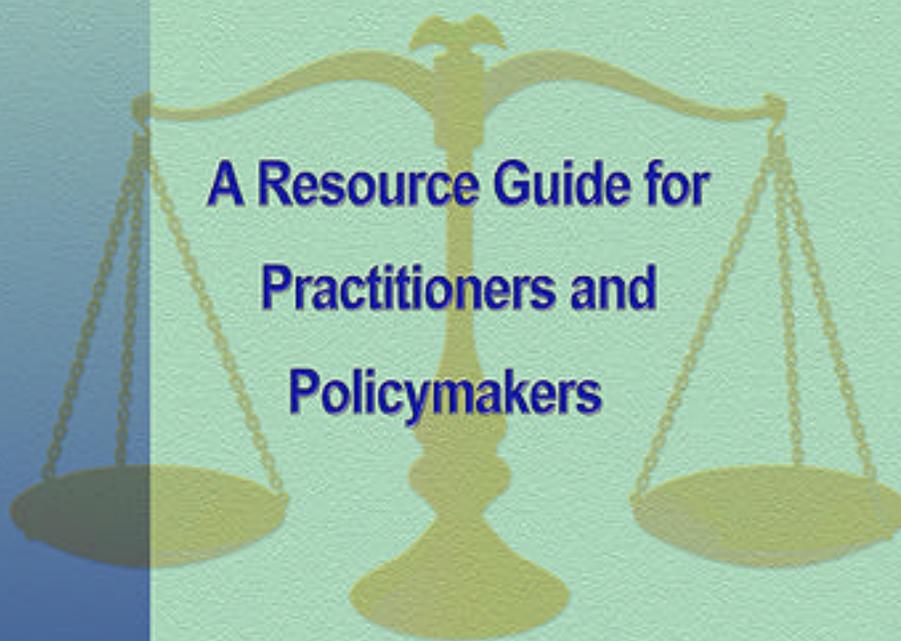




Compendium of Standards for Indigent Defense Systems



A Resource Guide for
Practitioners and
Policymakers

Volume II
Standards for
Attorney Performance

**December
2000**

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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 said, “I believe this effort is essential if our nation is to fulfill our obligation under *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*.

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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 services (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, *Performance Guidelines for Criminal Defense Representation*, 1997

State and Local

Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, 1999

Kansas Board of Indigents' Defense Services, *Permanent Administrative Regulations*, 1999

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

New Mexico Public Defender Department, *Performance Guidelines for Criminal Defense Representation*, 1998

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

Oregon State Bar, *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases*, 1996

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

Key Elements

Category	Standard	National Standards		State and Local Standards						
		ABA Defense Function	NLADA Performance Guidelines	CT	KS	MA	NM	New York City	OR	WA
A. Function of Standards										
	Use of standards	✓				✓				
	Functions of defense counsel	✓	✓	✓		✓	✓			
B. Attorney Qualifications										
	Adequate training and experience		✓	✓		✓	✓		✓	
	Adequate time and resources	✓	✓			✓	✓		✓	
C. Attorney Overall Responsibilities										
	Acting diligently and promptly	✓		✓		✓				
	Acting ethically	✓	✓	✓				✓	✓	✓
	Refraining from prejudicial out-of-court statements	✓								
D. Lawyer-Client Relationship										
	Meeting with client as soon as practicable	✓				✓	✓		✓	
	Preparing for initial interview		✓						✓	
	Orienting client and explaining role of counsel	✓	✓	✓		✓	✓		✓	
	Obtaining all facts from client	✓	✓	✓		✓	✓		✓	
	Advising client about case and his or her actions	✓								
	Overcoming language and other communication barriers		✓			✓			✓	
	Protecting confidentiality of communication	✓		✓						
	Keeping client informed of case progress	✓	✓	✓					✓	
	Specifying client versus attorney decisions	✓	✓	✓		✓	✓		✓	
	Identifying and resolving conflicts of interest	✓	✓	✓	✓	✓			✓	

Category	Standard	National Standards		State and Local Standards						
		ABA Defense Function	NLADA Performance Guidelines	CT	KS	MA	NM	New York City	OR	WA
E. Initial Case Actions										
	Pretrial release and other prompt actions	✓	✓			✓	✓		✓	
	Other client needs		✓						✓	
	Non-testimonial evidence		✓				✓			
F. Investigation and Preparation										
	Duty to investigate	✓	✓	✓		✓	✓		✓	
	Methods of and limits on interviewing witnesses	✓	✓						✓	
	Use of experts	✓	✓	✓					✓	
	Preparation and submission of discovery requests		✓	✓		✓	✓		✓	
	Compliance with proper discovery requests	✓	✓			✓				
	Duties regarding physical evidence	✓	✓							
	Development of a theory of the case		✓	✓			✓		✓	
	Pretrial motions		✓	✓		✓	✓		✓	
G. Preliminary Hearings										
	Arraignment duties		✓			✓	✓		✓	
	Preliminary hearing duties		✓			✓	✓			
H. Disposition Without Trial										
	Investigating plea alternative	✓				✓				
	Informing client of plea negotiations and offers	✓	✓	✓		✓	✓		✓	
	Preparing client for entry of plea		✓	✓		✓	✓		✓	

Category	Standard	National Standards		State and Local Standards						
		ABA Defense Function	NLADA Performance Guidelines	CT	KS	MA	NM	New York City	OR	WA
I. Trial										
	Trial preparation duties		✓			✓	✓		✓	
	Preparation for jury selection	✓	✓	✓		✓	✓		✓	
	Overall defense trial strategy		✓			✓			✓	
	Opening statement	✓	✓	✓		✓	✓		✓	
	Confronting the prosecution's case	✓	✓	✓		✓	✓		✓	
	Stipulations		✓	✓		✓			✓	
	Presentation of the defense case	✓	✓	✓		✓	✓		✓	
	Closing argument	✓	✓	✓		✓	✓		✓	
	Jury instruction		✓			✓	✓		✓	
	Protection of defendant's post-trial rights	✓	✓	✓	✓	✓			✓	
	Related issues	✓								
J. After Conviction										
	Sentencing duties	✓	✓	✓		✓	✓		✓	
	Pre-sentence report/sentencing memo		✓			✓	✓		✓	
	Motion for new trial		✓				✓		✓	
	Motion for bail pending appeal and related motions		✓				✓		✓	
	Explanation to client of right of appeal	✓	✓	✓			✓		✓	
	Filing of appeal			✓		✓				
	Cooperation with appellate counsel		✓	✓		✓				
	Related issues		✓				✓		✓	

A. Function of Standards

The standards in this section address the following topics:

1. Use of standards
2. Functions of defense counsel

1. Use of Standards

Commentary. The two standards below state that their provisions are intended to be used in some instances but not others.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

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

IV. Performance Standards and Complaint Procedures

These guidelines are intended for use by the committee for Public Counsel Services in evaluating, supervising and training counsel assigned. Counsel assigned...must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

2. Functions of Defense Counsel

Commentary. The standards below set the parameters for attorney performance standards by defining the overall objectives that counsel should aspire to. The specific standards that follow are efforts to operationalize the goals set forth here. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principles of Representation 1.1. Note: in the main, the Missouri guidelines are redundant with other standards, even using their exact language. Compare, for example, Missouri Guideline 1.3, Education, Training, and Experience of Public Defenders, to Massachusetts Assigned Counsel Manual Policy IV. A. 1.2, Performance Standards, General Principles of Representation: Education, Training, and Experience of Defense Counsel. Because of such similarities, this volume references but does not reprint the Missouri guidelines.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2 The Function of Defense Counsel

- (a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.
- (b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.
- (c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.
- (d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.
- (e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.
- (f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

- (g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
- (h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

Standard 4-1.6 Trial Lawyer's Duty to Administration of Justice

- (a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by lawyers. Lawyers should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.
- (b) All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.
- (c) Such qualified lawyers should not assert or announce a general unwillingness to appear in criminal cases. Law firms should encourage partners and associates to become qualified and to appear in criminal cases.
- (d) Such qualified lawyers should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law, representing the accused is likely to result in an unreasonable financial burden on the lawyer, or the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.1 Role of Defense Counsel

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

- (a) All counsel should abide by the policies adopted by the Connecticut Public Defender Services commission and the Chief Public Defender in regard to the representation of a client.
- (b) Counsel should zealously represent and advocate for each client and render effective assistance of counsel.
- (c) Counsel should adhere to the Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons.
- (d) Counsel should act with reasonable diligence and promptness in representing a client.

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

1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with all the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

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

Guideline 1.1 Role of Defense Counsel

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

B. Attorney Qualifications

Included here are standards that require the following

1. Adequate training and experience
2. Adequate time and resources

See also, *Compendium* Volume I, “Standards for the Administration of Defense Services,” and Volume III, “Standards for Capital Case Representation,” for similar provisions.

1. Adequate Training and Experience

Commentary. Experience and training as an advocate in criminal defense is a prerequisite for performing the responsibilities of a defense attorney. While the agency that administers the defense function has obvious responsibilities for ensuring appropriate credentials and training, the individual attorney is also responsible for attending relevant training and accepting only those appointments for which he or she is qualified. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principles of Representation 1.3.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.2 Education, Training and Experience of Defense Counsel

- a. To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practice of the specific judge before whom a case is pending.
- b. Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 2.1. Training

- (a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.
- (b) Counsel has a continuing obligation to stay abreast of changes and developments in criminal law and criminal procedure.
- (c) Counsel has a continuing obligation to continue his/her legal training, professional development and education through the weekly review of the Connecticut Law Journal and regular attendance at public defender, regional or national training programs and seminars which are offered.

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

1.2 Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of prosecutors and other court personnel.

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

Guideline 1.2 Education, Training, and Experience of Defense Counsel

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the practices of the specific judge before whom a case is pending.
- (b) When handling a criminal matter, 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.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

...

- 3. acquire and maintain appropriate experience, skills and training

Standard 1.1—Prerequisites for Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

...

Implementation

1. Counsel should be proficient in applicable substantive and procedural law and stay current with changes in constitutional, statutory, evidentiary law and local or statewide court rules.
2. Counsel should have appropriate experience, skills and training.
 - a. Counsel should obtain formal and informal training in the relevant areas of practice and should consult with others in the field, including non-attorneys.
 - b. Less experienced counsel should observe and when possible serve as co-counsel to more experienced attorneys. More experienced counsel should mentor less experienced attorneys.

Standard 2.1—Prerequisites for Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

...

Implementation

1. In addition to meeting the requirements for experience and training in Standard 1.1, *supra*, counsel should have at least fifteen (15) hours of mandatory continuing legal education training each year, at least ten (10) of which should relate to the practice of criminal defense or juvenile law.
- ...
3. Counsel should visit at least two correctional, juvenile or treatment facilities .

2. Adequate Time and Resources

Commentary. The companion to the administrative responsibility to set and monitor caseload and workload standards is the parallel responsibility of the individual attorney to accept only cases that he or she can appropriately handle with existing time and resources, and to devote the necessary resources to the defense effort.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.3 Delays; Punctuality; Workload

...

- (e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3 General Duties of Defense Counsel

- a. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that they have available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

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

1.2 General Duties of Defense Counsel

...

- (c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

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

Guideline 1.3 General Duties of 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 available 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 that the client receives quality representation. If counsel withdraws due to a conflict, counsel shall immediately inform the client, and shall arrange for and cooperate with new counsel.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must

...

4. devote adequate time and resources to the case

Standard 1.1 Prerequisites for Representation

...

3. Counsel should have adequate time and resources
 - a. Counsel should not accept caseloads that by reason of excessive size and/or complexity interfere with the provision of quality representation.
 - b. Counsel should have access to sufficient support services and physical resources to allow for quality representation.

C. Attorney Overall Responsibilities

Included herein are general standards for attorneys regarding the following topics:

1. Acting diligently and promptly
2. Acting ethically
3. Refraining from making prejudicial out-of-court statements

1. Acting Diligently and Promptly

Commentary. All attorneys are expected to act diligently and promptly at all times in all types of cases. These principles are especially significant in criminal defense, where failure to adhere to these principles can affect the client's liberty.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.3 Delays; Punctuality; Workload

- (a) Defense counsel should act with reasonable diligence and promptness in representing a client.
- (b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.
- (c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
- (e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

...

- (c) Counsel should act with reasonable diligence and promptness in representing a client.

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

1.3 General Duties of Defense Counsel

...

- (m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize the inconvenience to others.

2. Acting Ethically

Commentary. All attorneys are expected to act ethically at all times. The standards below are specific to criminal defense attorneys and include directives relating to some common problem areas. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principles of Representation 1.2.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2 The Functions of the Defense Counsel

...

- (c) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.
- (d) Defense counsel should not intentionally misrepresent matters of fact or law to the court.
- (e) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
- (f) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

Standard 4-1.3 Delays; Punctuality, and Workload

...

- (c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

Standard 4-6.2 Plea Discussions

...

- (c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

- (d) Defense counsel should not seek concessions favorable to one client by an agreement which is detrimental to the legitimate interests of a client in another case.
- (e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.1 Role of Defense Counsel

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

...

- (c) Counsel should adhere to the Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons.

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

XI. Compliance with Standards of Professional Responsibility

- A. Performance Standard: Quality representation requires that defense organizations and the lawyers they employ adhere to all standards of professional responsibility.
- B. Evaluation Criteria

- 1. Does the defense organization maintain adequate procedures and sufficient data-processing capacity for identifying and avoiding conflicts of interest?

Specific Guideline:

No defense organization should permit its lawyers to represent co-defendants in the same case or otherwise accept appointment to any cases which potentially place the organization or any of its lawyers in danger of violating standards of professional responsibility.

2. Does the defense organization maintain adequate procedures for protecting attorney–client confidences and work product?
3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:
 - (a) each lawyer’s workload remains within the limitations established in Section V of these General Requirements, adjusted in proportion to the amount of legal work unrelated to the contract a particular lawyer accepts?
 - (b) legal work performed outside the contract does not adversely affect the quality of representation provided to indigent defendants under the aegis of the defense organization?
 - (c) no conflicts of interest exist between each lawyer’s legal work unrelated to the contract and interests of any client assigned to the defense organization?

Specific Guidelines:

The defense organization must ensure that its lawyers devote at least 80% of their time to work assigned under the defense organization’s contract with the City.

No lawyer employed by a defense organization may accept a non-contract representation which the defense organization, or any of its other lawyers, would be barred from accepting under these General Requirements, or the code of Professional Responsibility.

The defense organization must obtain and maintain sufficient information—including at least the case caption, the names of parties, interested parties and relevant witnesses, the general nature of the case, its procedural history and the names of other participating counsel—with respect to each case in which any of the defense organization’s lawyers proposes to perform any legal work outside the contract to enable it to assess compliance with these General Requirements.

4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations’ clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?
5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?
6. Does the defense organization have adequate procedures to ensure that its lawyers do not otherwise abuse the attorney–client relationship to create fee-generating opportunities?
7. Does the defense organization have adequate procedures for receiving and responding to client complaints?
8. Does the defense organization maintain adequate procedures for identifying and resolving ethical issues?

9. Does the defense organization maintain adequate malpractice insurance coverage?

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

...

2. To provide quality representation and diligent advocacy, counsel must preserve, protect and promote the client's rights and interests.

