding, each appellate unit shall develop staffing ratios related to the caseload and number of attorneys in the office.
2. Prior to the creation of any appellate unit, or as soon thereafter as possible, a clearly articulated caseload standard staffing ratio and caseload weighting system should be developed—and publicly stated—with written plans for alternative methods of providing representation in the event those standards are exceeded.

...

L. Brief Preparation

1. All briefs filed by the appellate defender shall conform to the court rules of that jurisdiction.
2. All briefs filed by the appellate defender should have a professional, neat appearance, without typographical errors or misspellings, and be generally comparable in appearance to the briefs filed by the best law firms in the state.
3. All briefs filed by the appellate defender shall make appropriate use of legal authority, and be of the highest professional quality.
4. Briefs filed by the appellate defender office shall utilize federal case authority from other jurisdictions in support of positions for which no local authority exists or when local authority is contrary to the weight of recent decisions from other jurisdictions.

5. Briefs filed by the appellate defender shall include non -case reference materials, such as law reviews, treatises, scientific works, and, where appropriate, legal encyclopedias.
6. Briefs filed by the appellate defender shall have a consistent method of citation, consistent with that used by the appellate courts in the state or circuit. Where no consistency is found in the appellate courts, the appellate defender should follow the prescribed form of citation used in the *Harvard Citator*.
7. Appellate defenders should not use blind citations without supporting material s or run-on citations, listing many cases in support of one general or vague proposition.
8. Each appellate defender should adopt procedures for reviewing and screening the briefs that are filed by that office, which should include the careful review of the brief and record by at least one member of the staff other than the person who wrote the brief prior to the completion of the final draft of the brief. In offices of more than five attorneys, supervisory staff shall be designated for this purpose.
9. Each appellate defender should adopt procedures for providing an “issues conference” between the attorney handling the case and some other members of the staff in which the issues raised in the case are appropriately discussed prior to the actual commencement of the writing of the brief in the case.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

...

10. The brief filed by the appellate defender on behalf of the client shall conform in all respects with Rules 16, 18, and 20 of the Massachusetts Rules of Appellate Procedure and shall be of high quality.
11. The appellate defender shall transmit to the client a copy of the brief filed on the client’s behalf, and shall also transmit to the client a copy of the brief for the Commonwealth and copies of all other substantive documents figuring in the appellate proceedings. Assigned counsel must also submit a copy of the brief or new trial motion to CPCS.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 3.1 Brief and memorandum preparation

- (a) All briefs and memoranda filed by appellate counsel shall conform to the Rules of Appellate Procedure.
- (b) All briefs and memoranda shall have a professional, neat appearance, without typographical errors or misspellings, and be generally comparable in appearance to briefs filed by the best law firms in the state.
- (c) Appellate counsel shall not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.
- (d) All briefs and memoranda shall make appropriate use of legal authority. Briefs shall utilize out-of-state and federal authority in support of positions when no local authority exists or local authority is contrary to the weight of recent decisions from other jurisdictions. Briefs shall not contain run-on citations listing many cases in support of one general or vague proposition.
- (e) All briefs and memoranda shall utilize a method of citation consistent with the *Manual of Citation and Form for the Courts of the State of New Mexico* (1992).
- (f) The Appellate Defender shall adopt a procedure for screening the briefs and memoranda that are filed by the office, which should include a careful review of each pleading by an attorney other than the one who drafted the pleading.
- (g) The Appellate Defender shall adopt procedures for providing an “issues meeting” between the attorney handling a case and other members of the attorney staff at which the issues raised in the case can be discussed.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

IV. Supervision

B. Evaluation Criteria

...

- 6. Appellate Defender organizations should maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following:
 - (a) gathering and reviewing entire trial court record;
 - (b) communication with trial counsel and the client;
 - (c) identifying all potential appellate issues, including those raised by trial

- counsel of the client or that otherwise may not appear in the record;
- (d) conducting appropriate legal research;
- (e) filing postjudgment or appellate motions;
- (f) writing and editing motions and briefs;
- (g) preparing and presenting oral argument;
- (h) seeking further appeals in the event of an adverse decision by the Appellate Division
- (i) briefing and arguing any further appeals.

VIII. Case Management and Quality Control

...

B. Evaluation Criteria

...

(2) Case Management and Quality Control Criteria for Appellate Organizations

- (a) The defense organization should have adequate procedures and sufficient data-processing capacity to ensure that it has the complete record, including periodic letters sent to responsible persons/entities requesting any necessary documents.
- ...
- (e) The defense organization should have adequate procedures to ensure that all appellate motion and briefing schedules are met and that appeals are prosecuted as expeditiously as possible, particularly when the client is incarcerated.
- (f) The defense organization should have adequate procedures to ensure that full consideration is given to filing reply briefs in appropriate cases.
- (g) In addition to the documents required for trial defense organizations, the appellate defense organization should require that active case files contain the following:
 - (i) entire trial record;
 - (ii) factual summaries of interviews with trial counsel; and
 - (iii) appellate filings and orders.

5. Procedures for Oral Argument Preparation

Commentary. Oral argument is an important supplement to the formal written brief, which was the subject of the prior standards. Four standards address oral argument, but only three include provision for attorney preparation.

NLADA Standards for NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

M. Oral Argument

1. In jurisdictions which allow or encourage waiver of oral argument on appeal, the appellate defender shall have written standards for determining when such waiver is appropriate or requested.
2. All attorneys who are going to provide oral argument before an appellate court should have adequately prepared their argument. The office should adopt procedures for assisting attorneys with the development and presentation of oral argument, including the use of “moot court” arguments and video tape.
3. The chief appellate defender shall make certain that each member of his or her staff understands the rudiments of appellate argument, including the fact that no oral argument is to be read.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

...

