

# From My Vantage Point

By Jonathan E. Gradess\*

At the Chief Defender Convening held on July 25, 2004 in conjunction with NYSDA's Annual Meeting and Conference, the Chiefs adopted standards for systems and lawyers providing public defense and other mandated representation, and they voted to support creation of an independent statewide public defense commission. In doing so they revived a NYSDA effort that had been sidelined for far too long, and, hopefully, set the stage for a real reform of the state's public defense system.

## Standards

The new "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State" draw on existing national and other standards. They are tailored to New York's public defense scheme and set out requirements covering: Independence (of defense services), Funding, Workload, Scope of Representation, Training and Supervision, and Eligibility (of Clients). Also addressing Duties of Counsel (in both criminal and family court representation), the standards provide a concise set of best practices. A few hours after the Chiefs adopted the standards, the NYSDA Board of Directors followed suit. The vote in both bodies was unanimous.

Created with input from large urban defender programs and chiefs in rural counties, from county public defender offices, legal aid societies, and assigned counsel programs, and from Chiefs across the political spectrum with myriad views on how best to conduct and improve mandated legal services, these standards are not aspirational. They contain what those in the best position to know agree is *required* of public defense programs and practitioners. They come into existence at a propitious moment, as the State Bar and the Unified Court System are examining indigent defense, the legislative and executive branches prepare to monitor implementation of last year's fee increase, the NYSDA Client Advisory Board continues to develop its own standards, and headlines about wrongful convictions stir the public's concern about how justice is—or is not—being done. The work of the Chiefs, ratified by the NYSDA Board, should inform all these ongoing reform efforts.

These timely standards did not spring suddenly into existence. Their development could be dated to December 2000, when the Chiefs agreed to participate in a project to create standards for the provision of public defense. That decision followed a discussion on public defense reform in which Chiefs and representatives from the League of

Women Voters of New York State and the New York State Association of Criminal Defense Lawyers joined. Standards were an agenda item at many Chief Convenings thereafter, as one year, then another, rolled by.

Efforts to create standards for New York State public defense could also be said to have begun much earlier than the year 2000. In 1983, NYSDA's Board of Directors set up a committee to work toward adoption of NYSDA standards for public defense. Norman Shapiro chaired that Standards and Goals Committee. Thereafter, the Association sought comment on those proposed standards by publishing them serially in *The Defender*, NYSDA's magazine. As life would have it, way led on to way. The Model Public Defense Case and System were published by NYSDA and used in a series of technical assistance visits throughout the state. But standards development for a time stalled.

Before that effort and in the years since then, standards have proliferated nationally, all reflecting basic principles including the importance of independence, sufficient funding, and proper training. Many deal with specific types of representation (such as the ABA's newly revised "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases"). In addition to such national benchmarks, local and state standards have appeared, reflecting the different circumstances in which public defense services are provided.

The newly adopted standards now take their place among those other standards. We have already distributed them to public defense offices across the state, and will soon embark on a wider distribution.

Two decades after we began, we finally have New York guidelines to help us explain to funders and judges that public defense clients and their lawyers should not have to make-do with using the same expert that the prosecutor or DSS uses, should not have to converse for the first and only time about the case in a whisper before the bench or in a lockup with many other people listening in, *should* have resources in parity with the agency seeking to deprive a person of liberty or rights.

These standards have been a long time coming. They belong to everyone who represents clients entitled to mandated legal representation, and to those clients. Use them. Use them to get what you need. Let us know how we can help you use them. Let us know how you have used them. Let adoption of the standards lead a long-needed improvement of public representation in New York State.

## Independent Public Defense Commission

In addition to adopting standards, the Chiefs voted in July to support the creation of a statewide independent public defense commission. Like the standards, this has been, as readers of this column well know, a long time coming.

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\* The REPORT periodically features a column by the Association's Executive Director on major issues concerning public defense in New York State.

**Fourth Department** *continued*

F3d 218, 220 (4th Cir. 1994). New York's harmless analysis rule requires a determination of whether a defendant improperly advised of the consequences of the plea would not have entered a guilty plea if properly advised. *People v Mason*, 2 AD3d 272, 272-273. The federal constitutional standard is whether a reasonable probability exists that but for counsel's errors the defendant would have insisted on going to trial rather than plead guilty. *People v McDonald*, 1 NY3d 109, 115. The state constitutional standard is whether the defendant received meaningful representation. See *People v Ford*, 86 NY2d 397, 404. The court below has discretion to deny the motion without a hearing under CPL 440.30(4) if, for example, allegations essential to the motion are contradicted by the record and there is no reasonable possibility the allegations are true. See *People v Mills*, 194 AD2d 1016 *lv den* 82 NY2d 899. Order reversed, matter remitted for determination of the motion under the proper standards. (County Ct, Cayuga Co [Corning, JJ]) ☞

### **Pro Bono Counsel Needed for Death Row Prisoners**

Nearly 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals, and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The **ABA Death Penalty Representation Project** seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Robin M. Maher, Director, ABA Death Penalty Representation Project, 727 15th St. NW, 9th Floor, Washington, DC 20005; e-mail: [maherr@staff.abanet.org](mailto:maherr@staff.abanet.org); 202-662-1738. For more information, also see the Project's web site: <http://www.probono.net> (Death Penalty Practice Area).

**From My Vantage Point** (cont. from p. 7)

Now able to speak with one voice for reform, lawyers who provide mandated legal representation in New York can join the client community and others who care about justice in pushing for true reform.

**Stay Tuned**

I am delighted to report these two steps toward justice for our clients. I will be even more ecstatic to announce in the future that a truly independent, statewide public defense commission has successfully enforced statewide standards for mandated legal services. Stay tuned. ☞

**Book Review** (cont. from p. 8)

family of humankind. . . . The subject of prisons and corrections may tempt some of you to tune out. You may think, 'Well I'm not a criminal lawyer.' . . . In my submission you have the duty to stay tuned in. The subject is the responsibility of every member of our profession and every citizen. . . . This is your justice system; these are your prisons.

With an estimated two million now incarcerated in US prisons and jails, I would add it is more than a responsibility, it is a necessity. Brutality, rage, vengeance, inhuman living conditions, wherever they occur, eventually color and infect us all. ☞

**Immigration Practice Tips** (cont. from p. 10)

down a plea agreement had a reliance interest in the potential availability of § 212(c) relief."

**Updated Removal Defense Checklist in Criminal Charge Cases Available**

The IDP's valuable resource, "Removal Defense Checklist in Criminal Charge Cases," was recently updated to reflect legal developments through July 1, 2004. Find it on the NYSDA web site, [www.nysda.org](http://www.nysda.org) and look under NYSDA Resources for the Immigrant Defense Project page, where the checklist and other materials can also be found. ☞