Washington Defender Association, Standards for Public Defense Services

Standard Two: Duties and Responsibilities of Counsel

The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

3. Refraining from Making Prejudicial Out-of-Court Statements

Commentary. A special ethical problem area is the use of out-of-court statements to influence judges and juries. Parallel provisions prohibit similar practices by prosecutors. See ABA Prosecution Function Standards, Standard 3-1.4. The Missouri Guidelines for Representation provide an additional standard requiring counsel to be prompt for all court appearances and appointments and take steps to inform all parties when delay is unavoidable (Guideline 1.4(j)).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.4 Public Statements

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

D. Lawyer–Client Relationship

The first responsibilities assumed by defense counsel in a criminal matter relate to the establishment of the lawyer–client relationship. The standards relating to those duties address the following matters:

1. Meeting with client as soon as practicable
2. Preparing for initial interview
3. Orienting client and explaining role of counsel
4. Obtaining all facts from client
5. Advising client about case and his or her actions
6. Overcoming language and other barriers to communication
7. Protecting confidentiality of communication
8. Keeping client informed of case progress
9. Specifying client versus attorney decisions
10. Identifying and resolving conflicts of interest

1. Meeting with Client as Soon as Practicable

Commentary. The client is usually the lawyer's primary source of information for an effective defense. Early contact with the client can help speed disposition of the case, hasten the assessment and placement of clients with urgent treatment needs, and reduce unwarranted pretrial detention. It is a key safeguard for clients who are innocent. These standards must be read in conjunction with the standards on the content of the initial meeting.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.2 Interviewing the Client

- (a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
- (b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

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

1.3 General Duties of Defense Counsel

...

- (b) Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case.

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

Guideline 1.3 General Duties of Defense Counsel

...

- (b) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Counsel shall seek a supervisor's opinion on any potential conflicts.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.2 General Duties and Responsibilities of Counsel to Clients; Avoiding Conflict of Interests

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable and maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Rules of Professional Responsibility.

Implementation

1. As soon as practicable after being retained or appointed, counsel should contact the client and conduct an initial client interview.

Standard 1.4 Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation in the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings.

Implementation

1. To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.
2. Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. In instances where the client is detained or in custody, counsel should make every effort to conduct an initial interview within 48 hours of acceptance of a retainer or court appointment.

2. Preparing for Initial Interview

Commentary. Preparation is the key to attorney success. This preparation begins even before the initial meeting with the client. The two standards here detail the type of preparatory work expected to maximize the usefulness of meeting with the client.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

a. Preparation:

Prior to conducting the initial interview the attorney, should, where possible:

1. be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
2. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;
3. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;
5. be familiar with any procedures available for reviewing the trial judge's setting of bail.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.4—Initial Client Interview

Implementation

1. To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.

3. Orienting Client and Explaining Role of Counsel

Commentary. These several standards detail the specifics of the initial meeting between the attorney and the client. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 1.4(h). The Missouri Guidelines further recommend that counsel prepare a memorandum detailing the initial meeting discussion and provide client with a copy (Guideline 2.1(2)).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.1 Establishment of Relationship

- (a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

...

b. *The Interview:*

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case.

...

3. Information to be provided the client includes, but is not limited to:
 - A. an explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - B. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
 - C. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
 - D. the charges and the potential penalties;

- E. a general procedural overview of the progression of the case, where possible.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.2. Duty to Keep Client Informed

...

- (c) Counsel should inform and explain to the client that he/she has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify and, to not be compelled to incriminate him/herself.
- (d) Counsel should explain to the client the court procedures.
- (e) Counsel should explain the attorney–client privilege to the client and explain to the client that he/she is not required to speak to anyone regarding the case without counsel present.

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

Guideline 1.3

...

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

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.4 Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel’s representation and the case proceedings.

Implementation

...

3. At the initial interview, counsel should obtain the following types of information from the client:

- a. the facts surrounding the allegations against or affecting the client;
 - b. any possible witnesses who should be located;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;
 - d. any evidence that should be preserved; and
 - e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.
4. Counsel should convey the following types of information to the client:
- a. the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;
 - b. the role of counsel and the defense function;
 - c. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
 - d. a general procedural overview of the likely progression of the case;
 - e. the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;
 - f. an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;
 - g. how and when counsel can be reached;
 - h. when counsel will see the client next;
 - i. realistic answers, where possible, to the client's most urgent questions; and
 - j. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers.

4. Obtaining All Facts from Client

Commentary. It is critical for defense counsel to obtain all the relevant facts about the case, including both exculpatory and seemingly inculpatory information. Only when all the facts are obtained from the client can a defense strategy be developed.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.2 Interviewing the Client

- (a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
- (b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

a. *The Interview:*

...

- 3. Information to be provided the client includes, but is not limited to:
 - A. an explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - B. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
 - C. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
 - D. the charges and the potential penalties;
 - E. a general procedural overview of the progression of the case, where possible;

...

c. *Supplemental Information*

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

1. the facts surrounding the charges against the client;
2. any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;
3. any possible witnesses who should be located;
4. any evidence that should be preserved;
5. where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.1. Disposition of the Case

- (a) Counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
- (b) Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his/her pleas.
- (c) Counsel should caution the client to avoid communication about the case with witnesses or other individuals, except with the approval of counsel.

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

2.2. Initial Interview and Preparation for Bail Hearing

...

- (e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

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

Guideline 2.2 Initial Interview

(a) *Preparation:*

Prior to conducting the initial interview the attorney, should, where possible:

- (1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;
- (2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by pretrial service agencies concerning pretrial release, and law enforcement reports that might be available;
- (3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
- (4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;
- (5) be familiar with any procedures available for reviewing the judge's setting of bail.

(b) *The Interview:*

- (1) The purpose of the initial interview is both to inform the client of the charges/penalties and to acquire information from the client concerning pretrial release. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.
- (2) Information that may be acquired includes, but is not limited to:
 - (A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;
 - (B) the client's physical and mental health, educational, and armed services records;
 - (C) the client's immediate medical needs;
 - (D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;
 - (E) the ability of the client to meet any financial conditions of release;

- (F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals.
- (3) Information that may be provided to the client includes, but is not limited to:
 - (A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - (B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
 - (C) an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
 - (D) the charges and the potential penalties;
 - (E) a general procedural overview of the progression of the case, where possible.

(c) *Additional Information:*

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

- (1) the facts surrounding the charges against the client;
- (2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client’s rights;
- (3) any possible witnesses who should be located;
- (4) any evidence that should be preserved;
- (5) where appropriate, evidence of the client’s competence to stand trial and/or mental state at the time of the offense.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.3 Role of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel’s judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation.
2. Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.
3. Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

Standard 1.4 Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings.

Implementation

...

3. At the initial interview, counsel should obtain the following types of information from the client:
 - a. the facts surrounding the allegations against or affecting the client;
 - b. any possible witnesses who should be located;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;
 - d. any evidence that should be preserved; and
 - e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.

5. Advising Client about Case and His or Her Actions

Commentary. Once the attorney has gained all the information needed for the defense, the client must be informed of what he or she must do (or not do), what future steps will be taken, and the prospects for a successful defense.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4.3-7 Advice and Service on Anticipated Unlawful Conduct

- (a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.
- (b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.
- (c) Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.
- (d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except the defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

Standard 4-5.1 Advising the Accused

- (a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
- (b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.
- (c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

6. Overcoming Language and Other Barriers to Communication

Commentary. In this nation of immigrants, it is not uncommon that the client may need a translator to help in communicating with the attorney. Handicapped defendants, such as those who are deaf, may also need assistance. The standards in this section place responsibility for ensuring appropriate communication between attorney and client on the defense attorney. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 1.4(i).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

...

b. The Interview:

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

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

1.3 General Duties of Defense Counsel

...

- (1) Where counsel is unable to communicate with the client because of either language differences or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance including an interpreter for pre-trial preparation, interviews, and investigation, as well as in-court proceedings.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

...

8. make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.

Standard 1.2 General Duties and Responsibilities of Counsel to Clients; Avoiding Conflict of Interests

...

2. Counsel should ensure that barriers to communication with the client, such as differences in language or literacy, are overcome. Counsel should make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier, including assuring that counsel has sufficient additional time and resources to make those accommodations.

7. Protecting Confidentiality of Communication

Commentary. Attorney–client privilege is critical to the attorney–client relationship. Without the trust guarded by the privilege, the client may not be willing to divulge all the facts needed by the defense attorney. Unfortunately, the physical surroundings in which the attorney–client conversation occurs may jeopardize the confidentiality required by the privilege. These standards place responsibility for ensuring confidentiality on the defense attorney.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.1 Establishment of Relationship

- (a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel’s obligation of confidentiality makes privileged the accused’s disclosures.
- (b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.
- (c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.3. Protecting Confidentiality

Counsel should ensure that confidential communications between defense counsel and the client are conducted in privacy, including reasonable efforts to compel court and other officials to make necessary accommodations for private discussions between counsel and clients in courthouses, lockups, jails, prisons, detention centers, and other places where clients must confer with counsel.

8. Keeping Client Informed of Case Progress

Commentary. The attorney–client relationship, once begun, continues until the case is finished, the client terminates the relationship, or the court authorizes withdrawal. During the life of the relationship, the attorney is responsible for continued communication about case development with the client. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 1.4(d).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.8 Duty to Keep Client Informed

- (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
- (b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3 General Duties of Defense Counsel

...

- c. Counsel has the obligation to keep the client informed of the progress of the case, where it is possible to do so.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.2. Duty to Keep Client Informed

- (a) Counsel should keep the client informed of any developments in the case and the progress of the preparation of the defense, and provide sufficient information to permit intelligent participation in decision making by the client.
- (b) Counsel should comply with reasonable requests for information from the client and reply to client correspondence and telephone calls.
- (c) Counsel should inform and explain to the client that he/she has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify; and to not be compelled to incriminate him/herself.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

...

7. keep the client informed and seek the lawful objectives of the client

Standard 1.2 General Duties and Responsibilities of Counsel to Clients; Avoiding Conflict of Interests

...

3. Counsel should maintain regular contact with the client and should keep the client informed of the progress of the case, including:
 - a. the importance of maintaining contact with counsel and the need to notify counsel of any change of address;
 - b. the names and contact information regarding counsel and staff assisting with the case; and
 - c. any court dates and significant developments in the case.

9. Specifying Client Versus Attorney Decisions

Commentary. The attorney works first to benefit the client. See standards relating to defining function of defense counsel above. Further, it is the client whose liberty is at stake. The client's role is like that of a patient, whose informed consent must be obtained by the physician before certain medical procedures may be undertaken. These standards detail the several decision points where defense counsel is obliged to follow the direction of the client. Conversely, other decisions about tactical procedures are more appropriately left to the discretion of counsel. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 1.4(g).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-5.2 Control and Direction of the Case

- (a) Certain decisions relating to the conduct of the case are ultimately for the accused and other are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
 - (i) what pleas to enter;
 - (ii) whether to accept a plea agreement;
 - (iii) whether to waive jury trial;
 - (iv) whether to testify in his or her own behalf; and
 - (v) whether to appeal.
- (b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.
- (c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

- a. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

- b. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.
- c. Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.
- d. Counsel should not accept any plea agreement without the client's express authorization.
- e. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

Guideline 6.3 The Decision to Enter a Plea of Guilty

...

- b. The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.

Guideline 7.5 Presenting the Defense Case

- a. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- b. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.2. Control and Direction of the Case

- (a) Counsel should advise the client of those decisions which are ultimately for the accused, which are:
 - (i) what pleas to enter;
 - (ii) whether to accept a plea agreement;
 - (iii) whether to waive a jury trial;
 - (iv) whether to testify in his/her own behalf;
 - (v) whether to appeal;
 - (vi) whether to apply for sentence review.

- (b) Counsel should also advise the client of the client's right to assert certain defenses which include extreme emotional disturbance or insanity, when applicable.
- (c) Counsel should advise the client of the existence of any lesser included offense.
- (d) Counsel should advise the client that strategic and tactical decisions will be made by counsel.
- (e) Counsel should discuss a client's decision whether to testify at trial.

Guideline 5.3. Plea Negotiations

...

- (d) counsel should not accept or reject any plea agreement without the authorization of the client.

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

1.3. General Duties of Defense Counsel

...

- (f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.
- (g) The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.

5.1 Plea Negotiations

...

- (c) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and

the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based *solely* on the client's acknowledgement of guilt or *solely* on a favorable disposition offer.

5.2 Client Decisions

- (a) Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client that he/she will defend the client vigorously.
- (b) Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial.
- (c) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were to proceed to trial on the merits.

6.3 Bench Trial or Jury Trial

- (a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.
- (b) Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

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

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

- (a) Defense counsel should consider the client's competence to stand trial or to enter a plea whenever defense counsel has a good faith doubt as to the client's competence to proceed in the criminal case. Counsel may move for 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 in the criminal case.
- (b) Where competency is at issue, counsel has a continuing duty to review and prepare the case for all court proceedings. Counsel should develop information relevant to the issue of dangerousness.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.3 Role of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Standard 2.3 Role of Counsel

...

2. Decisions as to whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, or waiver, are ultimately for the client to determine.

10. Identifying and Resolving Conflicts of Interest

Commentary. Counsel is required to represent the interests of the client as well as possible, without interference from any other source. (See standards relating to independence of defense function in *Compendium* Volume I, “Standards for the Administration of Defense Services.”) Such representation may be jeopardized when counsel also represents another client with competing or adverse interests. These standards require defense counsel to act in specified ways whenever potential conflicts of interest exist. See also the standards on conflict-of-interest mechanisms in *Compendium* Volume I. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 1.4(c).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.5 Conflicts of Interest

- a. Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.
- b. Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant’s selection of counsel to represent him or her or counsel’s continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.
- c. Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that :
 - (i) the several defendants give an informed consent to such multiple representation; and
 - (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

- d. Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.
- e. In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:
 - (i) the accused consents after disclosure;
 - (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
 - (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

- f. Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.
- g. Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.
- h. Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.
- i. Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.
- j. Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.
- k. Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3

...

- b. Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Where appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 4.1. Conflicts

- (a) Counsel should adhere to the Rules of Professional Conduct regarding conflicts of interest
- (b) Counsel should be cognizant of the existence of any potential and actual conflicts of interest which would impair counsel's ability to represent a client, such as if...one client's interests are materially adverse to those of a current or former client.
- (c) Except for preliminary matters such as arraignment or an initial hearing, counsel should not represent a client when a conflict of interest exists between co-defendants or multiple defendants such that the representation of one client *will be directly adverse* to the other client.
- (d) Counsel should not represent a client if the representation of that client may materially limited by the lawyer's responsibilities to another current or former client or to a third person, or by the lawyer's own interests, unless:
 - (i) The lawyer reasonably believes the representation will not be adversely affected; and
 - (ii) The client consents after consultation, which consent should be documented by counsel in counsel's file. When the representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.
- (e) Counsel who has formerly represented a client should not thereafter use information relating to the former representation to the disadvantage of a former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.
- (f) Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case, unless required by the Rules of Professional Conduct.