13. Oral argument of the appeal on behalf of the client should not, absent unusual circumstances and with the approval of the client, be waived with respect to any case. The appellate defender shall inform the client of the date, time and place scheduled for oral argument of the appeal as soon as the appellate defender receives notice thereof from the appellate court.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

16. Counsel should request and appear for oral argument. In preparation for oral argument counsel shall review the briefs of both parties, file supplemental pleadings as warranted, and update his or her legal research.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 3.2 Oral argument

- (a) Appellate counsel should request oral argument when counsel determines that an oral presentation may advance the client’s interest more than the written arguments alone.
- (b) Appellate counsel should be adequately prepared for oral argument. In preparation, counsel shall review the briefs of both parties, file letters of supplemental authority as warranted, and update their legal research. No argument should ever be read.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VIII. Case Management and Quality Control

A. Evaluation Criteria

...

- (2) Case Management and Quality Control Criteria for Appellate Organizations

...

- (h) The defense organization should adequately prepare lawyers for each oral argument.

6. Case Termination Duties

Commentary. There is an obvious need to have procedures in place for responding to a victory on appeal. It is somewhat surprising then that only the New York City standards discuss this important responsibility. The Michigan standards provide for a somewhat broader responsibility of the appellate attorney for actions whenever or however the case ends. See also standards relating to trial attorney duties to cooperate with appellate counsel in *Compendium* Volume II, “Standards for Attorney Performance.”

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

...

18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the course of action which may be pursued as a result of that disposition and the scope of any further representation counsel will provide.
19. At whatever point in the postconviction proceedings counsel’s representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VIII. Case Management and Quality Control

...

B. Evaluation Criteria

...

3. Transition to Other Defenders

...

- (d) Each appellate defense organization should maintain adequate procedures for delivering case materials and shifting responsibility to the trial defender in the event of a reversal on appeal.

C. Caseload

Because of their importance to managing an appellate defender office, caseload standards are presented here in a separate category.

Commentary. Two types of standards are included here—those with and those without specific numerical recommendations. The NLADA standards call for development and use of weighted caseloads but do not specify numbers. The four state standards do provide specific numerical guidelines. The Indiana standards are significant in distinguishing between attorneys with and without support staff. See also, Illinois Office of the State Appellate Defender, Employee Manual, setting minimum work standards at 24 high-quality briefs per year and providing weighted value for different types of briefs. In contrast, the guidelines for the appeal unit of the Committee for Public Counsel Services (Massachusetts) restrict the total number of briefs to be handled by the unit at any one time to be no more than five times the number of attorneys in the unit. See also, Michigan’s Appellate Defender Act, MCL 780.716 §6(c), stating, “The Appellate Defender shall: (c) accept only that number of assignments and maintain a caseload which will insure quality criminal defense appellate services with the funds appropriated by the state.”

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

F. *Caseload*

1. In order to assure that effective representation is being provided by the appellate office and that adequate information is provided the funding source upon which to base an appropriate budget, it is essential that all appellate defender units develop caseload standards which accurately reflect the amount of casework which can be done by existing or contemplated staff.
2. The caseload for each particular jurisdiction should refer to national standards based on time records developed by each individual office based upon the specific nature of the cases handled by that unit.
3. It is essential that accurate records be kept for a period of time, to determine the actual time necessitated by a wide variety of cases handled by the appellate defender in each jurisdiction, including death penalty cases, lengthy or complex

cases, cases which do not involve a formal appeal to the appellate court, and other types of varied cases.

4. The appellate defender shall have clearly articulated policies to prevent the office from exceeding its caseload standards. Such policies should be discussed in advance with the funding authority and the appointing courts to ensure no misunderstanding regarding the obligations of the appellate defender. Such caseload standards and procedures should be reduced to writing regarding excessive caseload.

G. *Staffing*

1. In order to ensure quality representation and to adequately support requests for staffing and funding, each appellate unit shall develop staffing ratios related to the caseload and number of attorneys in the office.
2. Prior to the creation of any appellate unit, or as soon thereafter as possible, a clearly articulated caseload standard staffing ratio and caseload weighting system should be developed—and publicly stated—with written plans for alternative methods of providing representation in the event those standards are exceeded.

H. *Case Weighting and Staffing Ratios*

1. An appellate defender office or division shall annually complete twenty -two work-units for each full-time attorney or the equivalent. In jurisdictions which require an abridgement of the testimony by the appellant, the annual workload shall be twenty (20) work-units. The number of work-units shall be determined as follows:
 - a. A brief-in-chief or *Anders* brief filed in a case in which the court transcripts are 500 pages or less shall be one work -unit, except as otherwise provided herein.
 - b. In cases in which the defendant has not been sentenced to death, one additional work-unit shall be added for each additional 500 pages of court transcript.
 - c. In cases in which the defendant has been sentenced to death, the preparation of the brief shall constitute ten (10) work units and the procedures specified in subparagraphs f, g, h, and i shall constitute ten times the work-units specified in those subparagraphs.
 - d. A brief involving only the validity of a guilty plea or only the propriety of a sentence...shall constitute one-half work unit.
 - e. A case which is closed by the appellate unit with the submission of neither a brief nor postconviction motion shall constitute between one -quarter and one-half work-units, depending on the length of the record reviewed and work done on the case.
 - f. A case which is closed by the appellate unit after the disposition of a postconviction motion or writ but without the submission of an appellate-court brief shall constitute between one-half and one work-unit

depending on the length of the record reviewed, the nature of the postconviction hearing, and whether a trial court brief was submitted.

