

IDAHO STATE PUBLIC DEFENSE COMMISSION
Suggested Model Contract Terms

I. CASE TYPES

The Defending Attorney shall provide legal services for those persons deemed indigent and involved in the following types of cases:

- A. Capital
- B. Felony (non-capital)
- C. Misdemeanor
- D. Probation Revocation
- E. Appeals from Magistrate to District Court
- F. Juvenile
- G. Involuntary Mental Health Commitments
- H. Post-Conviction
- I. Child Protection
- J. Termination of Parental Rights, including appeals
- K. Criminal Contempt
- L. Extradition
- M. Misdemeanor and Delinquency Appeals, and felony appeals in the event the county does not qualify for the services of the State Appellate Public Defender

II. REPORTS AND INSPECTIONS

The Defending Attorney agrees to submit to the County the following reports at the times prescribed below. Failure to submit required reports may be considered a breach of this contract and may result in the County withholding payment until the required reports are submitted or the parties agreed to other corrective action.

A. Employee Profile

The Defending Attorney shall submit to the County 30 days after the final day of the fiscal year, a profile of positions for both legal and support staff who perform work under this Contract, distributed by type of case. The report will designate the name, position, and salary for each employee in a format to be provided. The County will not release this information except as required by law. The Defending Attorney will also identify any other attorney who has or will be providing services under this contract and in what capacity those services have been or will be provided. If the employee splits his/her work between work under this Contract and other business, the report will indicate the amount of time, designated either in hours or in a percentage of time, that employee devotes to private matters compared to work under this Contract.

B. Education and Training

The Defending Attorney shall submit to the County 30 days after the final day of the fiscal year a report for each attorney, MCLE and other training related to the Case Types identified in this contract and any other MCLE credits.

C. Caseload Reports

The Defending Attorney shall submit to the County 30 days after the final day of the fiscal year a report of the number of cases completed in the past year, categorized by Case Type.

D. Expenditure Reports for Operational (Non-Personnel) Expenses

The Defending Attorney shall submit to the County 30 days after the final day of the fiscal year a report including, for each month of the prior fiscal year, operational expenses incurred under the original appropriation, designated by Case Type, in the format to be provided. Any expenses which are incurred and are either extraordinary expenses, or for which a supplemental appropriation was needed, shall be included but separately designated.

E. Annual Subcontract/Conflict Attorney Use Report

If the Defending Attorney uses any subcontract attorneys in accordance with Section _____ (Assignment and Subcontracting), the Subcontracting Defending Attorney shall submit to the County a summary report.

F. Bar Discipline

The Defending Attorney will immediately notify the County in writing when it becomes aware that a complaint lodged with the Idaho State Bar (or any other state where the attorney is licensed) has resulted in reprimand, suspension, or disbarment of any attorney who is a member of the Defending Attorney's staff or working for the Defending Attorney.

G. Inspections

The Defending Attorney agrees to grant the County access to materials necessary to verify compliance with all terms of this Contract. At any time, upon reasonable notice during business hours and as often as the County may reasonably deem necessary for the duration of the Contract and a period of five years thereafter, the Defending Attorney shall provide to the County right of access to its facilities, including those of any subcontractor, to audit information relating to the matters covered by this Contract. Information that may be subject to any privilege or rules of confidentiality should be maintained by the Defending Attorney in a way that allows access by the County without breaching such confidentiality or privilege. The Defending Attorney agrees to maintain this information in an accessible location and condition for a period of not less than five years following the termination of this Contract, unless the County agrees in writing to an earlier disposition. Notwithstanding any of the above provisions of this paragraph, none of the Constitutional, statutory, and common law rights and privileges of any client are waived by this agreement.

H. Reporting Requirements for Defending Attorney Contracts

Defending Attorney shall comply with the reporting requirements set forth in Idaho Code 19-864 to include an annual report of the following information:

1. number of persons represented,
2. the crimes involved, (or the nature of the appointment)
3. the expenditures by category, i.e. investigators, evaluations, extraordinary travel, (other categories identified)
4. number of cases requiring appointment of conflict attorney

III. ESTABLISHMENT AND MAINTENANCE OF RECORDS

- A.** Defending Attorney agrees to maintain accounts and records, including personnel, property, financial, and programmatic records, which sufficiently and properly reflect all direct and indirect costs of services performed in the performance of this Contract, for a period of five (5) years after termination of this Contract unless permission to destroy them before that time period is granted by the County.
- B.** Defending Attorney agrees to maintain records which sufficiently and properly reflect all direct and indirect costs of any subcontracts or personal service contracts, for a period of five (5) years after termination of this Contract unless permission to destroy them before that time period is granted by the County. Such records shall include, but not be limited to, documentation of any funds expended by the Defending Attorney for said personal service contracts or subcontracts, documentation of the nature of the service rendered, and records which demonstrate the amount of time spent by each subcontractor personal service contractor rendering service pursuant to the subcontract or personal service contract.