- (g) The filing or existence of a habeas corpus petition or grievance against counsel in regard to his/her quality of representation shall not create a conflict of interest per se. Withdrawal by counsel from the representation of a client under such circumstances should occur if ordered by the court upon motion by the client or if counsel is of the opinion that the filing or existence of the habeas corpus petition or grievance will interfere with counsel's ability to adequately represent the client.
- (h) Counsel should withdraw upon the filing of a civil lawsuit against counsel by a client alleging malpractice, a finding of probable cause in connection with a grievance complaint, or if counsel has been scheduled to testify at a habeas corpus trial in which
 - (a) counsel is the subject of the claim of ineffective assistance of counsel which has been raised in the petition; and, (2) the pleadings have been closed.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-21-3. Withdrawing from cases

Any public defender may withdraw from any court-appointed case when that defender determines that there exists a possible conflict of interest in further representation of the defendant. The public defender may refuse to accept court-appointed cases when it is determined jointly by the public defender and the director that the current active caseload would preclude the public defender from providing adequate representation to new clients. When a decision is made to withdraw from a case or to not accept cases due to current caseloads, the public defender shall communicate this decision to the administrative judge of the district, who shall appoint attorneys, in sequence, from the panel for a period not to exceed three months unless such period is extended or terminated by the board at its next regularly scheduled meeting.

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

1.3. General Duties of Defense Counsel

...

- (e) Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.2 General Duties and Responsibilities of Counsel to Clients; Avoiding Conflict of Interests

...

5. Counsel should be alert to all potential and actual conflicts of interest. If counsel identifies an actual conflict of interest, counsel should immediately request permission from the court to withdraw and substitution of qualified counsel. If counsel identifies a potential or likely conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients.

Standard 2.2 General Duties and Responsibilities of Counsel; Avoiding Conflicts of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

Implementation

1. Counsel should follow Standard 1.2, Implementation 5, with regard to potential and actual conflicts of interest. In both adult criminal and juvenile delinquency matters, counsel and counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated for trial or hearing.

E. Initial Case Actions

Once the attorney-client relationship is established, it is important that the attorney act promptly in several areas. The standards here relate to the following topics:

1. Pretrial release and other prompt actions
2. Other client needs
3. Non-testimonial evidence

1. Pretrial Release and Other Prompt Actions

Commentary. The highest priority for defense counsel is to obtain the client's pretrial release. The ABA standards also list several other responsibilities that may require speedy action. See also, Missouri State Public Defender, Guidelines for Representation (1992), General Principle 2.3.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.6 Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.1

The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

Guideline 2.3 Pretrial Release Proceedings

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

and request that the court direct the appropriate officials to take steps to meet such special conditions.

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

2.1 Arraignment

- (a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, and should review the client's probation record paying particular attention to any alleged defaults.
- (b) Counsel should be familiar with the law regarding pre-trial detention on the grounds of "dangerousness." If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses, including the complainant.

2.2 Initial Interview and Preparation for Bail Hearing

- (a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs.
- (b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- (c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of pretrial conditions of release. Such information should generally include:
 - (1) client's residence and length of time at that residence;
 - (2) family (names, addresses and phone numbers);
 - (3) health (mental and physical) and employment background;
 - (4) explanation of any court defaults and any other information on the record;
 - (5) probation/parole status;
 - (6) possible sources of bail money;

- (7) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred.
- (d) Such information should be verified whenever possible.
- (e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

2.3 Bail or Detention Hearing

- (a) Counsel has an obligation to vigorously attempt to secure the pre trial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- (b) Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing.
- (c) Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings, and, where appropriate and possible, be ready to present "proffers" that address those issues.
- (d) Counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pre-trial probation, such as electronic monitoring, "stay orders, curfews, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties.
- (e) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing.
- (f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and the sheriff to any special needs of the client, e.g., medical problems, and request the court to order appropriate measures.

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

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to consult with the client regarding the available conditions of release, to consider those conditions acceptable to the client, and to advocate in the best interests of the client.

Guideline 2.3 Pretrial Release Proceedings

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

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.4 Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

Implementation

1. Counsel should obtain information regarding the client's ties to family, the community, immigration status, school or employment records, physical and mental

health, participation in community programs, past criminal and delinquency record, the ability of the client, relatives or third parties to meet any financial conditions of release and the names of individuals or other sources that counsel can contact to verify the information provided by the client.

2. Counsel should present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives or other persons who may take custody of the client or provide third party surety.
3. Counsel for juveniles should seek to have a minister, teacher, relative or other mentor come to the detention hearing to offer to provide extra guidance and positive activities for the youth during release. Counsel for juveniles should be aware of the alternatives to secure detention, including group homes, residential treatment, drug and alcohol treatment facilities, house arrest or other non-secure community based alternatives.
4. If a juvenile client is released, counsel should assure that the client's needs for safety and right to receive treatment are met by agencies responsible for the client's care.
5. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under available procedures.
6. If the court sets conditions of release, counsel should explain to the client and any third party the conditions of release and potential consequences of violating such conditions. If the court sets as a condition of release that security be posted, counsel should explain to the client and any third party the available options, procedures, and risks in posting security.
7. Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client. Juvenile clients in detention or shelter care should be advised of the right to have the placement decision reviewed every ten days, and counsel should seek review if requested by the client.

2. Other Client Needs

Commentary. While the standards rightly focus on the responsibilities of counsel that relate to the criminal matter itself, other needs of the client should also be addressed. Implicit in these standards is the responsibility of counsel to ensure that his or her client does not suffer from such neglect by institutional authorities as to constitute what would be cruel and unusual punishment for a convicted offender. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 2.3(c).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.3 Pretrial Release Proceedings

...

- d. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.4—Initial Client Interview

4. Counsel should convey the following types of information to the client:

...

- j. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers.

Standard 2.4—Obligations Of Counsel Regarding Pretrial Release

7. Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client. Juvenile clients in detention or shelter care should be advised of the right to have the placement decision reviewed every ten days, and counsel should seek review if requested by the client.

3. Non-Testimonial Evidence

Commentary. A related initial case action is to respond to prosecutor's request for non-testimonial evidence such as a blood sample. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 2.4. The Missouri guidelines also provide that the public defender should be attentive to the possibility of a competency issue (Guideline 1.2(f)).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.3 Prosecution Requests for Non-Testimonial Evidence

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

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

Guideline 3.3 Non-Testimonial Evidence

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

F. Investigation and Preparation

Once the initial meeting with the client has occurred and pretrial release has been sought, the defense must develop its theory of the case and marshal evidence to support that theory. In addition to the standards here, see also ABA Standards Relating to Discovery (2nd edition, 1996), which have significant implications for defense counsel duties.

Included here are standards relating to the following topics :

1. Duty to investigate; scope
2. Methods of and limits on interviewing witnesses
3. Use of experts
4. Preparation and submission of discovery requests
5. Compliance with proper discovery requests
6. Duties regarding physical evidence
7. Development of a theory of the case
8. Pretrial motions

1. Duty to Investigate; Scope

Commentary. Investigation is a mandatory component of any defense representation. It should be both prompt and thorough. The NLADA guidelines and Oregon standards address the scope of activities that constitute most investigations. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 4.2.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.1 Duty to Investigate

- (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.
- (b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

- a. Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.
- b. Sources of investigative information may include the following:
 - 1. *Charging documents*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

 - A. the elements of the offense(s) with which the accused is charged;
 - B. the defenses, ordinary and affirmative, that may be available;
 - C. any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

2. *The accused*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

- A. seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;
- B. explore the existence of other potential sources of information relating to the offense;
- C. collect information relevant to sentencing.

3. *Potential witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

- (a) Counsel should conduct a thorough independent investigation prior to trial, including investigation of potential witnesses, physical evidence and the scene of the alleged crime.
- (b) To the extent possible, counsel should obtain expert reports, witness statements, police and law enforcement reports and any other potential information relating to the offense.

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

4.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others.

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

Guideline 4.1 Case Review and Preparation

(a) Counsel has a duty to conduct an independent case review regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The review should be conducted as promptly as possible.

(b) Sources of case information may include the following:

(1) charging documents

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the Grand Jury proceedings.

(2) the accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;

(B) explore the existence of other potential sources of information relating to the offense;

(C) collect information relevant to sentencing.

(3) potential witnesses

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) the police and prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) the courts

Counsel should request and review preliminary hearing tapes/transcripts as well as Grand Jury tapes. Where appropriate, counsel should review the client's prior court file(s).

(6) physical evidence

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or to sentencing. Counsel should consider viewing the physical evidence consistent with case needs.

(7) the scene

Where appropriate, counsel (or an investigator) should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense.

(8) expert assistance

Counsel should secure the assistance of experts where it is necessary in order to:

- (A) prepare a defense;
- (B) understand the prosecution's case;
- (C) rebut the prosecution's case;
- (D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

(c) During case preparation and throughout trial counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of whether, when, and how to raise these objections. Counsel should also consider how to respond to objections which could be raised by the State.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.6—Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Implementation

Counsel should:

1. Obtain and examine all charging documents, pleadings and discovery.
2. Research and review the relevant statutes and case law to identify:
 - a. the elements of the charged offense(s);
 - b. any defects in the charging instrument, such as statute of limitations or double jeopardy; and
 - c. the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.
3. Conduct an in-depth interview with the client covering:
 - a. the events giving rise to the allegation(s);
 - b. the existence of witnesses or other potential sources of information;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights; and
 - d. information relevant to pretrial/prehearing release and possible disposition.
4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.
5. Request and secure discovery including:
 - a. potential exculpatory information;
 - b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;
 - c. oral and written statements by the client and details of the circumstances under which the statements were made;
 - d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;
 - e. books, papers, documents, photographs, audio and videotapes, computer discs, tangible objects, buildings or other materials relevant to the case;
 - f. statements and reports of experts, including data and documents upon which they are based;
 - g. reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;
 - h. statements of co-defendants;
 - i. inspection of physical evidence; and

- j. reports or notes of searches or seizures and the circumstances of any searches or seizures.
6. When appropriate, request the opportunity to inspect the District Attorney's file, if the procedure in the local jurisdiction so provides.
 7. Request and secure other information relevant to the case, including:
 - a. law enforcement notes (field notes);
 - b. client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;
 - c. 911 tapes, interofficer radio transmissions and dispatch reports; and
 - d. internal affairs files and investigation records.
 8. Inspect the scene of the alleged offense under circumstances similar to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
 9. Be familiar with and where appropriate obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

2. Methods of and Limits on Interviewing Witnesses

Commentary. Witnesses are the most common focus of the defense's investigation. The standards below discuss several factors that the investigation must take into account in interviewing witnesses.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.2 Illegal Investigation

Defense counsel should not knowingly use illegal means to obtain evidence or information or employ, instruct, or encourage others to do so.

Standard 4-4.3 Relations with Prospective Witnesses

- (a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.
- (c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.
- (d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.
- (e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

...

b. Sources of investigative information may include the following:

. . .

3. *Potential witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.6—Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Implementation

Counsel should:

...

4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.

3. Use of Experts

Commentary. In many cases, ranging from DUI to homicide, expert testimony will be required. These standards simply note the responsibility of defense counsel to present such witnesses as necessary.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.4 Relation with Expert Witnesses

- (a) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.
- (b) Defense counsel should not pay an excessive fee for the purpose of influencing an expert's testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

...

- b. Sources of investigative information may include the following:

...

7. *Expert assistance*

Counsel should secure the assistance of experts where it is necessary or appropriate to:

- A. the preparation of the defense;
- B. adequate understanding of the prosecution's case;
- C. rebut the prosecution's case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

...

- (e) Counsel should obtain the assistance of experts where necessary.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.6—Independent Investigation

- 9. Be familiar with and where appropriate obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

4. Preparation and Submission of Discovery Requests

Commentary. In most jurisdictions, defense counsel can obtain much information from the prosecution by submitting requests for discovery. In these jurisdictions, “trial by ambush” is past. Where such discovery is available, these standards discuss what types of information should be sought. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 2.2(c), 2.4, 4.1(a)(b)(d).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

...

b. Sources of investigative information may include the following:

...

4. *The police and prosecution*

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

Guideline 4.2 Formal and Informal Discovery

a. Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

b. Counsel should consider seeking discovery of the following items:

1. potential exculpatory information;
2. the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
3. all oral and/ or written statements by the accused, and the details of the circumstances under which the statements were made;
4. the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
5. all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
6. all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
7. statements of co-defendants.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

...

- (c) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such information through discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.
- (d) Counsel should consider seeking discovery of the following items:
 - (i) potential exculpatory information;
 - (ii) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
 - (iii) All oral and/or written statements by the accused, and the details of the circumstances under which the statements were made.
 - (iv) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
 - (v) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
 - (vi) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
 - (vii) statements of co-defendants.

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

4.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies.

- (a) details of all identification procedures, including examination of any photographs shown and selected;
- (b) written and oral statements of defendant/co-defendant(s);
- (c) copies of statements by potential witnesses;
- (d) copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
- (e) inspection of physical evidence;

- (f) list of potential witnesses and addresses;
- (g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;
- (h) probation records of all potential witnesses;
- (i) copies of Grand Jury minutes;
- (j) exculpatory evidence, identified as specifically as possible, and including promises, rewards, inducements made to witnesses;
- (k) any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking scenes, etc.).

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

Guideline 4.2 Formal and Informal Discovery

- (a) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the applicable rules of criminal procedure and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.
- (b) Counsel should seek discovery of the following items:
 - (1) potential exculpatory information;
 - (2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
 - (3) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;
 - (4) the prior criminal record of the accused and any evidence of other misconduct that the state may intend to use against the accused;
 - (5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
 - (6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
 - (7) statements of co-defendants.
- (c) Counsel should comply with the mandatory disclosure rules for District, Magistrate, and Metropolitan Courts.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.6—Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Implementation

Counsel should:

...

5. Request and secure discovery including:
 - a. potential exculpatory information;
 - b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;
 - c. oral and written statements by the client and details of the circumstances under which the statements were made;
 - d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;
 - e. books, papers, documents, photographs, audio and videotapes, computer discs, tangible objects, buildings or other materials relevant to the case;
 - f. statements and reports of experts, including data and documents on which they are based;
 - g. reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;
 - h. statements of co-defendants;
 - i. inspection of physical evidence; and
 - j. reports or notes of searches or seizures and the circumstances of any searches or seizures.

...

7. Request and secure other information relevant to the case, including:
 - a. law enforcement notes (field notes);
 - b. client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;
 - c. 911 tapes, interofficer radio transmissions and dispatch reports; and
 - d. internal affairs files and investigation records.

5. Compliance with Proper Discovery Requests

Commentary. Many jurisdictions that authorize defense discovery of prosecution files either authorize reciprocal discovery by the prosecution or conditional defense use of discovery requests with a waiver of any objection to parallel prosecution discovery. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 4.1(c).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.5 Compliance with Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.2 Formal and Informal Discovery

- a. Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

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

4.5 Reciprocal Discovery

Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery.

4.10 Discovery Compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply.

6. Duties Regarding Physical Evidence

Commentary. In a criminal matter, defense counsel may receive physical evidence from the client, his or her friends and relatives, the police, or the prosecution.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.6 Physical Evidence

- (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).
- (b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.
- (c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (a) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.
- (d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.
- (e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

a. Sources of investigative information may include the following:

...