- g. A case in which an evidentiary postconviction hearing is conducted by the appellate unit and in which an appellate court brief is submitted shall constitute between one and one-half to two work-units.
- h. The preparation of a reply brief or a petition for review or certiorari in a state court shall be...one-quarter work-unit. A petition for a writ of certiorari filed in the Supreme Court of the United States shall be one-half work-unit.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Standard 6. Caseload Control in Local Programs

6.1 Caseload Control in Programs

The local committee and the program's attorneys should prevent caseloads, by reason of their excessive size, from interfering with the rendering of quality representation or leading to the breach of professional obligations, using as a guide the "Standards on Providing Defense Services" of the American Bar Association.

With regards to programs employing contract defenders and/or public defenders, the local committee shall use the American Bar Association's Standard Three "Caseload Limits and Types of Cases" as a guide in reviewing its caseload. The caseload of contract defenders and public defenders should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Caseload limits should be determined by the number and type of cases being accepted, the local prosecutor's charging and plea bargaining practices, the court's propensity for accepting negotiated or non-negotiated pleas, and court calendar controls.

It is recommended that the caseload of a full-time public defender shall not exceed the following:

...

25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

Standard J. Caseloads of Counsel

The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering

of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

1. *Caseloads for Public Defenders Without Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office that does not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. The categories in Table 1 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 1

Type of Case	Full Time	Part Time (50%)
APPEAL	20	10

2. *Caseloads for Public Defenders With Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office with support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. The categories in Table 3 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 2

Law Clerk – Appeal	One for every two attorneys
--------------------	-----------------------------

Table 3

Type of Case	Full Time	Part Time (50%)
APPEAL	25	12

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard 3(2)(c)

2. Recommended Caseload Standards

The Commission recognizes that the cases it will accept will not likely fall into the general caseload statistical categories which compare the percentage of cases in which a plea is entered to the percentage of cases which go to trial. It is expected that the commission's cases will be more likely to go to trial, compared to a normal caseload. This will reduce the number of cases each litigation attorney can handle. In addition, the Commission also contemplates that travel, having to cover the entire state, causes a reduction in the total caseload of the litigation attorneys. It is also assumed that the cases themselves will be more complex since the commission will be handling serious felonies with sizeable records. This too will reduce the normal caseload. These assumptions also hold true for the appellate attorneys. The more complex the cases and the larger the record, fewer appeals can be handled by the appellate attorneys. Therefore, the following yearly caseload standards, per attorney, are recommended, with the understanding that the Commission will be monitoring these standards very carefully over the next year, since there is no history to rely upon, making them subject to change:

...

- c. Appellate grant attorney—40 non-capital appeals per year.

Washington Defender Association, Standards for Public Defense Services

Standard Three. Caseload Limits and Types of Cases

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

...

- 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

D. Attorney Qualifications and Training

Included herein are standards relating to the following topics :

1. Selection, qualifications, and removal
2. Training

See the same topics in *Compendium* Volume I, “Standards for the Administration of Defense Services.”

1. Selection, Qualifications, and Removal

Commentary. Only two standards address the selection, qualifications, and removal of appellate attorneys. The NLADA standards set separate standards for stand-alone appellate offices and those integrated into a combined trial/appellate office. They also speak to the issue of compensation levels. The New York City requirements are similarly comprehensive and set specific numerical requirements. See also *Compendium* Volume I, “Standards for the Administration of Defense Services.”

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

A. Selection of the Chief Defender in “Stand Alone” Appellate Defender Offices

1. The chief appellate defender shall be selected on the basis of merit by an independent committee or board consisting of both lawyers and non-lawyers.
2. The chief defender’s primary qualifications shall be:
 - a. The demonstrated commitment to the provision of quality defense representation for eligible persons charged with or convicted of criminal conduct;
 - b. The demonstrated ability to properly administer a law office of similar size and responsibilities; and
 - c. The demonstrated knowledge of the criminal law and the effective ability to provide actual representation.
3. The chief defender shall be appointed for a specific term of years.
4. The salary of the chief defender shall be equal to that of the highest paid attorney in the prosecutor’s office.
5. The chief defender shall not be selected on the basis of political affiliation, and candidates for such position shall not be requested to provide information regarding political affiliation.
6. During the chief defender’s term he or she shall not be discharged except for cause shown.

B. Selection of the Chief Appellate Defender in a Mixed Trial/Appellate Office

1. In an office which provides representation both at the trial and appellate levels, a separate unit or section should be established to provide appellate representation.
2. The chief of the appellate unit or section shall be selected by, and serve at the pleasure of, the chief public defender.
3. The chief of the office’s appellate unit shall have the following qualifications:
 - a. A demonstrated ability to administer the unit;

- b. The demonstrated expertise in appellate litigation, particularly in criminal cases;
 - c. The demonstrated ability to prepare effective written arguments and to edit the briefs of other attorneys; and
 - d. A demonstrated ability to interact appropriately with staff members, clients, and members of the public in general.
4. The salary of the chief of the appellate unit shall be equal to that of the highest paid attorney providing appellate representation on behalf of the prosecution in that jurisdiction.
 5. The chief of the appellate unit shall not be selected on the basis of political affiliation, and it should not be assumed that when a new chief defender takes office the head of the appellate unit should be changed.