IV. PERFORMANCE EXPECTATIONS TO BE CONSIDERED IN MODEL CONTRACTS FOR DEFENDING ATTORNEYS

A. American Bar Association’s Ten Principles of a Public Defense Delivery System:

The *Ten Principles* “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.” All ten of the *Principles* are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction’s compliance on each of the ten criteria and dividing the sum to get an average “score.” Rather, indigent defense systems should be designed to meet the goals articulated in each and all of the *Ten Principles* in order to establish a system in which defense professionals have the time, tools, and resources to provide constitutionally effective assistance of counsel.

The ten principles, in their general provisions, are:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The Ten Principles, in their entirety, are attached as Addendum A.

B. PERFORMANCE GUIDELINES OF THE NLADA

1. The Defending Attorney shall make reasonable effort to comply with the Performance Guidelines of the NLADA, attached as Addendum B.

The reasonable effort includes legitimate and articulated reasons for deviating from any particular Performance Guideline. So long as the reason(s) for the deviation is legitimate and articulated, the deviation will be deemed a reasonable effort to comply with the identified NLADA Performance Guideline.

The *Guidelines* are comprehensive but not exhaustive. The language allows for flexibility. While some actions are absolutely essential, others are left to counsel's considered judgment and to the peculiarities of practice and law in each jurisdiction. In other words, rather than being a checklist of required actions, the *Guidelines* are a series of steps each attorney must consider performing on behalf of each client, applying professional discretion to determine whether each individual step is necessary in the client's case.

2. The guidelines are divided into nine sections:
 1. Role, Duties and Training and Experience of Counsel
 2. Pre-Trial Release Proceedings
 3. Initial Appearance, Preliminary Hearing, and Prosecution Requests for Non-Testimonial Evidence
 4. Investigation, Discovery, Theory of the Case
 5. Pre-Trial Motions
 6. Plea Negotiations

7. Duties at Trial
8. Sentencing
9. Post-Sentencing Duties

Each section contains multiple guidelines, which, taken together, define the role and duties of defense counsel. After each guideline there are references to “Related Standards” that include nationally recognized standards and codes (e.g., the ABA, the National Advisory Commission on Criminal Justice Standards and Goals, the National Study Commission on Defense Services, and various NLADA standards), statutes, regulations, and policy manuals developed by state and local public defender and assigned counsel programs. The commentary, supported by footnotes citing to primary legal and secondary materials, provides an explanation and rationale for each guideline.

V. PERFORMANCE REQUIREMENTS

The Defending Attorney agrees to make reasonable effort to provide the services and comply with the requirements of this Contract. The reasonable effort includes legitimate and articulated reasons for deviating from any particular Performance Guideline. So long as the reason(s) for the deviation is legitimate and articulated, the deviation will be deemed a reasonable effort to comply with the identified NLADA Performance Guideline.

- A.** Continuity of representation at all stages of a case, sometimes referred to as “vertical” representation, promotes efficiency, thoroughness of representation, and positive attorney/client relations. The Defending Attorney agrees to make reasonable efforts to continue the initial attorney assigned to a client throughout all stages of a case assigned in this Contract. Nothing in this section shall prohibit the Defending Attorney from making necessary staff changes or staff rotations at reasonable intervals, or from assigning a single attorney to handle an aspect of legal proceedings for all clients where such method of assignment is in the best interest of the eligible clients affected by such method of assignment.
- B.** The Defending Attorney agrees that an attorney will make contact with all clients within 5 working days from notification of case assignment.
- C.** Conflicts of interest may arise in numerous situations in the representation of indigent defendants. The Defending Attorney agrees to screen all cases for conflict upon assignment and throughout the discovery process, and to notify promptly the appropriate authority when a conflict is discovered. The Defending Attorney will refer to the Idaho Rules of Professional Conduct, as interpreted by Idaho State Bar Association and opinions of the state judiciary, and to the American Bar Association Standards for Criminal Justice in order to determine the existence and appropriate resolution of conflicts.
- D.** The Defending Attorney agrees to comply with American Bar Association Opinion No. 06-441 (2006), (Addendum __) and manage his or her caseload in accordance with that ABA Opinion and corresponding provisions of the Idaho Rules of Professional Conduct.