5. *Physical evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

7. Development of a Theory of the Case

Commentary. Effective advocacy calls for storytelling: the better advocate is the one who has the better or more believable story in the mind of the fact finder. But every story needs a plot line to hold it together. In advocacy, this is the theory of the case that best explains the facts. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 6.2.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

...

- (f) During investigation and trial preparation, counsel should develop and continually reassess a defense theory of the case.

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

Guideline 4.3 Theory and Theme(s) of the Case

During case review and trial preparation, counsel should develop and continually reassess a theory of the case. Counsel should also develop power word themes to drive the theory of the case.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 1.5—Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Implementation

1. Counsel should develop an overall theory of the case that encompasses the best interests of the client and the realities of the client's situation in order to assist counsel in evaluating choices throughout the course of the representation.
2. Counsel should allow the case theory to focus the investigation and trial preparation of the case, seeking out and developing the facts and evidence that the theory makes material, but counsel should not become a "prisoner" of his or her theory.

8. Pretrial Motions

Commentary. Pretrial motions are another essential component of the defense case. Though the standards generally do not mandate the filing of any motion, they do mandate that counsel consider all potentially appropriate motions, so that the absence of pretrial motions is the result of professional choice rather than negligence or error. The standards below detail most of the grounds for filing pretrial motions, e.g., to suppress evidence. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 4.3.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 5.1 The Decision to File Pretrial Motions

- a. Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.
- b. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:
 1. the pretrial custody of the accused;
 2. the constitutionality of the implicated statute or statutes;
 3. the potential defects in the charging process;
 4. the sufficiency of the charging document;
 5. the propriety and prejudice of any joinder of charges or defendants in the charging document;
 6. the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
 7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including:
 - A. the fruits of illegal searches or seizures;
 - B. involuntary statements or confessions;
 - C. statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
 - D. unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
 8. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

9. access to resources which or experts who may be denied to an accused because of his or her indigence;
 10. the defendant's right to a speedy trial;
 11. the defendant's right to a continuance in order to adequately prepare his or her case;
 12. matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
 13. matters of trial or courtroom procedure.
- c. Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
1. the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
 2. changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
 3. later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

- a. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.
- b. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
 1. investigation, discovery and research relevant to the claim advanced;
 2. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
 3. full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

Guideline 5.3 Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

...

- (g) Counsel should file appropriate pretrial motions and memoranda or briefs in a timely fashion, as necessary to protect the defendant's rights after consideration of the statutes, case law and constitutional provisions. Counsel should file a motion for a bill of particulars prior to trial, except when tactical reasons exist for not doing so.

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

4.3 Pretrial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity it provides the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as "waiver" of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy. Counsel should scrupulously avoid making misrepresentations in affidavits.

4.7 Substantive Pretrial Motions

Among the motions that counsel should consider filing are:

- (a) nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;
- (b) dismissal for unconstitutionality of the statute;
- (c) dismissal for insufficiency of the complaint or indictment;
- (d) dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury;
- (e) request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
- (f) severance or joinder of defendants or charges;

- (g) suppression of evidence obtained in violation of federal and Massachusetts law, i.e., (1) illegally seized evidence, (2) “un-Mirandized” or involuntary statements, (3) identifications procured by impermissibly suggestive procedures;
- (h) funds for experts, investigators, interpreters, etc. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses ;
- (i) any other issues that are appropriate.

4.8 Trial Motions

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions in limine and motions to sequester.

4.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel’s preparation should include:

- (a) investigation and discovery necessary to advance the claim;
- (b) careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rule of Criminal Procedure;
- (c) subpoenas for pertinent evidence and witnesses;
- (d) full understanding of the burdens of proof and evidentiary rules;
- (e) careful consideration of the benefits/costs of having the client testify;
- (f) careful preparation of any witnesses who are called, especially the defendant;
- (g) submission of a memorandum of law may be required, and in most cases is advisable.

4.11 Interlocutory Relief

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution.

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

Guideline 5.1 The Decision to File Pretrial Motions

- (a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.

- (b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:
- (1) the pretrial custody of the accused and the filing of a motion to review conditions of release;
 - (2) the constitutionality of the implicated statute or statutes;
 - (3) the potential defects in the charging process;
 - (4) the sufficiency of the charging documents;
 - (5) the propriety and prejudice of any joinder of charges or defendants in the charging document;
 - (6) the discovery obligations of the prosecution;
 - (7) the suppression of evidence gathered as the result of violations of the New Mexico State Constitution and Fourth, Fifth or Sixth Amendments to the United States Constitution, including:
 - (A) the fruits of illegal searches or seizures;
 - (B) involuntary statements or confessions;
 - (C) statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
 - (D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
 - (8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
 - (9) the change of venue;
 - (10) the defendant's right to a speedy trial;
 - (11) the defendant's right to a continuance in order to adequately prepare his or her case;
 - (12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
 - (13) matters of trial or courtroom procedure.
- (c) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
- (1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

- (2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
- (3) later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

- (a) Motions should be filed in a timely manner, should comport with the formal requirements of state and local court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.
- (b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
 - (1) investigation, discovery and research relevant to the claim advanced;
 - (2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
 - (3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify;
 - (4) the assistance of an expert witness where appropriate and necessary;
 - (5) where appropriate and tactically advisable, obtaining a stipulation of facts by and between counsel.

Guideline 5.3 Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

- (1) If new supporting information is later disclosed or made available, counsel should consider renewing pretrial motions or filing additional motions at any subsequent stage of the proceedings.
- (2) Where appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.7—Pretrial Motions; Hearings Regarding Ability to Aid and Assist and Waiver of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

Implementation

1. Counsel should research, prepare, file and argue pretrial motions and notices if appropriate to address issues such as:
 - a. Constitutionality of relevant statute(s);
 - b. Defects in the charging process or instrument;
 - c. Severance of charges and/or co-defendants for trial;
 - d. *Brady v. Maryland* motions;
 - e. Motions to compel discovery ;
 - f. Motions for sanctions because of discovery violations ;
 - g. Violations of federal and state constitutional and statutory provisions, including but not limited to:
 - i. illegal searches and/or seizures;
 - ii. statements obtained in violation of the client’s right to counsel or privilege against self-incrimination;
 - iii. unreliable identification evidence;
 - iv. speedy trial; and
 - v. double jeopardy.
 - h. Motions or requests for extraordinary expenses, such as:
 - i. interpreters;
 - ii. experts for psychological evaluation for the purpose of aid and assist, diminished capacity, guilty but insane, waiver or disposition; and
 - iii. forensic services.
 - i. Matters of trial evidence which may be appropriately litigated by means of a motion in limine;
 - j. Notices of affirmative defenses ;
 - k. Motions to dismiss based on civil compromise, “best interests of the youth,” “in the furtherance of justice” and “general equitable powers of the court.”
2. Counsel should take the following steps with regard to seeking a determination of the client’s ability to aid and assist:
 - a. Whenever counsel has a good faith doubt as to the client’s ability to aid and assist in the proceedings, counsel should fully advise the client concerning the consequences of a determination that the client is unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, counsel should inform the court that counsel has a good faith doubt of the client’s ability to aid and assist in the matter, but should not divulge the client’s confidences and secrets.

- b. If the client agrees, counsel should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, counsel may stipulate that the client is unable to aid and assist counsel in the proceedings.
- c. At the hearing to determine whether the client is able to aid and assist, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.
- d. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences and secrets. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the client's confidences and secrets.
- e. If an adult client is found to be unable to aid and assist, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment.
- f. If the client is found able to aid and assist, counsel should recognize a continuing obligation during the course of the proceedings to raise good faith concerns about the client's ability to aid and assist.

G. Preliminary Hearings

Included here are standards relating to preliminary hearings for arraignment and other hearings such as discovery or probable cause hearings in jurisdictions where those are used. The standards in this section address these topics:

1. Arraignment duties
2. Preliminary hearing duties

1. Arraignment Duties

Commentary. An arraignment hearing is the point in the court process where the specific charges against the defendant are detailed in open court and the defendant enters a plea such as not guilty, innocent, or guilty. The scope of arraignment duties varies from the minimum responsibilities in the NLADA standards to those explained in the Massachusetts Manual.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.1 Presentment and Arraignment

The attorney should preserve the client's rights at the initial appearance on the charges by:

1. entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;
2. requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;
3. seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges;
4. requesting a timely preliminary hearing if it is provided for under the rules of the court unless there is a sound tactical reason not to do so.

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

1.5 Special Concerns

- (a) Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- (b) Where appropriate, counsel should consider advantages and disadvantages of seeking cross-complaints.

2.1 Arraignment

...

- (c) Counsel should insure that the client does not waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.

- (1) A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record, such as diversion, drug evaluation, mediation, or a continuance without a finding.
- (2) Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or probable cause hearing as soon as practicable within thirty days.

2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g., “911” or “turret” tape recordings. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client’s rights governing the prosecution’s efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

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

Guideline 3.1 Presentment and Arraignment

The attorney should preserve the client’s rights at the initial appearance on the charges by:

- (1) entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;
- (2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;
- (3) seeking a determination of whether there is probable cause to support the charges alleged and, requesting that the court dismiss the charge or charges if probable cause fails or other grounds exist for dismissal;
- (4) requesting a timely preliminary hearing if it is provided for under the rules of the court unless there is a sound tactical reason not to do so.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.5—Initial Court Appearances

Counsel should preserve all of the client’s constitutional and statutory rights at initial court appearances.

Implementation

Counsel should:

1. Promptly advise the client of and take action to preserve all constitutional and statutory rights of the client, including the right to remain silent, to file motions challenging the charging instrument, and to enter a plea of not guilty or deny the allegations contained in a delinquency petition and to request a jury trial, where failure to do so may result in the client being precluded from later obtaining such rights.
2. Request a timely preliminary hearing, if it is provided for under the rules of the court, unless there is a sound tactical reason not to do so.
3. If a preliminary hearing is held, review the allegations, marshal the evidence, and prepare to challenge the state’s evidence and arguments.
4. Review probable cause documents and any probable cause arguments, and, if no probable cause is established or other grounds for dismissal exist, ask the court to dismiss the charges.
5. Ensure that bail has been set, seek reductions in bail if appropriate, and initiate alternative release options.

2. Preliminary Hearing Duties

Commentary. The preliminary hearing described by these standards is often called a probable cause hearing (as it is by the Massachusetts Manual). Not all states use probable cause hearings, relying instead on grand jury proceedings. There are no standards, however, for these latter proceedings. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 3.2 – 3.5.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.2 Preliminary Hearing

- a. Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- b. In preparing for the preliminary hearing, the attorney should become familiar with:
 1. the elements of each of the offenses alleged
 2. the law of the jurisdiction for establishing probable cause
 3. factual information which is available concerning probable cause.

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

1.2 Probable Cause Hearing (Many of the standards in Sections V and VI apply also to this section.)

- (a) Counsel should always seek to obtain a probable cause hearing and avoid a direct indictment unless good reasons exist for a different strategy.
- (b) Where the client is entitled to a hearing, the attorney should insure that it is scheduled within thirty days, unless more time is needed to prepare, and delay will not increase the likelihood of direct indictment. Counsel should not waive this right without good reason.
- (c) In order to prepare for the hearing, counsel must know the elements of all charges against the client and must investigate as fully as possible the facts underlying the charges.
- (d) The probable cause hearing has a twofold purpose: to test the adequacy of the prosecution's case for binding over and to discover its strengths and weaknesses.
- (e) Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each essential or aggravating element. Counsel should take advantage of the potential for discovery offered by a hearing by filing appropriate motions, using

compulsory process, and sequestering witnesses. Counsel should not present evidence, especially the client's testimony, unless there is a sound tactical reason that overcomes the inadvisability of disclosing the defense case at this stage.

- (f) Where appropriate, counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.
- (g) As soon as practicable after the hearing, counsel should request a copy of the tape recording of the proceedings for possible use as impeachment at the trial and for trial preparation. It is counsel's responsibility to arrange for transcription of the tape.

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

Guideline 3.2 Preliminary Hearing

- (a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- (b) In preparing for the preliminary hearing, the attorney should consider:
 - (1) the elements of each of the offenses alleged;
 - (2) the law for establishing probable cause;
 - (3) the factual information which is available concerning probable cause;
 - (4) the tactics of calling the defendant as a witness;
 - (5) the tactical need to subpoena defense witnesses;
 - (6) the tactics of proceeding with or without discovery materials;
 - (7) the tactics of full or partial cross-examination.
- (c) The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such waiver.

Guideline 3.4 Grand Jury Representation

- (a) Where an attorney and/or defense team member becomes aware of a notice of target status, the attorney should consider consultation with the client to discuss the adjudicatory process, including ramifications of the client's testifying before the grand jury. Consultation and discussion should include but is not limited to the following:
 - (1) client does not have to testify because there is a Fifth Amendment right to remain silent and not to be used as a witness against oneself;
 - (2) client will be under oath when testifying and such grand jury testimony may be used against the client in future proceedings;

- (3) attorney may be present only during client's testimony and may advise the client, but the attorney may not speak or be heard by the grand jury;
 - (4) attorney should ask the client about exculpatory witness(es) and/or evidence so that the attorney may assess the need to present exculpatory witness(es) and/or evidence at the grand jury; and,
 - (5) if the client decides to testify, the attorney should review the allegations against the client, review the client's proposed grand jury testimony, and prepare the client to testify.
- (b) Upon return of the indictment, the attorney should determine if client received proper notice of target status and should listen to the grand jury tape to determine if the grand jury proceedings were conducted properly.
- (1) the attorney should be familiar with the grand jury statute 31-6-1 to 31-6-15, NMSA 1978 (1996 Cum. Supp.); and,
 - (2) where appropriate, the attorney should file motions to quash the indictment(s), and should consider the following grounds:
 - (A) improper prosecutorial conduct including but not limited to knowingly withholding exculpatory evidence, bullying jurors, and misstatements of law;
 - (B) procedural irregularities including but not limited to reconvening a Grand Jury at a later date with different people other than those who heard the initial evidence and improper juror qualifications.
 - (C) failure to give correct and adequate notice to a target.

H. Disposition Without Trial

In the context of defense counsel performance, disposition without trial refers simply to pleas of guilty. Standards here address the following topics:

1. Investigating plea alternatives
2. Informing client of plea negotiations and offers
3. Preparing client for entry of plea

In addition to the standards included herein, the Missouri Guidelines for Representation provide for (1) a continuing duty to prepare for trial while plea negotiations are ongoing and (2) preparation of a memo for the file detailing the contents of discussions with the client about a possible guilty plea (Guidelines 5.3 and 5.6). See generally, ABA Standards Relating to Pleas of Guilty (3rd Edition, 1996).

1. Investigating Plea Alternatives

Commentary. The core requirement of these standards is that counsel should not encourage the client to plead guilty until the attorney has fully examined the case facts. Both standards below also require counsel to consider plea negotiations. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 5.1(a)(b).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-6.1 Duty to Explore Disposition Without Trial

...

- (b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

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

5.1 Plea Negotiations

- (a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.