C. Selection of Legal Staff

1. All members of the defender office shall be hired on the basis of merit after open recruitment and hiring that has been publicly advertised in appropriate manners. Every effort shall be made to recruit and hire qualified persons of both genders and diverse racial and ethnic backgrounds.
2. The primary qualifications of staff attorneys in an appellate defender unit shall be:
 - a. The desire and ability to provide quality representation to indigent persons on appeal in criminal cases as demonstrated by such prior activities as:
 - i. Previous representation of criminal defendants;
 - ii. Clinical or law school work in legal writing, appellate advocacy, or similar activities;
 - iii. Clerkship or similar positions on appellate courts; and,
 - b. The ability to interact in a timely, professional, and appropriate manner with office staff, court personnel, and clients.
3. It is not to be assumed that an attorney whose primary previous experience is in the trial of cases is qualified to be an appellate defense counsel. Such persons shall independently demonstrate their ability to provide appellate representation to eligible defendants.
4. All members of the public defender staff shall have indefinite appointments to the positions, and shall continue to serve even when there is a new chief defender.
5. The salaries of the staff of the state public defender shall be equal to or higher than the salaries of persons doing comparable work in the prosecutor's office.
6. Staff members shall not be selected on the basis of political affiliation or be required to provide information regarding political affiliation.
7. Members of the public defender staff shall be discharged only for cause shown, and have an appropriate vehicle to appeal such dismissal or discipline to an

appropriate independent agency. Such “cause” for discharge shall include the failure to provide competent, effective, or timely representation in a significant number of cases.

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

...

D. Internal Structure of the Appellate Defender Office

1. In a mixed trial and appellate defender office:
 - a. Recruitment and hiring in a mixed office shall be done jointly by the chief defender and the director of the appellate unit, so as to ensure that persons with a particularized interest or skill in appellate litigation are hired for that unit.
 - b. Stability in the appellate defender unit should be encouraged, and short-term transfers of attorneys into the appellate unit should be discouraged, although it may be advantageous to allow appellate attorneys to spend short periods of time in trial units. It is preferable to have the attorney who briefed the case handle it subsequently, including oral argument.
 - c. All budgeting and staffing decisions within a public defender office shall be done jointly by the chief defender and the head of the appellate unit, with the chief defender having ultimate responsibility for the overall budget of the agency.
2. In stand-alone appellate defender offices, the appellate defender should develop such procedures as are necessary to the appropriate operation of the office, including the appointment of intermediate supervisory staff, procedures governing branch offices, and inclusion of such procedures in the office manual.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.2 Education, Training and Experience

- (a) To provide quality appellate representation, counsel must be familiar with the substantive criminal law and the rules of criminal and appellate procedure. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the distinct practices of each of the appellate courts.
- (b) When handling a criminal appeal, counsel should have sufficient experience, training and/or supervision to provide quality representation. The Department should afford sufficient training and supervision to enable lawyers to provide quality representation.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

II. Qualifications of Lawyers

A. Performance Standard: Lawyers employed by defense organizations should have sufficient qualifications and experience to enable them to render quality representation to their clients. Trial counsel should be able to provide quality representation throughout each case, from initial assignment through final judgment and any necessary postjudgment proceedings. Appellate counsel should be able to provide quality representation from initial appointment through final determination on appeal.

B. Evaluation Criteria

1. Qualifications for Counsel

(a) General Criteria for Trial and Appellate Counsel

- (i) Does the defense organization require all lawyers to be proficient in essential litigation skills, including:
 - (1) legal analysis
 - (2) manual and computer-assisted legal research;
 - (3) persuasive writing;
 - (4) oral advocacy
 - (5) communication with clients; and, as appropriate,
 - (6) the use of social service and investigative support services?
- (ii) Does the defense organization require that its lawyers keep up-to-date on developments in criminal practice and procedure?

...

(c) Criteria for Appellate Counsel

- (i) The Defense organization should require recent criminal appellate experience or a combination of criminal trial and appellate experience prior to certifying a lawyer as qualified to handle an appeal.
- (ii) Alternatively, the defense organization should require that lawyers who possess no recent criminal law experience are sufficiently trained and closely supervised.
- (iii) The defense organization should ensure that appellate lawyers are able to identify appellate issues, pursue postjudgment relief, research the law, write persuasive briefs and motions and deliver persuasive oral arguments.

Specific Guidelines:

- (a) *Lawyers briefing and arguing their own appellate cases should have experience in at least ten criminal cases, including writing at least five criminal appellate briefs and arguing at least five criminal appeals, the majority of which involved substantive, non-sentencing issues, within the previous three years.*
- (b) *Before assigning an appellate case to a lawyer who does not have the requisite experience set forth in Specific Guideline (a), the defense organization should require the lawyer:*
 - (i) *to complete a comprehensive training program on substantive and procedural criminal law, as well as written and oral advocacy, provided by the defense organization itself or a recognized provider of continuing legal education;*
 - (ii) *to be supervised by an experienced lawyer who is familiar with the facts and issues in the case and who shall perform a detailed review of, and approve all substantive work performed by, that lawyer, until the lawyer satisfies the minimum experience requirements of Specific Guideline (a); and*
 - (iii) *to moot the arguments prior to appearing before the court.*

2. Training

Commentary. Only two of the major sets of standards provide for training of appellate attorneys. In addition, the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services state that the unit attorneys should be provided a course of training in appellate practice and that there will be weekly conferences of the unit attorneys to discuss new issues of law and practice. See also the training standards in *Compendium* Volume I, “Standards for the Administration of Defense Services.”