- E.** The parties agree that in almost all cases, Attorney can adequately and effectively defend an accused utilizing less than sixty (60) hours of attorney's time. When the defending attorney can establish that the defense of an accused will require more than sixty (60) hours of the attorney's time, the attorney must give notice to the County that the case will exceed sixty (60) hours and provide an estimate of the additional hours necessary for competent representation. After sixty (60) hours has been expended on a case, the attorney shall submit a motion and Order under seal, monthly invoices, documenting time spent and the task completed, to the Administrative District Judge of the district, for approval of the reasonable expenditure of time. Attorney shall submit the Order and an invoice to the Board for payment of services expended in excess of sixty (60) hours. This hourly limit shall be based upon complexity of legal issues, anticipated length of trial, voluminous evidence, and any other factors that require additional attorney time to provide an adequate defense of an accused.
- F.** Adequate support staff is critical to an attorney's ability to render competent assistance of counsel at the caseload levels described above. The parties agree and expect that at a minimum the Defending Attorney will employ support staff services for its attorneys at a level sufficient to allow the attorney to comply with his or her Performance Expectation as outlined in Section VII.
- G.** The Defending Attorney may determine the means by which support staff is provided. The use of interns or volunteers is acceptable, as long as all necessary supervision and training is provided to insure that support services do not fall below prevailing standards for quality of such services in this jurisdiction.
- H.** Contracting Boards and Defending Attorneys should treat a first degree murder case in which a death notice may be filed, as a Capital case until either the prosecuting attorney affirmatively declines to file a death notice or the time in which to file the death notice has passed. If the Defending Attorney is to be responsible for representing defendants in Complex Litigation cases, the following provisions apply. Complex Litigation cases require the assignment of one full-time attorney and a half-time investigator prior to completion, except for Capital cases which typically require two (2) full-time attorneys and one (1) full-time investigator, as well as the services of a mitigation specialist. Aggravated homicide cases are considered Capital cases until such time as an irrevocable decision is made by the Prosecuting Attorney not to seek the death penalty in the case. Complex Litigation cases remain pending until the termination of the guilt phase and penalty phase of the trial, or entry of a guilty plea. Upon entry of a verdict or guilty plea, such cases are complete for the purposes of accepting additional Complex Litigation cases. Payment for post-conviction, pre-judgment representation shall be negotiated. Other special provisions of this Contract which relate to Complex Litigation are found in Section VII(B) (Minimum Qualifications) and Section VIII (Assignment of Complex Litigation).
- I.** The Defending Attorney may use legal interns. If legal interns are used, they will be used in accordance with Idaho Bar Commission Rule 226.

- J. The Defending Attorney agrees that it will consult with experienced counsel as necessary and will provide appropriate supervision for all of its staff.
- K. Significant or material increases [terms to be determined by County and Contracting Attorney] in work resulting from changes in court calendars, including the need to staff additional courtrooms, shall not be considered the Defending Attorney's responsibility within the terms of this Contract. Any requests by the courts for additional attorney services because of changes in calendars or work schedules will be negotiated separately by the Defending Attorney and the Board of County Commissioners. Such additional services shall only be required when funding has been approved by the Board of County Commissioners, and payment arranged by contract modification.

VI. TRAINING REQUIREMENTS

Defending attorneys providing public defense services shall participate in regular training programs on criminal defense law, including a minimum of seven (7) hours of continuing legal education annually or 21 hours every 36 months in areas relating to their public defense practice.

Attorneys in civil commitment and dependency practices should attend training programs in these areas

All contractors, law firms or public defender offices should develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction. In offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held to inform them of office procedure and policy. All attorneys should be required to attend regular training programs on developments in criminal law, criminal procedure, and the forensic sciences.

Every attorney providing counsel to indigent accused should have the opportunity to attend courses that foster relevant advocacy skills and to review professional publications and other media.