2. Informing Client of Plea Negotiations and Offers

Commentary. The client alone is responsible for the decision to plead guilty or to seek a trial before a jury or judge. Thus, it is the attorney's duty to provide all the relevant information needed by the client to make that decision. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 5.1, 5.2.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-6.2 Plea Discussions

- (a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.
- (b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

- (a) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
- (b) Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.
- (c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.
- (d) Counsel should not accept any plea agreement without the client's express authorization.

Guideline 6.2 The Contents of the Negotiations

...

- (b) In developing a negotiation strategy, counsel should be completely familiar with:
 - 1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
 - A. not to proceed to trial on the merits of the charges;
 - B. to decline from asserting or litigating any particular pretrial motions;
 - C. an agreement to fulfill specified restitution conditions and/or participation in

- community work or service programs, or in rehabilitation or other programs.
- D. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
2. benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
 - A. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - B. that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
 - C. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
 - D. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - E. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
 - F. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;
 - G. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official presentence report, certain information;
 - H. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.

Guideline 6.3 The Decision to Enter a Plea of Guilty

- (a) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.3. Plea Negotiations

- (a) Counsel should discuss with the client any ongoing plea negotiations and convey all offers to the client.

- (b) Counsel should discuss with the client the advantages and disadvantages of accepting a plea agreement.
- (c) Counsel should discuss with the client any rights which are waived by acceptance of a plea agreement.
- (d) Counsel should not accept or reject any plea agreement without the authorization of the client.
- (e) Counsel should discuss with the client the nature of the charge to which he/ she would be entering a plea, the possible maximum and/or mandatory sentences which the client is exposed to as a result of the plea and any other questions that the court may raise during the canvass.

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

5.1. Plea Negotiations

- (a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolutions of the case through a negotiated plea or admission to sufficient facts.
- (b) Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.
- (c) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based *solely* on the client's acknowledgement of guilt or *solely* on a favorable disposition offer.
- (d) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The attorney shall keep the client informed of the status of the plea negotiations.

5.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty or admit to sufficient facts unless the client either admits guilt to counsel, or admits

guilt to the court in a colloquy or tenders an *Alford*³ plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

5.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, release pending sentencing or appeal.

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

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

- (a) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial, and in doing so, counsel should fully explain the rights that are waived by a decision to enter a plea and not to proceed to trial.
- (b) Where appropriate under state or local rules or necessary for client control, counsel should consider obtaining the consent of the client before entering into any plea negotiations.
- (c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the client any offers made by the prosecution for a negotiated settlement.
- (d) Counsel should not accept any plea agreement without the client's express authorization.
- (e) Even though plea negotiations are ongoing, counsel should move forward with case preparation and take the necessary steps to preserve a defense. Counsel should consult with an immediate supervisor or experienced colleague to determine the steps necessary to preserve a defense.

Guideline 6.2 The Contents of the Negotiations

- (a) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting attorney(s) which may impact the content and likely results of negotiated plea bargains.
- (b) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:
 - (1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;
 - (2) the possibility of forfeiture of assets;

- (3) the other potential effects of conviction upon immigration status, motor vehicle licensing, right to carry arms, parental rights, and other civil rights;
 - (4) any registration requirements including sex offender registration and job specific notification requirements;
 - (5) any possible and likely sentence enhancements in the present and in future cases or parole consequences;
 - (6) the possible and likely place and manner of confinement;
 - (7) the effects of good-time or earned-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
 - (8) the effect on appellate rights.
- (c) In developing a negotiation strategy, counsel should be completely familiar with:
- (1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:
 - (A) declining to assert the right to trial;
 - (B) declining to assert or litigate any particular pretrial motions;
 - (C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;
 - (D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;
 - (E) admitting identity and waiving challenges to proof or validity of prior conviction record.
 - (2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:
 - (A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - (B) that the defendant may enter a conditional plea to reserve the right to litigate and contest certain issues affecting the validity of a conviction;
 - (C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
 - (D) that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - (E) that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
 - (F) that at the time of sentencing and/or in communications with the preparer of the official presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed by the court.

- (G) that at the time of sentencing and/or in communications with the preparer of the official presentence report, the prosecution will not present certain information;
 - (H) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement.
- (d) In conducting plea negotiations, counsel should be familiar with:
- (1) the various types of pleas that may be agreed to, including a plea of guilty, guilty but mentally ill, a plea of nolo contendere, a conditional plea of guilty, and the right to a plea in which the client is not required to personally acknowledge his or her guilt (*Alford* plea);
 - (2) the advantages and disadvantages of each available plea according to the circumstances of the case;
 - (3) whether the plea agreement is binding on the court and jail/prison and parole authorities;
 - (4) any recent changes in the applicable statutes or court rules and the effective dates of these changes.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.8—Pretrial Negotiations and Admission Agreements

Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

Implementation

1. Counsel should be fully aware, and ensure the client is fully aware, of:
 - a. rights the client will waive by entering into a pretrial admission or disposition agreement;

- b. conditions and limits of the agreement;
 - c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;
 - d. deferred sentences, conditional discharges and diversion agreements;
 - e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;
 - f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;
 - g. available drug rehabilitation programs, psychiatric treatment, and health care;
 - h. incarceration including any mandatory minimum requirements and maximum terms;
 - i. the possible and likely place and manner of confinement;
 - j. credit for pretrial detention;
 - k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - l. self-surrender to place of custody;
 - m. eligibility for correctional programs, work release and conditional leaves;
 - n. probation or suspension of sentence and permissible conditions of probation;
 - o. restitution, fines, assessments and court costs;
 - p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;
 - q. asset forfeiture;
 - r. collateral consequences of conviction, e.g., deportation, civil disabilities, and enhanced sentences for future convictions;
 - s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and
 - t. possibility of later expungement and sealing of records.
2. In conducting negotiations, counsel should be familiar with the various types of admissions or pretrial dispositions that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and an admission to juvenile court jurisdiction.
 3. The decision to enter an admission rests solely with the client and the client's decision must be knowing, voluntary and intelligent.
 4. When the client enters an admission, counsel should make sure the full content and conditions of the admission agreement are placed on the record before the court.

5. If the client is in custody or may be taken into custody after entry of the admission, counsel should seek release pending formal disposition.

3. Preparing Client for Entry of Plea

Commentary. Before the court can accept a plea of guilty from a defendant, several procedural requirements must be met. These requirements are intended to ensure that the plea is voluntary and truthful, and that there are facts to support criminal charges. See generally, ABA Standards Relating to Guilty Pleas (3^d Edition, 1996). These requirements may be somewhat exacting, and deviation from them may require postponement of the plea. Thus, the attorney must prepare the client for the guilty plea. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 5.4, 5.5.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.4 Entry of the Plea Before the Court

- a. Prior to the entry of the plea, counsel should:
 1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
 2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by entering a plea;
 3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.3. Plea Negotiations

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- (d) Counsel should not accept or reject any plea agreement without the authorization of the client.

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

5.2 Preparation

- (a) When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any,

including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.

- (b) Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.

5.3 Consequences of Conviction

Counsel must also advise the client of the consequences of a conviction, including:

- (a) the maximum possible sentence of all offenses;
- (b) mandatory minimum sentences where applicable;
- (c) different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- (d) potential liability for enhanced punishment after subsequent arrest;
- (e) possible federal charges or penalty enhancements;
- (f) conviction consequences for non-citizens (G.L., c.278, §29D);
- (g) Sex Offender Registration Act (G.L., c.6, §§178C *et seq.*) and DNA Seizure and Dissemination Act (G.L., c.22E) requirements;
- (h) parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
- (i) potential civil liabilities;
- (j) possible loss or suspension of driver's license.

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

Guideline 6.3 The Decision to Enter a Plea of Guilty

- (a) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain the advantages, disadvantages, and potential consequences of the agreement.
- (b) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision. Where counsel reasonably believes that

acceptance of a plea offer is in the best interests of the client, counsel should advise the client of the benefits of this course of action.

- (c) Where the client verbally rejects a fully explained and detailed plea offer, and if appropriate, counsel may ask the client to sign a written rejection of plea offer statement.

Guideline 6.4 Entry of the Plea before the Court

- (a) Prior to the entry of the plea, counsel should:
 - (1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
 - (2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the accused will be exposed to by entering a plea;
 - (3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.
- (b) When entering the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record by the court.
- (c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing.
- (d) Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.8—Pretrial Negotiations and Admission Agreements

Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

Implementation

1. Counsel should be fully aware, and ensure the client is fully aware, of:
 - a. rights the client will waive by entering into a pretrial admission or disposition agreement;
 - b. conditions and limits of the agreement;
 - c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;
 - d. deferred sentences, conditional discharges and diversion agreements;
 - e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;
 - f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;
 - g. available drug rehabilitation programs, psychiatric treatment, and health care;
 - h. incarceration including any mandatory minimum requirements and maximum terms;
 - i. the possible and likely place and manner of confinement;
 - j. credit for pretrial detention;
 - k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - l. self-surrender to place of custody;
 - m. eligibility for correctional programs, work release and conditional leaves;
 - n. probation or suspension of sentence and permissible conditions of probation;
 - o. restitution, fines, assessments and court costs;
 - p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;
 - q. asset forfeiture;
 - r. collateral consequences of conviction, e.g. deportation, civil disabilities, and enhanced sentences for future convictions;

- s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and
- t. possibility of later expungement and sealing of records.

I. Trial

The culmination of the criminal justice process is the trial. Defense standards relating to the trial address the following:

1. Trial preparation duties
2. Preparation for jury selection
3. Overall defense trial strategy
4. Opening statement
5. Confronting the prosecution's case
6. Stipulations
7. Presentation of the defense case
8. Closing argument
9. Jury instruction
10. Protection of defendant's post-trial rights
11. Related issues

In addition to the standards presented herein, the Missouri Guidelines for Representation recommend that counsel be alert to improprieties in the verdict and, as appropriate, request that the jury be polled (Guideline 7.11). See generally, ABA Standards Relating to Trial by Jury (3rd Edition, 1996).

1. Trial Preparation Duties

Commentary. The trial preparation duties detailed here overlap in practice with the investigative duties above. The three standards here are very detailed, albeit not exhaustive. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 6.1, 6.5.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.1 General Trial Preparation

- a. The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- b. Where appropriate, counsel should have the following materials available at the time of trial:
 1. copies of all relevant documents filed in the case;
 2. relevant documents prepared by investigators;
 3. voir dire questions;
 4. outline or draft of opening statement;
 5. cross-examination plans for all possible prosecution witnesses;
 6. direct examination plans for all prospective defense witnesses;
 7. copies of defense subpoenas;
 8. prior statements of all prosecution witnesses (e.g., transcripts, police reports);
 9. prior statements of all defense witnesses;
 10. reports from defense experts;
 11. a list of all defense exhibits, and the witnesses through whom they will be introduced;
 12. originals and copies of all documentary exhibits;
 13. proposed jury instructions with supporting case citations;
 14. copies of all relevant statutes and cases;
 15. outline or draft of closing argument.
- c. Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
- d. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where

appropriate, counsel should prepare motions and memoranda for such advance rulings.

- e. Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.
- f. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
- g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.
- h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

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

6.1 General Trial Preparation

- (a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
 - (1) summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable;
 - (2) summoning all potentially helpful physical or documentary evidence;
 - (3) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
 - (4) obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;
 - (5) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case.
- (b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
 - (1) copies of all relevant documents in the case;
 - (2) relevant documents prepared by investigators;
 - (3) proposed voir dire questions;

- (4) outline of opening statement;
 - (4) cross-examination plans for all possible prosecution witnesses;
 - (5) outline of argument for required findings of not guilty and authorities supporting it;
 - (6) direct examination plans for all prospective defense witnesses;
 - (7) copies of defense subpoenas;
 - (8) prior statements of all prosecution witnesses (e.g., Grand Jury minutes, transcripts, police reports);
 - (9) prior statements of all defense witnesses;
 - (10) reports from defense experts;
 - (11) a list of all defense exhibits, and the witnesses through whom each will be introduced;
 - (12) proposed jury instructions with supporting case citations;
 - (13) copies of all relevant statutes and cases, including any potential lesser-included offenses;
 - (14) outline or draft of closing argument.
- (c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- (d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior bad acts, reputation testimony, prejudicial evidence) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

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

Guideline 7.1 General Trial Preparation

- (a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- (b) Where appropriate, counsel should have the following materials available at the time of trial:
- (1) copies of all relevant documents filed in the case;
 - (2) relevant documents prepared by investigators;
 - (3) reports, test results, and other materials subject to disclosure under SCRA 5-501 - 5-509;

- (4) voir dire questions;
 - (5) outline or draft of opening statement;
 - (6) cross-examination plans for all possible prosecution witnesses;
 - (7) direct examination plans for all prospective defense witnesses;
 - (8) copies of defense subpoenas;
 - (9) prior statements of all prosecution witnesses;
 - (10) prior statements of all defense witnesses;
 - (11) reports from defense experts;
 - (12) a list of all defense exhibits, and the witnesses through whom they will be introduced;
 - (13) originals and copies of all documentary exhibits;
 - (14) proposed jury instructions with supporting case citations;
 - (15) copies of all relevant statutes and cases;
 - (16) outline or draft of closing argument.
- (c) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
- (d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
- (e) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request that all trial proceedings, including motions, bench conferences in chambers, and jury instructions, be recorded.
- (f) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
- (g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a client transport order to have the client available for all required court appearances.
- (h) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

1. Preparation for Trial

- a. In an adult criminal case, counsel should discuss with the client the relevant strategic considerations of waiving a jury trial in favor of a bench trial or plea;
- b. Counsel should have the following materials available at the time of trial:
 - i. copies of all relevant documents filed in the case;
 - ii. relevant documents prepared by investigators;
 - iii. voir dire questions;
 - iv. outline or draft of opening statement;
 - v. cross-examination plans for all possible prosecution witnesses;
 - vi. direct examination plans for all prospective witnesses for the client;
 - vii. copies of subpoenas;
 - viii. prior statements of all the prosecution’s witnesses (e.g., transcripts, police reports);
 - ix. prior statements of all the client’s witnesses;
 - x. reports from experts;
 - xi. a list of exhibits, and the witnesses through whom they will be introduced;
 - xii. originals and copies of all documentary exhibits;
 - xiii. proposed jury instructions with supporting authority;
 - xiv. copies of all relevant statutes and cases;
 - xv. evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
 - xvi. outline or draft of closing arguments.
- c. Counsel should decide whether to file a motion in limine to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
- d. Throughout the trial process, counsel should ensure all legal issues are preserved and an adequate record is made for appellate review. Counsel should assure that all proceedings are on the record.

- e. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence through objections and cross-examination of state's witnesses.
- f. Counsel should advise the client and the client's witnesses as to suitable courtroom dress, decorum, and demeanor, and should counsel the client and witnesses concerning timeliness and sobriety issues. If the client or the client's witness is incarcerated, counsel should ensure that the client or witness does not appear before the jury in jail clothing.
- g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.
- h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of guilt or in a juvenile proceeding that the youth is within the jurisdiction of the court.