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

K. *Training*

1. Training for attorneys.
 - a. Each appellate defender office shall have an established training program for entry level attorneys which should be commenced prior to the attorney actually providing representation in any case. “On the job” training, based upon what the attorney will learn from individual cases, is not adequate. Such training shall involve both appellate defender staff, court personnel, and others.
 - b. The appellate defender shall have ongoing continuing legal education programs for attorneys, and specially designed ongoing training for all members of the staff, including support staff and the most senior attorney.
 - c. The appellate defender shall make use of national programs which are of particular relevance to appellate defenders, and shall work with funding sources to ensure funding for both in-state and out-of-state continuing legal education programs.
2. The appellate defender office shall have training for all staff members that enter the office, including secretarial persons. Such training should include a background on the importance of the appellate defender and the relationship of the work each staff member [performs] to the ultimate goal of the office of providing quality and efficient representation.
3. The appellate defender should take an active role in the continuing legal education of the entire bar, and should work actively with the providers of continuing legal education to ensure participation.
4. The appellate defender shall cooperate and work with attorneys who provide trial representation to:
 - a. Identify issues which might be raised at trial which reflect new or developing legal trends;

- b. Properly preserve at trial issues which might be raised on appeal;
- c. Acquaint the trial bar with recent decisions which have an impact on the trial cases; and
- d. Share the appellate defender research facilities if such materials are not available elsewhere and the appellate defender has adequate materials and office space.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

F. Appointment of Appellate Counsel

The comprehensive plan shall provide for the appointment of lead appellate counsel meeting the following qualifications.

...

- 2. Other Cases. To be eligible to serve as appointed counsel in other cases, an attorney shall have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard III. Certification and Assignment Procedures

A. Criminal

...

- 6. Criminal Appeals and Other Postconviction Matters

Training Requirement:

Applicants for certification to accept these cases must complete an 8-hour Appeals and Postconviction Training Program offered by CPCS. Registration information is found in the CPCS Certification Bulletin.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.6 Training

- (a) The appellate defender shall work with the Director of Training and Staff Development to establish a training program for all entry-level appellate attorneys.

- (b) The appellate defender shall ensure that in-house Public Defender training programs include training specifically related to appellate practice.
- (c) The appellate division shall have training for all staff members that enter the office, including secretarial persons. Such training shall include an explanation of the critical role of an appellate defender office.
- (d) The appellate defender shall cooperate and work with trial attorneys to:
 - 1. identify issues which might be raised at trial which reflect new or developing legal trends;
 - 2. properly preserve at trial issues which might be raised on appeal; and
 - 3. stay abreast of significant recent appellate court decisions.
- (e) The Appellate Defender shall work with the Director of Training and Staff Development to support state-wide departmental training programs.

E. Performance

Included herein are standards relating to the following topics :

1. Determining issues to appeal
2. Diligence and accuracy
3. Duty to meet with trial lawyers
4. Duty to meet with client
5. Bail release during appeal
6. Assessing postconviction remedies
7. Miscellaneous duties

1. Determining Issues to Appeal

Commentary. The several standards on determining which issues to include in the appeal cover a broad spectrum of issues. Some of these issues are

- Continued representation
- Meritorious versus non-meritorious issues
- Client versus attorney decisions
- Federal constitutional claims
- Office procedures for determining appeal issues

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.3 Counsel on Appeal

- (a) Appellate Counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.
- (b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.
- (c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.
- (d) Appellate counsel has the ultimate authority to decide which arguments to make on appeal. When appellate counsel decides not to argue all of the issues that his or her client desires to be argued, appellate counsel should inform the client of his or her pro se briefing rights.
- (e) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

N. *Discretionary Review*

1. Each office should have procedures for determining how cases should be reviewed and what standard should be applied when deciding whether a discretionary appeal to either state or federal court should be taken.
2. Review of each case for determining whether it is appropriate for discretionary review shall be based upon articulated standards, and in the event the attorney handling the case determines that such discretionary review shall not be pursued, the case shall be reviewed by another attorney other than the one who initially presented the case. In offices of five or more attorneys, supervisory staff shall be designated for this purpose.
3. Following an unsuccessful first appeal, the defendant shall be informed of the alternatives for discretionary review, and given the opportunity to articulate a desire to seek such review. In the event a competent client indicates that no further appeals shall be pursued, no further action shall be taken by the appellate defender. In the event the client desires to pursue a discretionary appeal or further discretionary review, the ultimate decision of whether such discretionary review shall be pursued is the attorney's, and not the client's.
4. Every appellate defender in a state system shall have the availability of review in the federal courts by habeas corpus. State appellate defenders shall not be restricted to state courts.
5. When a defendant absconds during the pendency of an appeal, no new appeals or petitions should be filed on his/her behalf. Any pending appeal shall be completed, unless it appears that the fact that the defendant has escaped will prejudice the defendant at any new trial. Except when learned through information governed by the attorney-client privilege, the appellate defender shall inform the court having jurisdiction over the case that the defendant has absconded.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

...

11. In any case in which the defendant faces lengthy incarceration, probation, or parole the appellate defender should consider whether there are federal constitutional claims which, in the event that relief is denied in the state appellate courts, would form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, the appellate defender should raise and argue such federal constitutional claims, unless the appellate defender concludes that there is a tactical basis for not including such claims and the client assents.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.

...

9. Counsel should assert claims of error which are supported by facts of record which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.
10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.1 Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

Guideline 1.3 General Duties of Appellate Defense Counsel

- (a) When agreeing to act as counsel or accepting appointment, counsel has an obligation to work with the Department to make sure that counsel has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a

particular matter. If counsel believes that counsel is unable to offer quality representation in a particular case, counsel shall immediately advise counsel's supervisor who shall review the situation to ensure the client receives quality representation.

- (b) Counsel has a continuing duty to keep the client informed of the progress of the case.

2. Diligence and Accuracy

Commentary. Only two standards provide specific performance standards for appellate attorneys. In addition, in defining “diligence,” the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services require the appellate attorney assigned to a case to “immediately” communicate with the client and within three weeks read the entire transcript of the case and confer about issues of law that may be raised. See also *Compendium* Volume II, “Standards for Attorney Performance,” and Gwinnett Judicial Circuit (Georgia) Internal Operating Procedures 98-5, G8.4, “Conduct of Appeal,” paralleling ABA Standard 4-8.4.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.4 Conduct of Appeal

- (a) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts.
- (b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.
- (c) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

- 14. Counsel shall be accurate in referring to the record and the authorities relied on in both written and oral presentations to the court.
- 15. Counsel shall comply with all applicable court rules regarding the timely filing of pleadings and with such other timing requirements as may be specified by the court in a particular case.