VII. EXPERIENCE REQUIREMENTS

A. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, defending attorneys shall meet the following minimum professional qualifications:

1. Satisfy the minimum requirements for practicing law in Idaho as determined by the Idaho Supreme Court; and
2. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and,
3. Be familiar with the Idaho Rules of Professional Conduct; and,

4. Be familiar with the NLADA Performance Guidelines; and,
5. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and,
6. Be familiar with mental health issues and be able to identify the need to obtain expert services.

B. Defending attorneys' qualifications in Death Penalty Cases.

1. Each attorney acting as lead counsel in a first degree murder case in which a death notice has been filed or in a first degree murder case in which a notice of intent to seek the death penalty could be filed shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A) and VII (C); and,
 - b. Be familiar with the 2003 ABA Guidelines for the appointment and performance of defense counsel in death penalty cases Standards for Capital cases; and,
 - c. Be familiar with the 2008 supplementary guidelines for the mitigation function of defense teams in death penalty cases; and,
 - d. Be familiar with the requirements as set forth in Idaho Criminal Rule 44.3.
2. The defense team in a first degree murder case in which a notice of intent to seek the death penalty has been filed or in a first degree murder case in which a notice of intent to seek the death penalty could be filed, should include, at a minimum, the two attorneys appointed pursuant to Idaho Criminal Rule 44.3, a mitigation specialist and an investigator. Psychiatrists, psychologists and other experts and support personnel should be added as needed.

C. Defending attorneys' qualifications in Felony Cases:

1. Each attorney representing a defendant accused of a crime or a penalty enhancement, which could result in a sentence of a term of incarceration of fifteen (15) years in the penitentiary or more or accused of a crime for which there is a mandatory minimum term of incarceration, shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A); and has either:
 - i. served three years as a prosecutor; or
 - ii. served three years as a public defender; or
 - iii. three years in a private criminal practice; and
 - b. Been trial counsel alone or with other trial counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

2. Each attorney representing a defendant accused of a crime punishable by less than fifteen years of incarceration years in the penitentiary, or facing a revocation of probation shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A); and has either:
 - i. served two years as prosecutor; or
 - ii. served two years as public defender; or
 - iii. two years in a private criminal practice; and
 - b. Been trial counsel alone or with other counsel and handled a significant portion of the trial in two felony cases that have been submitted to a jury.

3. Each attorney representing a defendant who is a juvenile charged as an adult or where the juvenile has been waived to adult court shall meet the following requirements;
 - a. The minimum requirements set forth in Section VII (A); and has either:
 - i. served three years as a prosecutor; or
 - ii. served three years as a public defender; or
 - iii. three years in a private criminal practice; and
 - b. Been trial counsel alone or with other trial counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury; and,
 - c. Has obtained three (3) juvenile-specific MCLE training hours each year.

D. Defending attorneys' qualifications in Juvenile Cases.

1. Juvenile Cases - Felony: Each attorney representing a juvenile in which the juvenile is being adjudicated for the commission of a felony for which the juvenile could be required to register on the sex offender registry or for initial commitment or recommitment shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII(A); and has either:
 - i. Served three years as a prosecutor; or
 - ii. Served three years as a public defender; or
 - iii. three years in a private criminal practice, and
 - b. Been trial counsel alone or with other trial counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury; and,
 - c. Has obtained three (3) juvenile-specific MCLE training hours each year;

2. Juvenile Cases - Misdemeanor/other: Each attorney representing a juvenile in hearings upon motions to waive jurisdiction under the JCA pursuant to Idaho Code section 20-508; in hearings to examine the juvenile to determine if he is competent to proceed in Idaho Code section 20-519A, status offenses or in any misdemeanor proceeding shall meet the following requirements;
 - a. Each attorney representing a defendant involved in a matter concerning a misdemeanor, shall meet the requirements as outlined in Section VII (A).

E. Defending attorneys' qualifications in Misdemeanor and Criminal Contempt

cases.

1. Each attorney representing a defendant involved in a matter concerning a misdemeanor, shall meet the requirements as outlined in Section VII (A).

F. Defending attorneys' qualifications in Child Protection Actions (CPA) and Termination of Parental Rights proceedings.

1. Each attorney representing a client in a CPA or in a termination matter shall meet the following requirements:
 - a. The minimum requirements as outlined in Section VII(A); and
 - b. Shall have one (1) year CPA experience or have significant experience in handling complex litigation, civil litigation or have served as co-counsel in at least two dependency cases with another attorney who meets the required qualifications;
 - c. Attorneys in CPA matters should be familiar with expert services and treatment resources for substance abuse and other social services for families.
 - d. Attorneys representing children in CPA matters should have knowledge, training, experience, and ability in communicating effectively with children.