2. Preparation for Jury Selection

Commentary. The first step at most trials is selection of the jury. The specific process for jury selection varies from jurisdiction to jurisdiction and even by individual judges within a single court. Approaches include questioning of jurors by the judge alone, by the attorneys, by the judge and attorneys jointly, or by the judge with written questions submitted by the attorneys. ABA standards call for direct questioning by the attorneys since they are more intimately familiar with the case and the areas of potential bias. See Trial by Jury Standards 15-2.4 and commentary. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.3.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.2 Selection of Jurors

- (a) Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.
- (b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.
- (c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel should not intentionally use the voir dire to present factual matter which defense counsel knows will not be admissible at trial or to argue counsel's case to the jury.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.2 Voir Dire and Jury Selection

a. Preparation

1. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, counsel should seek to obtain a prospective juror list.

4. Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - A. to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
 - B. to convey to the panel certain legal principles which are critical to the defense case;
 - C. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - D. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor;
 - E. to establish a relationship with the jury, when the voir dire is conducted by an attorney.
 5. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
 6. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
 7. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
- b. *Examining the Prospective Jurors*
1. Counsel should consider seeking permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.
 2. Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.
 3. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the voir dire as to those sensitive questions.
 4. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.
- c. *Challenges*
1. Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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- (i) Counsel should be familiar with the voir dire process and the exercise of both challenges for cause and peremptory challenges and should conduct a thorough voir dire.

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

6.4 Voir Dire and Jury Selection

(a) Preparation

- (1) Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
- (2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.
- (3) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
- (4) Counsel should develop and file written voir dire questions tailored to the particular case in advance of trial.
- (5) Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.
- (6) Counsel should consider asking for extra peremptory challenges.

(b) Examining Prospective Jurors

- (1) Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. interracial murder or sexual assault cases, sexual assault on children, "insanity" defenses.
- (2) Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
- (3) When appropriate, counsel should consider requesting individual juror voir dire even when case law does not require it, particularly if the proposed voir dire questions may elicit sensitive information.

(c) Challenges

- (1) Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
- (2) When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
- (3) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
- (4) Counsel should make every effort to consult with the client in exercising challenges.
- (5) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

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

Guideline 7.2 Voir Dire and Jury Selection

(a) Preparation

- (1) Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
- (2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.
- (3) Prior to jury selection, counsel should seek to obtain a prospective juror list, and should develop a method for tracking juror seating and selection.
- (4) Counsel must be familiar with the juror questionnaires and, where appropriate, should submit a supplemental questionnaire as a pretrial motion.
- (5) Counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Voir dire questions should be designed to:
 - (A) elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
 - (B) convey to the panel certain legal principals which are critical to the defense case;
 - (C) preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - (D) present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

- (E) establish a relationship with the jury, when the voir dire is conducted by an attorney.
- (6) Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
- (7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
- (8) Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
- (9) Counsel should consider seeking assistance from a colleague or a defense team member to record voir dire panel responses and to observe voir dire panel reactions. Counsel should also communicate with the client regarding the client's voir dire panel preferences.

(b) *Examining the Prospective Jurors*

- (1) Counsel should personally voir dire the panel. If the court conducts voir dire, counsel should submit proposed questions to be incorporated into the court's voir dire.
- (2) Counsel should take all steps necessary to protect the voir dire record for appeal, including filing a copy of the proposed voir dire questions or moving the admission of the proposed questions into evidence.
- (3) If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors. Counsel should consider whether the court, rather than counsel, should conduct particularly sensitive voir dire.
- (4) In a group voir dire, counsel should consider the impact of questions which may elicit responses which are likely to prejudice other prospective jurors, or to reveal information otherwise inadmissible.

(c) *Challenges*

- (1) Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.
- (2) Counsel should object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

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2. Jury Selection in Adult Criminal Cases

- a. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
- b. Counsel should develop voir dire questions in advance of trial.
- c. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - i. to elicit information about the attitudes of individual jurors, which will inform counsel about peremptory challenges and challenges for cause;
 - ii. to convey to the panel certain legal principles which are critical to the case;
 - iii. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - iv. to present the client and the client's case in a favorable light, without prematurely disclosing information about the case to the prosecutor; and
 - v. to establish a relationship with the jury.
- d. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
- e. Counsel should be familiar with the law concerning challenges for cause and peremptory challenges.
- f. If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors.
- g. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.
- h. Counsel should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.

3. Overall Defense Trial Strategy

Commentary. Just as defense counsel is expected to develop a theory of the case to best explain the facts from the defense's perspective (see above), so, too, defense counsel must develop a trial strategy over how best to present that theory. Trial strategy goes beyond the theory of the case, however, to include other issues, especially whether to put on a proactive defense at all. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 6.4.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.5 Presenting the Defense Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

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

6.6 Presenting the Defense Case

Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

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4. Proof

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- g. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.

4. Opening Statement

Commentary. The first major action once the trial itself commences is for the two attorneys to present their opening statements to the jury. The purpose of these statements is to provide the jurors with a mental road map of key aspects of the case, including what will be occurring, the facts in dispute, and how each witness relates to these disputes. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 7.1, 7.4.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.4 Opening Statement

Defense counsel's opening statement should be confined to a statement of the issues in the case and the evidence defense counsel believes in good faith will be available and admissible. Defense counsel should not allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.3 Opening Statement

- a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- b. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
- c. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.
- d. Counsel's objective in making an opening statement may include the following:
 1. to provide an overview of the defense case;
 2. to identify the weaknesses of the prosecution's case;
 3. to emphasize the prosecution's burden of proof;
 4. to summarize the testimony of witnesses, and the role of each in relationship to the entire case;
 5. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 6. to clarify the jurors' responsibilities;

7. to state the ultimate inferences which counsel wishes the jury to draw.
- e. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
- f. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
 1. the significance of the prosecutor's error;
 2. the possibility that an objection might enhance the significance of the information in the jury's mind;
 3. whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

- (a) If the court allows an opening statement, it should be confined to a statement of the issues in the case and the evidence counsel believes in good faith will be available and admissible at trial.

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

6.5 Opening Statement

- (a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening and of deferring the opening statement until the beginning of the defense case.
- (b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- (c) Counsel's objectives in making an opening statement may include the following:
 - (1) to provide an overview of the theory of the defense case;
 - (2) to summarize the testimony of witnesses and the role of each in relationship to the entire case;
 - (3) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

- (4) to identify the weaknesses of the prosecution's case;
 - (5) to remind the jury of the prosecution's burden of proof,
 - (6) to clarify the jurors' responsibilities;
 - (7) to personalize the client and counsel to the jury.
- (d) Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.
- (e) Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

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

Guideline 7.3 Opening Statement

- (a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- (b) Counsel should be familiar with the law and the individual trial judge's rules regarding the permissible content of an opening statement.
- (c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.
- (d) Counsel's opening statement should introduce the case theory(s) and theme(s) using storytelling techniques. Counsel's opening statement may also incorporate these objectives:
 - (1) to provide an overview of the defense case;
 - (2) to identify the weaknesses of the prosecution's case;
 - (3) to emphasize the prosecution's burden of proof;
 - (4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;
 - (5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - (6) to clarify the juror's responsibilities;
 - (7) to state the ultimate inferences which counsel wishes the jury to draw.
 - (8) to prepare the jury for the client's testimony or failure to testify.
- (e) Counsel should consider incorporating the promises of proof that the prosecutor makes to the jury during opening statement into the defense summation.
- (f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions,

unless tactical considerations weigh against any objections or requests. Such tactical considerations may include, but are not limited to:

- (1) the significance of the prosecutor's error;
- (2) the possibility that an objection might emphasize the significance of the information in the jury's mind, or negatively impact the jury;
- (3) whether there are any rules made by the judge against objecting during the other attorney's opening statement.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

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3. Opening Statements

- a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- b. Counsel's objective in making an opening statement may include the following:
 - i. provide an overview of the defense case;
 - ii. identify the weaknesses of the prosecution's case;
 - iii. emphasize the prosecution's burden of proof;
 - iv. summarize the testimony of witnesses and their roles in relationship to the entire case;
 - v. describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - vi. clarify the juror's responsibilities; and
 - vii. state the ultimate inferences which counsel wishes the jury to draw.
- c. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
- d. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should object, request a mistrial, or seek cautionary instructions, unless tactical considerations weigh against any such objections or requests.

5. Confronting the Prosecution's Case

Commentary. The burden of proof is on the prosecution to prove the state's case. Counsel can most effectively attack the prosecution's case by exposing its weaknesses. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 6.3, 7.5, 7.7.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.6 Examination of Witnesses

- (a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
- (b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.
- ...
- (d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.4 Confronting the Prosecution's Case

- a. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
- ...
- c. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- d. In preparing for cross-examination, counsel should:
 - 1. consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - 2. consider whether cross-examination of each individual witness is likely to generate helpful information;
 - 3. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;

4. consider a cross-examination plan for each of the anticipated witnesses;
 5. be alert to inconsistencies in witnesses' testimony;
 6. be alert to possible variations in witnesses' testimony;
 7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 8. where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
 9. be alert to issues relating to witness credibility, including bias and motive for testifying.
- e. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.
 - f. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.
 - g. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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- (l) Counsel should be prepared to cross-examine prospective witnesses for the State, be familiar with the applicable law and procedures concerning impeachment, and be alert to issues relating to witness credibility, including bias and motive for testifying.

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

6.6 Confronting the Prosecution's Case

- (a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- (b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- (c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- (d) In preparing for and carrying out cross-examination, counsel should also:
 - (1) develop a coherent and sensible theory of the case, along with the framework of the closing argument;
 - (2) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
 - (3) integrate into cross-examination the theory of the defense and closing argument;
 - (4) consider whether cross-examination of each witness is necessary or likely to generate helpful information;
 - (5) review and organize all prior statements and testimony of each witness;
 - (6) be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
 - (7) be alert to significant omissions or deficiencies in the testimony of any witness; e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics, etc.;
 - (8) consider using certified copies of prior convictions or pending cases of witnesses;
 - (9) be alert to all issues relating to witness competency or credibility, including bias or motive for testifying.
- (e) If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
- (f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
- (g) Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. Counsel should request,

when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

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

Guideline 7.4 Confronting the Prosecution's Case

- (a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.
- (b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- (c) In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- (d) In preparing for cross-examination, counsel should:
 - (1) consider the need to integrate cross-examination, the theory and theme(s) of the defense and closing argument;
 - (2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking unnecessary questions or questions which may hurt the defense case.
 - (3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
 - (4) consider a cross-examination plan for each of the anticipated witnesses;
 - (5) be alert to inconsistencies in a witness's testimony;
 - (6) be alert to possible variations in witnesses' testimony;
 - (7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - (8) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
 - (9) be alert to issues relating to witness credibility, including bias and motive for testifying.
- (e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the law concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

- (f) Prior to trial, counsel should ascertain whether the prosecution has provided copies of all prior statements of the witnesses it intends to call at trial as required by law. If disclosure is not timely made, counsel should prepare and argue (a) motion (s) to:
- (1) dismiss the case;
 - (2) exclude the witness's testimony and all evidence affected by that testimony;
 - (3) grant a mistrial;
 - (4) continue the case; or
 - (5) give a cautionary instruction.
- (g) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a directed verdict on each count charged, and, where there are colorable issues, be prepared with supporting case law. If necessary, counsel should request that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

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- a. Counsel should anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
- b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- c. In preparing for cross-examination, counsel should:
 - i. be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;
 - ii. consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - iii. consider whether cross-examination of each individual witness is likely to generate helpful information;
 - iv. anticipate those witnesses the prosecution might call in its case-in-chief and in rebuttal;

- v. consider a cross-examination plan for each of the anticipated witnesses;
 - vi. be alert to inconsistencies or variations in a witness's testimony;
 - vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - viii. review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
 - ix. be alert to issues relating to witness credibility, including but not limited to background, bias and motive for testifying.
- d. Counsel should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
 - e. Before beginning cross-examination, counsel should ascertain whether the prosecution has provided copies of all prior statements. If counsel does not receive prior statements of prosecution witnesses until the prosecution has completed direct examination, counsel should, at a minimum, request adequate time to review these documents before commencing cross-examination.
 - f. At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion in order that counsel may make an informed decision whether to present a defense.
 - g. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.
 - h. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
 - i. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
 - j. In preparing for presentation of a defense case, counsel should:
 - i. develop a plan for direct examination of each potential defense witness;
 - ii. determine the order of witnesses;
 - iii. consider the possible use of character witnesses; and
 - iv. consider the need for expert witnesses.
 - k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.
 - l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.
 - m. Counsel should conduct redirect examination as appropriate.

- n. At the close of the defense case, counsel should renew the motion for judgment of acquittal (or directed verdict) on each charged count.

6. Stipulations

Commentary. Not all facts in the case will be in dispute. Stipulations of fact by prosecution and defense may be used to speed up the case by removing the need for witnesses to testify to those facts. In some instances, there may be an advantage to the defense in using stipulations; in other instances, there may be disadvantages. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.2.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.4 Confronting the Prosecution’s Case

- (b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution’s case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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- (n) Counsel should consider the advantages and disadvantages before entering into stipulations concerning the prosecution’s case.

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

6.6 Confronting the Prosecution’s Case

- (a) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution’s case.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

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- b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

7. Presentation of the Defense Case

Commentary. The standards take very different approaches to the defense's presentation of its case. The ABA standards are negative in character, detailing what actions attorneys are not permitted to do. The NLADA and the three state standards, in contrast, specify those actions expected of defense counsel. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.8.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.5 Presentation of Evidence

- (a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.
- (b) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.
- (c) Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.
- (d) Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 4-7.6 Examination of Witnesses

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- (c) Defense counsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.5 Presenting the Defense Case

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- b. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

- c. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
- d. In preparing for presentation of a defense case, counsel should, where appropriate:
 - 1. develop a plan for direct examination of each potential defense witness;
 - 2. determine the implications that the order of witnesses may have on the defense case;
 - 3. consider the possible use of character witnesses;
 - 4. consider the need for expert witnesses.
- e. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- f. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- g. Counsel should conduct redirect examination as appropriate.
- h. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4

- (m) Counsel should prepare all defense witnesses for direct and possible cross-examination.

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

6.7 Presenting the Defense Case

- (a) Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).

- (c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate:
 - (1) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
 - (2) after discussion with the client, make the decision whether to call any witnesses;
 - (3) develop a plan for direct examination of each potential defense witness;
 - (4) determine the implications that the order of witnesses may have on the defense case;
 - (5) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
 - (6) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
 - (7) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
 - (8) attempt to obtain the prior records of all defense witnesses.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- (g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- (h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- (i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
- (j) Counsel should guard against improper cross-examination by the prosecutor.
- (k) Counsel should conduct redirect examination as appropriate.
- (l) At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each count charged and/or aggravating element.
- (m) Counsel should keep a record of all exhibits identified or admitted.

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

Guideline 7.5 Presenting the Defense Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on a defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
- (c) Counsel should be aware of the elements of any affirmative defense, the time frames for disclosure, and whether the client bears a burden of persuasion or a burden of production. Defense presentations with a time notice requirement include the following: alibi, insanity, inability to form specific intent, entrapment, and polygraph evidence.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate:
 - (1) develop a plan for direct examination of each potential defense witness;
 - (2) determine the implications that the order of witnesses may have on the defense case;
 - (3) consider the possible use of character witnesses;
 - (4) consider the need for expert witnesses;
 - (5) consider the use of demonstrative evidence and the order of exhibit presentation.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses, including expert(s), for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the client of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examinations as appropriate.
- (h) At the close of the defense case, counsel should renew the motion for a directed verdict on each charged count.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

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- h. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
- i. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
- j. In preparing for presentation of a defense case, counsel should:
 - i. develop a plan for direct examination of each potential defense witness;
 - ii. determine the order of witnesses;
 - iii. consider the possible use of character witnesses; and
 - iv. consider the need for expert witnesses.
- k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.
- l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.
- m. Counsel should conduct redirect examination as appropriate.