3. Duty to Meet with Trial Lawyers

Commentary. The appeals attorney’s responsibility to meet with the trial attorney is the converse of the trial attorney’s duty to confer with the appeals attorney. (See “Performance Standards” in this volume.) In addition to the standards cited here, see the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services, which state that where the trial attorney was provided through the committee, the appellate attorney “shall be entitled to receive reasonable assistance from the client’s trial attorney.” See also *Compendium* Volume II, “Standards for Attorney Performance,” for trial counsel’s responsibility to meet with appellate counsel.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

J. *Contact with Trial Counsel*

1. Each appellate defender office should have a clearly articulated procedure for contact with trial counsel which shall include, at a minimum, notifying trial counsel that the appellate defender unit has been assigned to provide appellate representation to the defendant and should include such other general procedures as appear necessary within that jurisdiction.
2. In any case in which appellate counsel argues that trial counsel provided ineffective representation, appellate counsel should give notice to the trial attorney of such asserted claim.
3. Each office shall develop clearly-articulated internal procedures for screening cases in which claims of ineffectiveness are raised.
4. Appellate defenders working in a mixed office which includes a trial representation unit should always be mindful of the potential conflict in providing representation to an individual represented by that same office at trial. Attorneys should carefully consider claims of ineffectiveness in every case, and immediately take action to remove the case from the public defender’s office when such claim appears to be arguable.
5. The appellate defender should encourage cooperation with trial counsel, including the trial attorney providing assistance on appeal, provided, however, that appellate counsel is primarily responsible for the handling of such a case.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.4 Contact with Trial Counsel

- (a) Appellate counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the clients issues on appeal.
- (b) In any case in which appellate counsel argues that trial counsel provided ineffective representation, appellate counsel should give notice to trial counsel of such asserted claim.
- (c) The Appellate Defender should encourage cooperation between appellate and trial counsel, provided, however, that appellate counsel is primarily responsible for the appeal.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VIII. Case Management and Quality Control

A. Evaluation

...

- 2. Case Management and Quality Control Criteria for Appellate Organizations
 - (a) Appellate lawyers should consult with trial counsel regarding potential appellate or postjudgment issues that may not appear in the record.

4. Duty to Meet with Client

Commentary. See also *Compendium* Volume II, “Standards for Attorney Performance,” for standards on meeting with client and keeping client informed, and standards herein relating to identifying appeal issues and client role in that action. In addition, see the definition of “diligence” in the Massachusetts Committee for Public Counsel Service Guidelines.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

D. Scope of Representation

1. The appellate defender shall have a clearly-articulated policy of discussing the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. Such policies shall include discussing any possible adverse consequences or strategic problems when pursuing such appeal, even when there is an arguable issue to appeal. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of...strategic considerations.

...

I. Client Contact

1. All appellate defender clients shall be personally interviewed by the attorney who will actually be handling the case.
 - a. Each appellate defender unit shall adopt written office policies which require each client to be seen by the attorney actually providing representation in that case. Such policy shall include at least one visit, and such additional visits as are required by the particular facts and circumstances of the case.
 - b. Each appellate defender office shall work out, in advance, procedures with those correctional institutions which will be visited by appellate defender staff to insure the least possible delay and misunderstanding.
 - c. The appellate defender shall work with institutional officials to ensure that each correctional institution makes arrangements for a private interview room for attorney/client visits. An attorney shall not be expected to interview a client in a general visiting room, a room divided by a screen or glass partition, or a room in which a listening device is installed. An attorney shall not be expected to interview a client while the client is wearing handcuffs, leg irons, or chains. The appellate defender should work with the department of corrections and the superintendents of each institution to ensure an advance understanding of the facilities needed for

private interview space.

2. Mail Contact

- a. The appellate defender shall take all necessary steps to ensure that the attorney/client privilege is protected in all correspondence to and from an incarcerated individual. The appellate defender shall work with the prison administration and the attorney general in the state to ensure that the appropriate law in that jurisdiction is followed in relation to the opening and/or censoring of attorney/client mail.
- b. The appellate defender shall inform his or her client of the status of the case at each step in the appellate process, shall explain any delays in the case, and shall provide general information to every client regarding the process and procedures which will be taken in the matter, and the anticipated timeframe for such processing.
- c. The appellate defender shall provide the client with each substantive document filed in the case by both the prosecution and the defense.
- d. The appellate defender shall respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval.

3. Telephone contact

- a. The appellate defender should inquire as to the possibility of gaining telephone contact with clients who are incarcerated when such a brief telephonic contact can further the client's interest.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

...

- 2. The appellate defender shall keep the client informed of all significant developments in the client's case. The appellate defender shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval. The appellate defender shall accept collect telephone calls from an incarcerated client, provided that such calls are of a reasonable number and at reasonable intervals

...

4. After reading the transcript, the appellate defender shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall invite the client to visit the appellate defender at the appellate defender's office, for the purpose of conferring with the client about the issues which may be raised on the client's appeal.

6. If, after the conference described in Standard 4, the client insists on having briefed on his or her appeal a contention which, in the judgment of the appellate defender, cannot be supported by any rational argument, the appellate defender (a) shall inform the client of the client's right with respect to such contention; (b) shall supply the client with a copy of the *Moffett* opinion; and (c) if the client thereafter wishes to invoke his or her rights with respect to such contention, shall comply in all respects with the guidelines of the *Moffett* case....