G. Defending attorneys' qualifications in Mental Health Commitment Cases.

1. Each attorney representing a respondent shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A); and
 - b. Each staff attorney shall be accompanied by counsel qualified under this section at his or her first two (2) civil commitment cases; and
 - c. Shall not represent a client in a commitment hearing unless he or she has either:
 - i. served one year as a prosecutor, or
 - ii. served one year as a public defender, or
 - iii. one year in a private civil commitment practice, or
 - iv. has previously been appointed in five (5) civil commitment hearings.

H. Defending attorneys' qualifications in Problem Solving Courts.

1. Each attorney representing a client in a problem solving court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A); and
 - b. The requirements set forth above for representation in the type of practice involved in the problem solving court (e.g., felony, misdemeanor, juvenile); and,
 - c. Be familiar with mental health and substance abuse issues and treatment alternatives.

I. Defending attorneys' qualifications in Post-Conviction Cases.

1. Each attorney representing a client in a post-conviction case shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII (A); and, either:
 - i. has served two years as a prosecutor; or
 - ii. has served two years as a public defender, or
 - iii. two years in a private criminal practice, and
 - b. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury; and,
2. Has attended at least three (3) hours of continuing legal education in the area of post-conviction every reporting period; and
3. Been counsel alone of record in a post- conviction case or shall be supervised by an attorney who has experience representing petitioners in post-conviction cases.

J. Defending attorneys’ qualifications in Appellate Proceedings

1. Each attorney who is counsel for a case on appeal from the magistrate to district court or from district court to the Idaho Supreme Court or to the Idaho Court of Appeals shall meet the following requirements:
 - a. The minimum requirements set forth in Section VII(A); and
 - b. Be familiar with ABA Standards for Criminal Justice: Prosecution & Defense Function, Standard 4-8.2 through 4-8.6.

VIII. DEFINITIONS

Appointment

An “appointment” is the assignment of a contractor to represent or advise an eligible person on any matter under the terms of this contract.

Case

A “case” is any action in this state in which Contractor has been appointed to represent a client under the terms of this contract. Specific definitions of case types are listed in Section I.

OR

Case

A Case shall mean representation of one person on one charging document. The following Idaho Supreme Court definition on case processing and reporting will apply:

“A new criminal case is defined, processed, and reported as follows:

1. A criminal case is initiated and counted at the filing of the charging document (citation, complaint, information, or indictment).
2. The defendant and all misdemeanor and felony charges resulting from a single incident are counted as a single case, even if it involves multiple citations or

complaints. Infractions must be filed separately, but may be consolidated. If the charging document contains multiple defendants involved in a single incident, a separate case will be created for each defendant, so that each defendant is counted as a single case. Idaho Criminal Rules and Misdemeanor Criminal Rules provide some exceptions:

- a. Two or more defendants can be joined in a single case pursuant to I.C.R. 8(b).
 - b. Offenses based on two or more acts or transactions connected together or constituting part of a common scheme or plan may be consolidated pursuant to M.C.R. 3(e).
3. In cases involving multiple charges, the case type is classified according to the most serious offense (i.e., if a defendant is charged with a misdemeanor and a felony in a single case, the case is classified as a felony).
4. The disposition of a criminal case is reported in the same case subtype that was used when the case was filed. For example, if a case is filed as a felony and is reduced to a misdemeanor prior to disposition, it is reported as a disposition of a felony. Similarly, if a case is filed as a misdemeanor and is amended to a felony, it is reported as a disposition of a misdemeanor.
5. With respect to felony bound over to district court, the following rules apply:
 - a. When a felony is filed in the magistrate division, it is counted as a new felony filing.
 - b. Upon the filing of the information and/or order binding the case over to the district court, the case is counted as a disposition of a felony in magistrate division and as a new felony filing in district court.
 - c. When disposed in district court, the case is counted as a disposition of a felony in the district court.
 - d. If the case is reduced to a misdemeanor and remanded to the magistrate division for the acceptance of a misdemeanor plea, the case is counted as a disposition of a felony in the district court and a remand of a felony in the magistrate division.