8. Closing Argument

Commentary. Closing argument summarizes and focuses the defense's position for the factfinder. As these standards indicate, the closing argument may emphasize any factual disputes and discuss how the facts relate to the relevant law. While great discretion is given to attorneys in their closing arguments, there are also significant limits. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.10.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.7 Argument to the Jury

- (a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
- (c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.
- (d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.6 Closing Argument

- a. Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- b. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- c. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - 1. highlighting weaknesses in the prosecution's case;
 - 2. describing favorable inferences to be drawn from the evidence;
 - 3. incorporating into the argument:
 - A. helpful testimony from direct and cross-examinations;

- B. verbatim instructions drawn from the jury charge;
- C. responses to anticipated prosecution arguments;
- 4. the effects of the defense argument on the prosecutor's rebuttal argument.
- d. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 - 1. whether counsel believes that the case will result in a favorable verdict for the client;
 - 2. the need to preserve the objection for a double jeopardy motion;
 - 3. the possibility that an objection might enhance the significance of the information in the jury's mind.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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- (q) Counsel should present closing argument and object to any improper argument by opposing counsel.

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

6.6 Closing Argument

- (a) Before an argument, counsel must file and should seek to obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- (b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing argument.
- (c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
 - (1) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
 - (2) favorable inferences to be drawn from the evidence;

- (3) incorporating into the argument:
 - (a) helpful testimony from direct and cross-examinations;
 - (b) verbatim instructions drawn from the expected jury charge;
 - (c) responses to anticipated prosecution arguments;
- (4) the effects of the defense argument on the prosecutor's possible rebuttal argument.
- (d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at the conclusion of the argument), requesting a mistrial, or seeking cautionary instructions.

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

Guideline 7.6 Closing Argument

- (a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- (b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- (c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - (1) highlighting weaknesses in the prosecution's case;
 - (2) describing favorable inferences to be drawn from the evidence;
 - (3) incorporating into the argument:
 - (A) the theory and theme(s) of the case;
 - (B) helpful testimony from direct and cross-examinations;
 - (C) verbatim instructions drawn from the jury charge;
 - (D) responses to anticipated prosecution arguments;
 - (E) visual aids and exhibits.
 - (4) the effects of the defense argument on the prosecution's rebuttal argument.
- (d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 - (1) whether counsel believes that the case will result in a favorable verdict for the client;

- (2) the need to preserve the objection for a double jeopardy motion;
- (3) the possibility that an objection might enhance the significance of the information in the jury's mind.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

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5. Closing Argument

- a. In developing closing argument, counsel should review the proceedings to determine:
 - i. what aspects can best be used in support of the defense, for example:
 - (a) weaknesses in the prosecution's case; and
 - (b) favorable inferences to be drawn from the evidence.
 - ii. what to incorporate into the argument, for example:
 - (a) helpful testimony from direct and cross-examinations;
 - (b) verbatim instructions drawn from the jury charge; and
 - (c) responses to anticipated prosecution arguments;
 - iii. what the possible effects of the defense arguments are on the prosecution's rebuttal argument.
- b. Whenever the prosecution exceeds the scope of permissible argument, counsel should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.
- c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.
- d. Counsel should object to and argue against improper instructions proposed by the prosecution.
- e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.

- f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
- g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

9. Jury Instruction

Commentary. The final substantive duties of trial counsel pertain to influencing the judge's instructions to the jury on the law. While the role here of counsel varies across jurisdictions, it is never an insignificant one. Failure at this point can jeopardize the success of all prior actions since the judge's instructions guide jury deliberations. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.9.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.7 Jury Instructions

- a. Counsel should be familiar with the local rules and the individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- b. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions.
- c. Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- d. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.
- e. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
- f. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

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

6.6 Jury Instructions

- (a) Counsel must file proposed or requested jury instructions before closing argument.
- (b) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

- (c) Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- (d) Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- (e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- (f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and if necessary, request additional or curative instructions.
- (g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

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

Guideline 7.7 Jury Instructions

- (a) Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- (b) Counsel should submit written modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Client approval is required for submission of a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions and should ensure that all jury instruction argument is on the record.
- (c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- (d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including filing a copy of the proposed jury instructions or moving them into evidence.
- (e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

- (f) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.9—Trial

...

5. Closing Argument

...

- c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.
- d. Counsel should object to and argue against improper instructions proposed by the prosecution.
- e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.
- f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
- g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

10. Protection of Defendant's Post-Trial Rights

Commentary. Counsel should be prepared to act promptly to protect the client's appeal and other rights should the trial verdict be unfavorable. In anticipation of such a possibility, counsel must at each stage of the trial take such actions as required by rule to protect client's appeal rights. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 7.6.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.9 Posttrial Motions

Defense counsel's responsibility includes presenting appropriate posttrial motions to protect the defendant's rights.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.1 General Trial Preparation

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- e. Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

...

- (r) Counsel should submit requests to charge to the court and take appropriate steps to preserve the record when necessary.
- (s) Counsel should endeavor throughout the trial process to establish a proper record for appellate review and should request that all trial proceedings be recorded.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-9. Duties of trial counsel following sentencing

- (a) In order to protect a convicted defendant's right to appeal, it shall be the duty of each trial counsel to:
- (1) file a motion for modification of sentence, when appropriate;
 - (2) file a motion for release on appeal bond, when appropriate;
 - (3) file a notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant;
 - (4) upon filing the notice of appeal, obtain a court order for the trial transcript, and a transcript of any pretrial or posttrial proceedings from which a claim of error may arise;
 - (5) upon filing the notice of appeal, obtain an order from the district court appointing the state appellate defender as counsel for the appeal and file the order of appointment with the clerk of the district court within five days of the filing of the notice of appeal; and
 - (6) submit a draft of the docketing statement and all documents necessary to docket the appeal required by Supreme Court Rule....

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

6.1 General Trial Preparation

- (a) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practices regarding:
- (1) preservation of each type of objection at every stage of the proceedings;
 - (2) offers of proof regarding evidence ruled inadmissible;
 - (3) recording of trial proceedings. Counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.11—Postdisposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

1. Counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
2. Counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.
3. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.
4. Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.
5. Counsel should inform the client of procedures available for requesting a discretionary review of or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.
6. Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

11. Related Issues

Commentary. The two ABA standards presented here deal with two different trial functions. Both courtroom professionalism and relations with the jury may in some respects be mere variations on the attorney's ethical responsibilities.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.1 Courtroom Professionalism

- (a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.
- (b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.
- (c) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.
- (d) Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.
- (e) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

Standard 4-7.3 Relations with Jury

- (a) Defense counsel should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during the trial. Defense counsel should avoid the reality or appearance of any such communications.
- (b) Defense counsel should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
- (c) After discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such

course, communicate with jurors to determine whether such challenge may be available.

J. After Conviction

A trial attorney's responsibilities do not terminate at the conclusion of the trial. Where the client has been convicted, a number of important responsibilities exist. The standards in this section address the following issues:

1. Sentencing duties
2. Pre-sentence report/sentencing memo
3. Motion for new trial
4. Motion for bail pending appeal and related motions
5. Explanation to client of right of appeal
6. Filing of appeal
7. Cooperation with appellate counsel
8. Related issues

The Missouri Guidelines for Representation also include provision for counsel to advise the client about the court's sentence, especially conditions of probation (Guideline 9.3).

1. Sentencing Duties

Commentary. The most important postconviction responsibility of the trial attorney is to advocate for the client at sentencing. The NLADA and Oregon standards are especially extensive in describing the duties expected of counsel at this stage. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 9.1, 9.2. It must also be remembered that this is a rapidly changing area of the law and thus should be viewed in conjunction with subsequent case law. See, e.g., *Williams v. Taylor* — U.S. —, 120 S.Ct. 1479, 146 L. Ed.2d 435 (2000).

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.1 Sentencing

- (a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.
- (b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is not presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.
- (c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.
- (d) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 8.1 Obligations of Counsel in Sentencing

- a. Among counsel's obligations in the sentencing process are:
 1. where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
 2. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
 3. to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
 4. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
 5. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;
 6. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

Guideline 8.2 Sentencing Options, Consequences and Procedures

- a. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
 1. any sentencing guideline structure;
 2. deferred sentence, judgment without a finding, and diversionary programs;
 3. expungement and sealing of records;
 4. probation or suspension of sentence and permissible conditions of probation;
 5. restitution;
 6. fines;
 7. court costs;
 8. imprisonment including any mandatory minimum requirements;
 9. confinement in mental institution;
 10. forfeiture.

- b. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
 - 1. credit for pre-trial detention;
 - 2. parole eligibility and applicable parole release ranges;
 - 3. effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - 4. place of confinement and level of security and classification;
 - 5. self-surrender to place of custody;
 - 6. eligibility for correctional programs and furloughs;
 - 7. available drug rehabilitation programs, psychiatric treatment, and health care;
 - 8. deportation;
 - 9. use of the conviction for sentence enhancement in future proceedings;
 - 10. loss of civil rights;
 - 11. impact of a fine or restitution and any resulting civil liability;
 - 12. restrictions on or loss of license.
- c. Counsel should be familiar with the sentencing procedures, including:
 - 1. the effect that plea negotiations may have upon the sentencing discretion of the court;
 - 2. the procedural operation of any sentencing guideline system;
 - 3. the effect of a judicial recommendation against deportation;
 - 4. the practices of the officials who prepare the presentence report and the defendant's rights in that process;
 - 5. the access to the presentence report by counsel and the defendant;
 - 5. the prosecution's practice in preparing a memorandum on punishment;
 - 7. the use of a sentencing memorandum by the defense;
 - 8. the opportunity to challenge information presented to the court for sentencing purposes;
 - 9. the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;
 - 10. the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

- a. In preparing for sentencing, counsel should consider the need to:

1. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
2. maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
3. obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
4. ensure the client has adequate time to examine the presentence report;
5. inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
6. prepare the client to be interviewed by the official preparing the presentence report;
7. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
8. inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
9. collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

Guideline 8.5 The Prosecution's Sentencing Position

- a. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.
- b. If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
- c. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude

consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

Guideline 8.7 The Sentencing Process

- a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interests.
- b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
- c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
- d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- e. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation of the defendant.
- f. Where appropriate, counsel should prepare the client to personally address the court.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.5. Sentencing

- (a) Prior to sentencing, counsel should discuss with the client the maximum sentence that may be imposed, which may include any period of probation, any special conditions of probation which may include treatment or restitution, and any fine which may be imposed.
- (b) Counsel should inform the client of the nature of the presentence investigation process and the client's right to waive the presentence investigation if appropriate.
- (c) For the purposes set forth in Connecticut Practice Book, counsel or counsel's representative should be present during the Office of Probation's interview of the client in the presentence investigation process when requested by the client, or when, in counsel's opinion, counsel's presence is required to protect the interests of the client, or when otherwise appropriate.

- (d) Counsel should review the presentence investigation report with the client and request that any necessary corrections be made to the presentence investigation report in writing and in accordance with Connecticut Practice Book.
- (e) Counsel should request a copy of the corrected report for his/her file and for the parole board.
- (f) With the client's consent, counsel should provide information and documents to the probation officer preparing the presentence report.
- (g) Counsel should advocate the best possible disposition for sentencing on behalf of the client.

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

1.2 Sentencing

Counsel should begin gathering information relative to possible sentencing.

1.5 Dispositions

- (a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- (b) Counsel should request a reasonable time period for the payment of any fines or restitution.
- (c) Counsel should make sure that the client fully understands the foreseeable consequences of the sentence, including any conditions of probation.
- (d) Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.

Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.

7.1 Preparation

Defense counsel should be familiar with and consider:

- (a) the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties;
- (b) the official version of the client's prior record, if any;
- (c) the position of the probation department with respect to the client;
- (d) the sentencing recommendation and memorandum, if any, of the prosecutor;

- (e) seeking the assistance of an expert—either through community resources or the Committee for Public Counsel Services;
- (f) the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender registration, DNA Seizure;
- (g) the sentencing practices of the judge, to the extent they may be determined;
- (h) the sentencing guidelines, as they would apply to the case;
- (i) referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing;
- (j) any victim impact statement to be presented to the court;
- (k) any other report to be presented to the court in aid of sentencing;
- (l) seeking an evidentiary hearing, e.g., restitution amount;
- (m) requesting a continuance for sentencing at a later date;
- (n) any other information or proposals that may be helpful to the client.

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

Guideline 8.1 Obligations of Counsel in Sentencing

- (a) Counsel has the following obligations for the sentencing process :
 - (1) to consider all sentencing, correctional, and financial implications;
 - (2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
 - (3) to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
 - (4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
 - (5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report;
 - (6) to consider the need for and availability of sentencing specialists, and/or mental health and/or mental retardation professionals, and to seek the assistance of such specialists whenever possible and warranted;
 - (7) to identify and preserve the legal and constitutional issues for appeal.

Guideline 8.2 Sentencing Options, Consequences and Procedures

- (a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:
 - (1) habitual offender statutes, sentencing enhancements, mandatory sentence requirements, and all other applicable sentencing statutes or case law;
 - (2) deferred sentence, conditional discharge, and diversionary programs;
 - (3) expungement and sealing of records;
 - (4) probation or suspension of sentence and mandatory/permissible conditions of probation;
 - (5) restitution;
 - (6) mandatory registration programs: sex offender, DNA, and school systems/health care providers' background checks;
 - (7) fines;
 - (8) court costs;
 - (9) imprisonment including any mandatory minimum requirements;
 - (10) forfeiture;
 - (11) sixty (60) day diagnostics and forensic evaluations.
- (b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:
 - (1) credit for pre-trial detention;
 - (2) parole eligibility and supervision;
 - (3) effect of earned time or good-time credits on the client's release date and how those credits are earned and calculated;
 - (4) place of confinement and level of security and classification;
 - (5) self-surrender to place of custody;
 - (6) eligibility for correctional/jail programs, and furloughs;
 - (7) available drug rehabilitation programs, psychiatric treatment, and health care;
 - (8) deportation/exclusion and other consequences under federal immigration law;
 - (9) use of the conviction for sentence enhancement in future proceedings;
 - (10) loss of civil rights, including right to bear arms, voting rights, and employment consequences;
 - (11) impact of a fine or restitution and any resulting civil liability;
 - (12) restrictions on or loss of license.
- (c) Counsel should be familiar with and advise the client of the sentencing procedures, including:

- (1) the effect that plea negotiations may have upon the sentencing discretion of the court;
- (2) the procedural operation of the sentencing system, including concurrent and consecutive time calculations;
- (3) the practices of the officials who prepare the presentence report and the defendant's rights in that process;
- (4) the access to the presentence report by counsel and the defendant;
- (5) the prosecution's practice in preparing a memorandum on punishment;
- (6) the use of a sentencing memorandum by the defense;
- (7) the opportunity to challenge information presented to the court for sentencing purposes;
- (8) the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;
- (9) the participation that victims under the Victims' Rights Act and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparing for Sentencing

- (a) In preparing for sentencing, counsel should consider the need to:
- (1) inform the client of the applicable sentencing requirements, options, and alternatives, the sentencing judge's practices and procedures, and the likely and possible consequences of the sentencing alternatives;
 - (2) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
 - (3) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical/mental health/counseling history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
 - (4) ensure that the client has adequate time to review the contents and recommendations of the presentence report;
 - (5) inform the client of his or her right to speak at the sentencing proceedings and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
 - (6) prepare the client to be interviewed by the official preparing the presentence report;
 - (7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

- (8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
- (9) collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should also specifically request the opportunity to present tangible and testimonial evidence.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.10—Sentencing or Disposition

Counsel should:

1. be knowledgeable in disposition provisions and alternatives;
2. ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;
3. ensure all reasonably available mitigating and favorable information is presented to the court;
4. in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties;
5. in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.