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

3. Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation
4. Counsel shall fully apprise the defendant of the reasonably foreseeable consequences of pursuing an appeal in the particular case under consideration....

11. When a defendant insists that a particular claim be raised on appeal against the advice of counsel, counsel shall inform the defendant that he or she has the right to present that claim to the appellate court *in propria persona*. Should the defendant choose to proceed in such manner, counsel shall provide procedural advice and such clerical assistance as may be required to conform the defendant's pleadings for acceptability to the court.
12. Assigned counsel shall not take any steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

VIII. Case Management and Quality Control

...

B. Evaluation

...

2. Case Management and Quality Control Criteria for Appellate Organizations

...

- (c) Appellate lawyers should conduct informed consultation with each client regarding the issues to be raised on appeal or through postjudgment motions, as well as the viability of further appeals in the event of an adverse decision by the Appellate Division.

***New Mexico Public Defender Department, Performance Guidelines for
Appellate Criminal Defense Representation***

Guideline 1.3 General Duties of Appellate Defense Counsel

...

- (b) Counsel has a continuing duty to keep the client informed of the progress of the case.

Guideline 2.1 Scope of Appellate Representation

- (a) Appellate counsel shall discuss the merits, strategy and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations.

Guideline 2.3 Client Contact

- (a) Appellate counsel shall communicate with all clients, unless the client cannot be found through reasonable measures. Counsel should aspire to communicate with each client either in person or telephonically.
- (b) Appellate counsel shall inform his or her client of the status of the case at each step in the appellate process, shall explain any delays, and shall provide general information

to every client regarding the process and procedures which will be taken in the matter, and the anticipated timeframe for such processing.

- (c) Appellate counsel shall provide the client with a copy of each substantive document filed in the case by both the prosecution and the defense.
- (d) Appellate counsel shall respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval.
- (e) Upon disposition of the case by the court, appellate counsel shall promptly and accurately inform the client of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.
- (f) The Appellate Defender shall take all necessary steps to ensure that the attorney-client privilege is protected in all correspondence to and from an incarcerated individual.

Guideline 3.5 Continuing Responsibility to Raise Issue of Client's Incompetence.

Appellate counsel should consider the client's competence to make critical appellate decisions whenever counsel has a good faith doubt as to the client's competence to proceed. Counsel may move for an evaluation over the client's objection, and if necessary, counsel may make known to the court those facts which raise the good faith doubt of competence to proceed on a appeal.

5. Policy for Seeking Bail Release During Appeal

Commentary. Performance standards for trial attorneys require local attorneys to seek pretrial release for their clients. A similar obligation applies to appellate attorneys.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

D. Scope of Representation

...

2. The appellate defender shall have a clearly articulated policy regarding seeking the release of defendants on appellate bond which shall include the filing of appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters
- ...
6. If it appears to the appellate defender that...there is a reasonable possibility that an incarcerated client might receive a stay of sentence ..., the appellate defender shall bring in the appropriate court a motion to stay the client's sentence.

***New Mexico Public Defender Department, Performance Guidelines for
Appellate Criminal Defense Representation***

Guideline 2.1 Scope of Appellate Representation

...

- (b) Appellate counsel shall assist trial counsel in filing appropriate motions in the district court seeking the client's release on bond pending appeal. If necessary, appellate counsel shall draft and file such motions.

6. Assessing Postconviction Remedies

Commentary. Failure of an appeal does not necessarily terminate the case. Appeal to a higher court may be available. Postconviction remedies may also be available, including federal constitutional claims or the availability of newly discovered evidence in many (but not all) states.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.5 Postconviction Remedies

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other postconviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a postconviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a postconviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction, and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

...

15. If the decision of the Appeals Court is adverse to the client, the appellate defender shall promptly inform the client of the client's right to make application to the Supreme Judicial Court for further appellate review of the case; and, if the client requests that such application be made, the appellate defender shall prepare and file on the client's behalf an application to the Supreme Judicial Court for further appellate review of the case within the time prescribed.... When the Supreme Judicial Court has ruled on the application for further appellate review, the appellate defender shall promptly inform the client by letter of the ruling.
16. In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the chief Counsel or his/her designee, to seek relief from the

client's conviction, when in the best judgment of the appellate defender there exists a reasonable likelihood that such relief may be obtained by petition for writ of certiorari to the United States Supreme Court, in the federal courts on petition for writ of habeas corpus, or in state court by a motion for new trial or other postconviction relief.

17. In any case in which federal habeas corpus relief is potentially available but in which the appellate defender does not seek or obtain approval to continue representation, the appellate defender shall inform the client of the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court or the filing of a motion for new trial (as to any federal constitutional issues not already exhausted) in the state trial court.
18. Following the completion of any unsuccessful direct appeal from a conviction, the appellate defender shall inform the client of the opportunity to file within sixty (60) days a motion to revise and revoke the sentence pursuant to Mass. R. Crim. Pro. 29. Upon request of the client, the appellate defender shall either file and litigate said motion or shall provide assistance to the client so that the client may file such motion *pro se*.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.1 Scope of Appellate Representation

...

- (i) The Appellate Defender shall have the discretion to assist non-clients in seeking appropriate postconviction remedies, including seeking counsel on appeal, obtaining the necessary forms for filing motions in state and federal courts, and explaining to inmates the law as it relates to the facts of each case.

7. Miscellaneous Duties

Commentary. The miscellaneous standards address the timing of appellate representation, other representational duties, and challenges to effectiveness of trial counsel.

Timing of Appellate Representation

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

...