“Post-judgment actions in criminal cases are processed and reported as follows:

1. In addition to new criminal cases, the following post-judgment actions will be tracked and reported separately:
 - a. Motion to revoke probation
 - b. Motion for early discharge of probation
 - c. Motion to modify terms of probation
 - d. Defendant is transferred to a problem-solving court following a guilty plea/sentencing
 - e. Motion for contempt/Motion to show cause
 - f. Motion to amend or set aside judgment of conviction or set aside guilty plea
 - g. Motion to correct or reduce sentence
 - h. Motion for new trial
 - i. Motion for stay of execution
 - j. Motion to seal case
 - k. Motion for appellate bond
 - l. Case remanded to the magistrate division for acceptance of a misdemeanor plea

2. The above post-judgment actions will be counted at the filing of a motion or, the issuing of an order for cases that are remanded to a lower court or transferred to a problem-solving court.
3. The disposition of any of the above listed post-judgment actions is counted as a disposition in the same post-judgment category that triggered the action.”

**Recommended Criminal Case Subtypes for Statistical Reporting
(District Court and Magistrate Division)**

Domestic violence	Public order (drunkenness, disorderly conduct, disturbing the peace, etc.)
Other assault/battery	Weapon
Rape/sexual assault/battery	DUI
Child sex abuse	Other motor vehicle
Elder abuse	Other felony (District Court only)
Other crimes against persons (murder, manslaughter, robbery, etc.)	Other misdemeanor (Mag. Div. only)
Property crimes (burglary, larceny, grand/petit theft, fraud, vandalism, etc.)	Appeals from Mag. Div. (District court only)
Drug	

Completion of a case is deemed to occur when all necessary legal action has been taken during the following period(s): In criminal cases, from arraignment through sentencing, from arraignment through the necessary withdrawal of counsel after the substantial delivery of legal services, or from the entry of counsel into the case through sentencing or necessary withdrawal after the substantial delivery of legal services. Nothing in this definition prevents the Defending Attorney from providing necessary legal services to an eligible client prior to arraignment, but payment for such services will require a showing pursuant to the Extraordinary Expenses paragraph below.

Client

A "client" is a person whom a state court has determined to be eligible for and entitled to court-appointed counsel at state expense, pursuant to Idaho Code §19-852 and §19-854.

Complex Litigation Cases

Complex Litigation refers to: 1) all Capital homicide cases, 2) all aggravated homicide cases, 3) those felony fraud cases in which the estimated attorney hours necessary exceeds sixty (60) hours, 4) cases which involve substantial scientific information resulting in motions to exclude evidence pursuant to controlling case law emanating from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow*, 113 S.Ct. 2786 (1993), or similar opinions, and 5) other cases in which counsel is able to show the appropriate court in an ex parte proceeding that proper representation requires designation of the case as complex litigation.

Contractor or Subcontractor

"Contractor" or "Subcontractor" includes Contractor's agents, employees, members, officers, representatives, successors, and subcontractors.

Disposition

Disposition in criminal cases shall mean: 1) the dismissal of charges, 2) the entering of an order of deferred prosecution, 3) an order or result requiring a new trial, 4) imposition of sentence, or 5)

deferral of any of the above coupled with any other hearing on that case number, including but not limited to felony or misdemeanor probation review, that occurs within thirty (30) days of sentence, deferral of sentence, or the entry of an order of deferred prosecution. No hearing that occurs after 30 days of any of the above will be considered part of case disposition for the purpose of this Contract except that a restitution hearing ordered at the time of original disposition, whether it is held within 30 days or subsequently, shall be included in case disposition. Disposition includes the filing of a notice of appeal or a motion pursuant to Idaho Criminal Rule 35, if applicable. Nothing in this definition prevents the Defending Attorney from providing necessary legal services to an eligible client after disposition, but payment for such services will require a showing pursuant to the contract below. Disposition in other cases shall mean:

Disposition in a civil case shall mean the entering of a final judgment, which may include a default judgment, a summary judgment, or a dismissal.

Law Firm

A "law firm" is a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may engage in non-court-appointed legal representation.

Other Litigation Expenses

Other Litigation Expenses shall mean those expenses which are not part of the contract with the Agency, including expert witness services, language translators, laboratory analysis, and other forensic services. It is anticipated that payment for such expenses will be applied for in the appropriate courts by motion and granted out of separate funds reserved for that purpose. Payment for mitigation specialists in Capital cases is included in this category.