Implementation

1. Counsel should be fully aware, and make sure the client is fully aware of:
 - a. sentencing guideline structure, if applicable, or the maximum, mandatory, minimum and likely sentence or disposition, including likely jail, detention or prison time, or training school commitment;
 - ...
 - c. imprisonment or incarceration, including any mandatory minimum requirements and maximum terms;
 - d. restitution, fines, unitary assessments and court costs;
 - e. possible and likely sentence enhancements, and probation, parole, or post-prison supervision consequences;
 - f. asset forfeiture;

- g. deferred sentences, conditional discharges, informal disposition, or conditional postponement and diversion agreements;
 - h. probation or suspension of sentence and permissible conditions of probation;
 - i. possibility of later expungement and sealing of records;
 - j. the possible and likely place and manner of confinement;
 - k. credit for pretrial detention;
 - l. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - m. if applicable, parole or post-prison supervision eligibility and applicable release ranges;
 - n. self-surrender to place of custody;
 - o. likely post-prison or training school supervision conditions;
 - p. eligibility for correctional programs, work release and conditional leaves;
 - q. available drug rehabilitation programs, psychiatric treatment, and health care;
 - r. collateral consequences of conviction, e.g., deportation, civil disabilities, sex offender registration, DNA and AIDS testing, and enhanced sentences for future convictions;
 - s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;
 - t. the purpose of the interview for the Pre-Sentence Investigation (PSI) or the interview of the juvenile court counselor for disposition, including that the client's attitude may be a critical factor in obtaining a favorable recommendation for sentencing or disposition and that clients who appear cooperative, concerned, remorseful, and responsible will fare better;
- ...
2. Counsel should be familiar with the sentencing and dispositional hearing procedures, including:
 - a. effect that plea negotiations may have upon the sentencing discretion of the court;
 - b. procedural operation of any sentencing guideline system;
 - c. effect of a judicial recommendation against deportation;
 - d. access to the presentence or dispositional report by counsel, the client, and others;
 - e. availability of assessments such as psychiatric, psychological, educational or neurological evaluations to both the PSI investigator or juvenile court counselor and client's counsel in preparing sentencing or dispositional recommendations;
 - f. prosecution's practice in preparing sentencing or dispositional recommendations;

- g. use of a sentencing or dispositional memorandum by counsel;
 - h. opportunity to challenge information presented to the court for sentencing or dispositional purposes;
 - i. availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;
 - ...
 - l. participation that victims and prosecution or client's witnesses may have in the sentencing or dispositional proceedings;
 - m. witnesses that may be called by counsel, such as family members, teachers, ministers or others who have worked with the client;
 - n. the admissibility of other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities.
3. Counsel should:
- a. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences thereof;
 - b. maintain regular contact with the client prior to the sentencing hearing and keep the client informed of the steps being taken in preparation for sentencing;
 - c. obtain from the client information such as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and sources through which the information can be corroborated;
 - d. determine with the client whether to obtain an independent psychiatric, psychological, educational or neurological or other evaluation for sentencing or dispositional purposes;
 - e. if the client is being evaluated, whether by the state or at counsel's request, counsel should call or write the evaluator in advance to provide favorable background information for the evaluator's use and to request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
 - f. ensure that the client who is being evaluated understands the process, is not frightened, and is encouraged to cooperate;
 - g. prepare the client to be interviewed for a presentence or dispositional report;
 - h. inform the client of the client's right to address the court at sentencing or disposition and inform the client of the possible consequences that admission of guilt may have upon an appeal, retrial or trial on other offenses;
 - i. ensure that the client has adequate time to examine the presentence report or dispositional report;

- j. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
 - k. collect documents and affidavits to support the client's position, prepare witnesses to testify at the sentencing or disposition and request the opportunity to present tangible and testimonial evidence.
4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:
 - a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;
 - b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
 - c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.
 5. Counsel should determine whether the prosecution will advocate that a particular type or length of sentence or disposition be imposed.
 6. If a written sentencing or disposition memorandum is submitted by the prosecution, counsel should verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
 7. When the court has found evidence sufficient to support jurisdiction in a delinquency case, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the youth or society.
 8. Counsel should prepare and present to the court a sentencing or disposition memorandum where there is a strategic reason for doing so.
 9. Counsel should be prepared at the sentencing or disposition proceeding to take the steps necessary to advocate fully for the requested sentencing or disposition and to protect the client's interest.
 - ...
 11. In the event facts will be disputed at sentencing or disposition, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
 12. Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses.

13. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, credit for time served, good time credits, and against the deportation of the defendant.
14. Where appropriate, counsel should prepare the client to personally address the court.

2. Pre-Sentence Report/Sentencing Memo

Commentary. An important part of the sentencing procedure in many states is the pre-sentence report submitted by probation. In some jurisdictions, this report is supplemented by a sentencing recommendation from the prosecution, with or without a short written report. The standards specify that defense counsel duty is to influence or respond to both of these recommendations, as well as to develop and present the defense's own sentencing report and recommendation. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 9.2(c).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 8.4 The Official Presentence Report

- a. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:
 1. determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
 2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;
 3. review the completed report;
 4. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
 5. take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:
 - A. the court refuses to hold a hearing on a disputed allegation adverse to the defendant;
 - B. the prosecution fails to prove an allegation;
 - C. the court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to correctional and/or parole officials.

6. Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

Guideline 8.6 The Defense Sentencing Memorandum

- a. Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:
 1. challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;
 2. challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;
 3. information contrary to that before the court which is supported by affidavits, letters, and public records;
 4. information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;
 5. information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
 6. information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;
 7. presentation of a sentencing proposal.

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

7.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

7.3 Pre-Sentence Reports

- (a) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct these before prejudice occurs.
- (b) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

7.4 Defense Recommendations

- (a) Counsel should carefully consider and discuss with the client any sentencing recommendation to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel.

Counsel should explore all reasonable alternatives to incarceration, e.g., community services, rehabilitative programs, restitution.

- (b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- (c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses; e.g., reports or testimony from employers, community representatives and family.
- (d) Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

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

Guideline 8.4 The Official Presentence Report

- (a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:
 - (1) determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
 - (2) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;
 - (3) review the completed report and discuss it with the client;
 - (4) take appropriate steps to ensure that erroneous or misleading information which may harm the client is challenged or deleted from the report;
 - (5) take appropriate steps to preserve and to protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:
 - (A) the court refuses to hold a hearing on a disputed allegation adverse to the defendant;
 - (B) the prosecution fails to prove an allegation;
 - (C) the court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenge d or unproved information deleted before the report or memorandum is distributed to correctional, probation and/or parole officials.

- (6) Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

Guideline 8.5 The Prosecution's Sentencing Position

- (a) Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for an aggravated sentence.
- (b) If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
- (c) If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to probation, parole and correctional officials.

Guideline 8.6 The Defense Sentencing Memorandum

- (a) In the appropriate case, counsel should prepare and present to the court a defense sentencing memorandum. Among the topics counsel may wish to include in the memorandum are:
 - (1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;
 - (2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;
 - (3) information contrary to that before the court which is supported by affidavits, letters, and public records;
 - (4) information favorable to the defendant concerning such matters as the offense, mitigating factors (cultural background, mental health, retardation, etc.), relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;
 - (5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
 - (6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;
 - (7) presentation of a sentencing proposal.

Guideline 8.7 The Sentencing Process

- (a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's legal rights and interests.

- (b) Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
- (c) In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
- (d) Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- (e) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation/exclusion of the defendant.
- (f) Where appropriate, counsel should prepare the client to personally address the court. In addition, counsel should prepare expert and sentencing advocate witnesses to address the court.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.10—Sentencing or Disposition

Counsel should:

...

- 4. in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties.

Implementation

- 1. Counsel should be fully aware, and make sure the client is fully aware of:

...

- t. the purpose of the interview for the Pre-Sentence Investigation (PSI) . . . , including that the client’s attitude may be a critical factor in obtaining a favorable recommendation for sentencing or disposition and that clients who appear cooperative, concerned, remorseful, and responsible will fare better;

...

- 3. Counsel should:

...

- i. ensure that the client has adequate time to examine the presentence report or dispositional report;

...

4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:
 - a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;
 - b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
 - c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.

3. Motion for New Trial

Commentary. In virtually all jurisdictions, the defense may submit a motion for a new trial to the court. While the substantive requirements for such a motion vary, all motions must comply with time and other procedural requirements. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 8.2. The New Mexico guidelines also provide for motions to reconsider the sentence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.1 Motion for a New Trial

- a. Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
- b. When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
 1. the likelihood of success of the motion, given the nature of the error or errors that can be raised;
 2. the effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

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

Guideline 9.1 Motion for a New Trial in District Court

- (a) Counsel should be familiar with the procedures available under the Rules of Appellate Procedure, 12-201, to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
- (b) When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
 - (1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;

- (2) the effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to appeal the issues that might be raised in the new trial motion.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.11—Postdisposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

1. Counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

4. Motion for Bail Pending Appeal and Related Motions

Commentary. It is within the discretion of the court in most jurisdictions to permit bail after conviction and to stay execution of the sentence pending appeal.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.3 Bail Pending Appeal

- a. Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.
- b. Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

Guideline 9.4 Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

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

Guideline 9.3 Bail Pending Appeal

- (a) Where a client indicates a desire to appeal from a conviction after trial or after a conditional plea, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.
- (b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel to pursue the request for bail.

Guideline 9.4 Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement. Counsel should also consider a remand and release order followed by a later date of self-surrender.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.11—Postdisposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

...

3. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.
4. Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

5. Explanation to Client of Right of Appeal

Commentary. A final responsibility to the client is to explain his or her appeal rights. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 10.1.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.2 Appeal

- (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.2 Right to Appeal

- a. Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's right to appeal, such as ordering transcripts of the trial proceedings.
- b. Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.

Guideline 9.5 Sentence Reduction

Counsel should inform the client of procedures available for requesting a discretionary review of, or reduction in, the sentence imposed by the trial court, including any time limitations that apply to such a request.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeal

- (a) Counsel should inform the client of his/her right to appeal.

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

Guideline 9.2 Right to Appeal from District Court Disposition

- (a) Counsel should inform the client of his/her right to appeal a conviction after trial, after a conditional plea or after a guilty plea that was not entered in a knowing, intelligent and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision.
- (b) If the client wishes to appeal, counsel should timely file a notice of appeal and a docketing statement or timely request extensions after advising the client of the need for an extension. If a client wishes to waive appeal from a conviction after trial or a conditional guilty plea, counsel should timely file a written waiver of appeal pursuant to Rule 5-702 (b).
- (c) Where possible, counsel should request the audio-tape or stenographic transcript of the proceedings in order to prepare a complete and accurate docketing statement, and where possible, should preserve that transcript to provide to appellate counsel on request. In judicial districts where it is not possible to obtain the transcript of the trial to prepare the docketing statement, counsel should take careful, contemporaneous notes of all trial proceedings to ensure an accurate statement of the facts.
- (d) Where appellate counsel was not trial counsel, trial counsel should timely respond to requests from appellate counsel for additional information about the case.
- (e) If an appeal is subsequently assigned to the general calendar, trial counsel should provide the district court clerk with a list of all the hearing dates and court proceedings that are needed for the record on appeal. Trial counsel must also file a designation of the specific exhibits needed for appeal with the district court clerk pursuant to Rule 12-212.
- (f) Counsel's advice to the client regarding the right to appeal should include an explanation of the limited nature of the relief available on direct appeal and, where appropriate, should advise the client of the right to file a pro se habeas corpus petition. Counsel should provide a pro se habeas corpus packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise a client of the relevant time frames for filing state and federal habeas corpus

petitions and provide information and advice necessary to protect a client's right to postconviction relief.

- (g) If counsel does not have sufficient training or experience to represent a client on appeal or a post-conviction proceeding, counsel should seek assistance from the Appellate Division of the Public Defender Department, and should obtain sufficient training to provide quality representation.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.11—Postdisposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

...

2. Counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.

6. Filing of Appeal

Commentary. The legal duties of counsel for the filing of an appeal from conviction are set by state law.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeal

...

- (c) In any case involving conviction after trial and imposition of a sentence of incarceration or a suspended sentence of incarceration, there shall be a presumption that an appeal should be filed on behalf of a client. If it is the opinion of the attorney that all potential issues in the appeal would be wholly frivolous, those issues should normally be addressed in accordance with the procedures set forth in Practice Book. After the appeal has been filed, counsel should submit an *Anders* brief identifying anything in the record that might arguably support the appeal following a review of the trial transcript. Under circumstances when a defendant deems it in his/her best interests not to appeal a conviction, the final decision not to appeal must be made by a defendant knowingly, intelligently, and after full consultation with counsel. In any case in which an accused wishes to waive his/her right to appeal, a waiver should be made before the court on the record or in a writing signed by the defendant in which he/she affirmatively states his/her desire not to appeal so as to ensure that the decision is voluntary.

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

8.1 Appellate Rights

- (a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence and should file such motion in a timely fashion if requested to do so by the client or, if appropriate, to insure an accurate and legal sentence.
- (b) After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file in a timely fashion the appropriate notice and request either a tape or transcript of all prior court proceedings.
- (c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

8.2 Continuing Duty to Represent

Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should file a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed.

7. Cooperation with Appellate Counsel

Commentary. Where the appeal of a conviction is handled by an attorney other than the trial attorney, coordination between the two is needed to better identify issues for appeal. See also, *Compendium* Volume IV, “Standards for Appellate Representation,” and Missouri State Public Defender, Guidelines for Representation (1992), Guidelines 11.1(b)(2), 11.3(a)(3), and 11.4(a)(2).

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.2 Right to Appeal

...

- c. Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeals

...

- (d) Counsel should cooperate in providing information to appellate counsel in regard to the trial proceedings in accordance with the requirements of the Division’s policy regarding the handling of appeals.

8. Related Issues

Commentary. In a number of states, procedures exist for the expungement of a criminal conviction record. Where such laws exist, the client should be so informed.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.6 Expungement or Sealing of Record

Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

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

Guideline 9.6 Expungement or Sealing of Record

Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Standard 2.11—Postdisposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

...

6. Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.