E. Timing of Postconviction Representation

1. The appellate defender shall cooperate with the trial courts, appellate courts, trial public defenders and private attorneys to ensure that all appeals desired by criminal defendants are timely pursued. The appellate defender should further directly assist defendants in filing the necessary jurisdictional documents to perfect appeals in a timely manner.
2. The appellate defender shall cooperate with trial courts, appellate courts, trial defenders, and private attorneys to ensure that no defendant is without legal representation between trial and appeal, while awaiting the assignment of counsel by the court. Such cooperation might include the development of rules or procedures for ensuring that no hiatus in counsel exists, and working with the appropriate courts in developing procedures such as to ensure continuity of representation.
3. The appellate defender should take all steps necessary to reduce the delays and time necessary for the processing of appeals which adversely affect the client. Such efforts include the development of appropriate appellate court rules which minimize the unnecessary procedures for perfection and prosecution of an appeal.
4. Cases in which the defendant is incarcerated only on the basis of the conviction under appeal shall be handled in a priority manner.
5. The public defender shall cooperate with the courts and court reporters to ensure the prompt completion of the appropriate record on appeal. The public defender shall not determine the merit of any case without the careful review of such records.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.2 Timing of Postconviction Representation

- (a) Appellate counsel shall cooperate with trial courts, appellate courts, trial public defenders and private attorneys to ensure that all appeals desired by criminal defendants are timely pursued.
- (b) Appellate counsel shall cooperate with trial courts, appellate courts, trial public defenders and private attorneys to ensure that no defendant is without legal representation between trial and appeal.
- (c) Appellate counsel shall cooperate the courts, court reporters and tape monitors to ensure the prompt completion of the appropriate record on appeal.
- (d) The appellate defender should take all steps necessary to reduce the delays and time necessary for the processing of appeals which adversely affect the client.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

...

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

- 1. Immediately upon receipt of the assignment of a direct appeal or new trial motion to an appellate defender, the appellate defender shall: (a) file an appearance in the appropriate court and (b) communicate with the client to inform the client of the assignment. Immediately upon receipt of the assignment of a screening concerning a motion to withdraw guilty plea, the appellate defender shall communicate with the client to inform the client of the assignment, but should only file an appearance after the appellate defender has conducted a review to determine that there is a meritorious basis for the motion. Upon receipt of the assignment of a screening other than a motion to withdraw guilty plea, the appellate defender may, but is not required to, contact the defendant and should file an appearance in court only after assignment of counsel has been approved by the chief counsel or his/her designee.

...

- 3. Within three weeks after the receipt of the transcript by an appellate defender, the appellate defender shall read the entire transcript of the case.

If the appellate defender is still subject to CPCS' mentor requirements, as determined by the Director of Legal Resources and Support Services, the appellate defender shall immediately provide the mentor with a copy of the transcript and shall confer with the mentor as to the issues to be raised in the appeal. The appellate defender, whether still subject to mentor requirements or not, may at any time also confer with the Supervising Appellate Counsel, Private Counsel Division.

...

14. The appellate defender shall promptly inform the client by letter of the decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision.

Other Representational Duties

NLADA Standards and Evaluation Design for Appellate Defender Offices

I. Criteria for Assuring the *Quality* of Legal Representation

...

D. *Scope of Representation*

...

3. The appellate defender shall have a clearly-articulated policy regarding the filing of motions in the appellate court which should include providing the client with the most complete and effective representation in the appellate court through the appropriate motion practice.
4. The appellate defender may provide representation in interlocutory (prejudgment) appeals, and shall make the availability of the office known to attorneys providing representation to criminal defendants at trial.
5. The appellate defender shall be assigned appeals taken by the prosecution in the same manner in which appeals are assigned when taken by the defendant.

...

11. The appellate defender shall file *amicus curiae* briefs in state appellate courts when issues are raised in cases litigated by other counsel when such cases will have a significant impact on a large number of defender clients and the briefs filed by counsel can be effectively augmented by such *amicus* briefs; in all other cases the appellate defender shall have the discretion to file *amicus* briefs.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

5. In any appeal of right, counsel shall comply with the applicable court rules regarding the timely and proper filing of claims of appeal and shall take any other steps which may be necessary to protect the defendant's right to review.
6. Counsel shall promptly request and review all transcripts and lower court records.
- ...
13. Counsel should seek to utilize publicly funded support services designed to enhance their capacity to present the law and facts to the extent that such services are available and may significantly improve the representation they can provide.
- ...
17. Counsel shall keep the defendant apprised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.
18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.
19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.1 Scope of Appellate Representation

- ...
- (c) Appellate counsel shall provide the client with the most complete and effective representation through an appropriate motions practice.
- (d) The appellate division may provide representation in interlocutory appeals and extraordinary writs, and shall make the availability of the division known to attorneys providing representation to criminal defendants at trial.
- (e) The appellate division shall be assigned appeals taken by the prosecution in the same manner in which appeals are assigned when taken by the defendant.
- (f) The Appellate Defender shall have authority to seek discretionary review in any state appellate court.

- (g) The Appellate Defender, with the approval of the Chief Public Defender, shall have the discretion to seek review of any state court conviction in the United States Supreme Court by writ of certiorari.
- (h) The Appellate Defender shall have the discretion to assist prison inmates and others seeking redress of institutional grievances.
- ...
- (j) The Appellate Defender shall have the discretion to file *amicus curiae* briefs in state appellate courts when issues are raised in cases litigated by other counsel, when such cases may have a significant impact on the appellate division's clients and the briefs filed by counsel can be effectively augmented by such *amicus* briefs.

Challenges to the Effectiveness of Counsel

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.6. Challenges to the Effectiveness of Counsel

- (a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.
- (b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.
- (c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.
- (d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.