

**PERFORMANCE STANDARDS
FOR
CRIMINAL DEFENSE REPRESENTATION**

**THE NEW MEXICO PUBLIC DEFENDER COMMISSION
AND
THE LAW OFFICES OF THE PUBLIC DEFENDER**

**EFFECTIVE
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PERFORMANCE STANDARDS FOR CRIMINAL DEFENSE REPRESENTATION

INTRODUCTION

On May 2, 2014, the New Mexico Public Defender Commission adopted the following Performance Standards for Criminal Defense Representation. These standards were previously identified in September 1998 by the New Mexico Public Defender Department as "Guidelines" for representation. The Commission unanimously decided that the rules of representation should be required as minimal standards rather than aspirational guidelines. Though the Commission aspires to have the highest quality representation for all clients, the Performance Standards reflect the steps that should be taken in any client's case in order to achieve constitutionally mandated representation.

The New Mexico Public Defender Commission will continue to work in conjunction with the Law Offices of the Public Defender to monitor these standards and to adjust them as necessary to be consistent with New Mexico law and practice.

PERFORMANCE STANDARDS FOR CRIMINAL DEFENSE REPRESENTATION

Standard 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.

Standard 1.2 Education, Training, and Experience of Defense Counsel

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.

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.

Standard 1.3 General Duties of Defense Counsel

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.

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.

Counsel has a continuing obligation to keep the client informed of the progress of the case.

Standard 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.

Standard 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 pre-trial 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.

Standard 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.

Standard 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.

Standard 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.

Standard 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.

Standard 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 5th 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.

Standard 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.

Standards 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.

Standard 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.

Standards 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.

Standards 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.

Standard 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.

Standard 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.

Standard 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.

Standard 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 pre-sentence 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

pre-sentence 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.

Standard 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.

Standard 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.

Standard 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.

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 venire panel responses and to observe venire panel reactions. Counsel should also communicate with the client regarding the client's venire 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, 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.

Standard 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.

Standard 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 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 a witness' 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 prosecutor 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' 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.

Standard 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.

Standard 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.

Standard 7.7 Jury Instructions

- (a) Counsel should be familiar with the local rules and the individual judges'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.

Standard 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 pre-sentence 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.

Standard 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 pre-sentence report and the defendant's rights in

that process;

- (4) the access to the pre-sentence 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.

Standard 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 pre-sentence 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 pre-sentence 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.

Standard 8.4 The Official Pre-sentence Report

- (a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the pre-sentence investigation report or similar document. In addition, counsel should:
 - (1) determine whether a pre-sentence 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 pre-sentence 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, 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.

Standard 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.

Standards 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 pre-sentence report and any

- prosecution sentencing memorandum;
- (2) challenges to improperly drawn inferences and inappropriate characterizations in the official pre-sentence 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.

Standard 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.

Standard 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.

Standard 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 post-conviction 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 Law Offices of the Public Defender, and should obtain sufficient training to provide quality representation.

Standard 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.

Standard 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.

Standard 9.5 Sentence Reconsideration

- (a) Counsel should inform the client of the procedures available for requesting a discretionary reconsideration of the sentence imposed by the trial court. Where appropriate, counsel should request a timely hearing for the motion to reconsider sentence.
- (b) Counsel should file the motion to reconsider sentence prior to the filing of the judgment and sentence. If the motion is filed after the filing of the judgment and sentence, counsel should request an extension from the district court judge to file the notice of appeal.

Standard 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.