Defending Attorney

A "Defending Attorney" is any licensed attorney employed by the office of public defender, contracted by the county or otherwise assigned to represent adults or juveniles at public expense.

Public Defense Commission (PDC) and "State of Idaho" includes the respective agents, employees, members, officers, representatives, and successors of PDC and State of Idaho.

Representational Services

The services for which the Contracting Authority is to pay the Defending Attorney are representational services, including lawyer services and appropriate support staff services, investigation and appropriate sentencing advocacy and social work services, and legal services including, but not limited to, interviews of clients and potential witnesses, legal research, preparation and filing of pleadings, negotiations with the appropriate prosecutor or other agency and court regarding possible dispositions, and preparation for and appearance at all court proceedings. The services for which the Contracting Authority is to pay the Defending Attorney do not include extraordinary expenses incurred in the representation of eligible clients. The allowance of extraordinary expenses at the cost of the Contracting Authority will be determined by a court of competent jurisdiction.

Addendum A

Ten Principles Of a Public Defense Delivery System

February 2002

ABA Standing Committee On Legal Aid And Indigent Defendants 2001 - 2002

Chair

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Manchester, NH

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Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter

only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at <http://www.abanet.org/crimjust/home.html>.

ACKNOWLEDGMENTS

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L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA Ten Principles Of A Public Defense Delivery System

BLACKLETTER

1 The public defense function, including the selection, funding, and payment of defense counsel,¹ is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁴ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁵

2 Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be *ad hoc*,⁹ but should be according to a

coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

3 Clients are screened for eligibility,¹² and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,¹³ and usually within 24 hours thereafter.¹⁴

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.¹⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.¹⁷

5 Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁰

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²¹

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.²² The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,²⁵ and separately fund expert, investigative, and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the

impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education.

Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.²⁸

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁹

NOTES

1 “Counsel” as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. “Defense” as used herein relates to both the juvenile and adult public defense systems.

2 National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter “NAC”], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter “NSC”], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter “ABA”], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter “Assigned Counsel”], Standard 2.2; *NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter “Contracting”], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter “Model Act”], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter “ABA Counsel for Private Parties”], Standard 2.1(D).

3 NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter “ABA Monitoring”], Standard 3.2.

4 Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

5 ABA, *supra* note 2, Standard 5-4.1

6 “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

7 NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

8 ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

9 NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

- 10 ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).
- 11 NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).
- 12 For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.
- 13 NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).
- 14 NSC, *supra* note 2, Guideline 1.3.
- 15 American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.
- 16 NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.
- 17 ABA Defense Function, *supra* note 15, Standard 4-3.1.
- 18 NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).
- 19 Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].
- 20 ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.
- 21 Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.
- 22 NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).
- 23 NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).
- 24 ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.
- 25 NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.
- 26 ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

27 ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

28 NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

29 NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

Addendum B

National Legal Aid & Defender Association

**Performance Guidelines for Criminal Defense
Representation**

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BLACKLETTER

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.

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 practices 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.

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 counsel has 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.

(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.

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

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

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 2.2 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.

(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.

(2) Information that should 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 he or she 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 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.

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 needs.

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 for not to do so.

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.

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.

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.

(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) *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.

(6) *the scene*

Where appropriate, counsel should attempt to 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, and lighting conditions).

(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.

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;

Guideline 4.3 Theory of the Case

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

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.

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 6.2 The Contents of the Negotiations

(a) 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) other consequences of conviction such as deportation, and civil disabilities;

(4) any possible and likely sentence enhancements or parole consequences;

(5) the possible and likely place and manner of confinement;

(6) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.

- (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.
- (c) 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, a plea of nolo contendere, a conditional plea of guilty and a plea in which the defendant 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 prison and parole authorities.
- (d) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

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.
- (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 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 before 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 and present to the court all reasons warranting the client's release on bail pending sentencing.

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.

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.

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.

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.

(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-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 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 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.

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.

(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.

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.

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) 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 caselaw 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.

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;
 - (6) 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 8.4 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 8.5 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 8.6 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.

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 interest.
- (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.

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.

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.

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

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.

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.

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.

(Order the bound volume of NLADA's Performance Guidelines, including not just the black letter standards, but commentary, related standards, annotations, and authorities.)

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