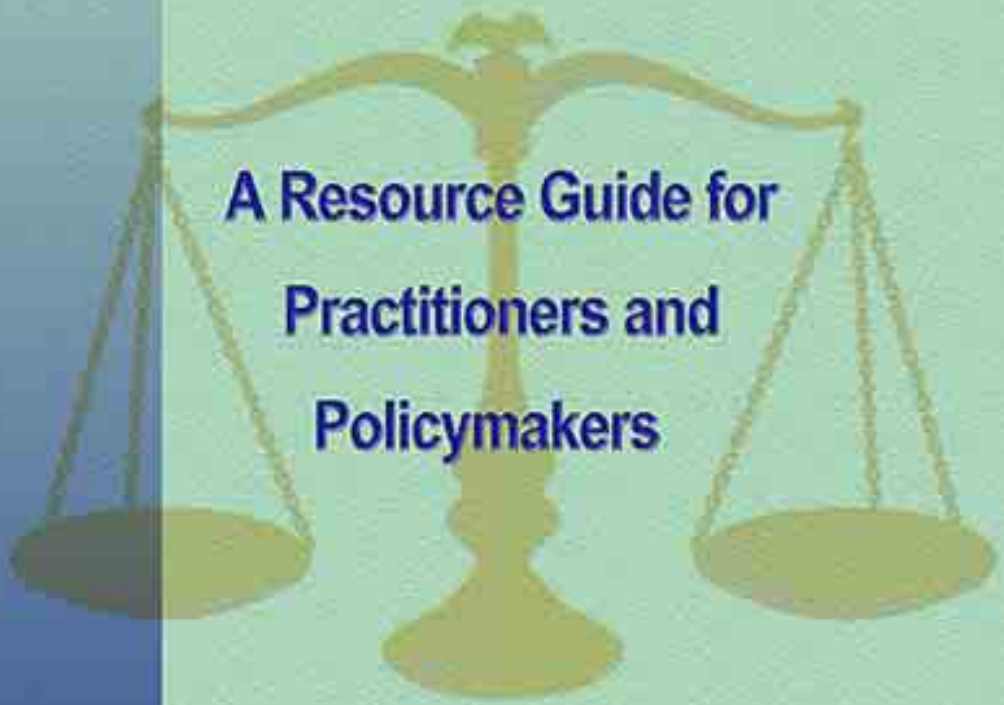
U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems

A Resource Guide for Practitioners and Policymakers



Volume I

Standards for

Administration of Defense Services

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Foreword

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

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

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

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

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

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Introduction

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

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

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

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

Sponsorship and Development

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

Methodology

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

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

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

The table titled "State Legislation and Court Rule Parallels to Standards for the Administration and Performance of Criminal Defense," located at the end of this introduction, shows how the 50 states have treated some key standards issues relating to the governance and administration of defense sy stems. Issues include these:

- Use of a state defender agency, local defender agency, or both
- State funding of local defense system
- Authority for the appointment of counsel
- Use of contract attorneys or establishment of agency authority
- Client eligibility criteria
- Recoupment authorization

The table also lists which states have laws, rules, or standards relating to capital and post-conviction representation and to attorney performance.

The table is not exhaustive. Excluded are regulations issued by an administrative agency such as the state public defender office. Although such regulations may have the force of law, resources did not permit their collection. The topics covered in the chart are those most frequently included where standards are adopted.

The lack of a checkmark in any particular box does not necessarily mean state law does not cover the topic. It merely means that there was no explicit mention of the item in the legislation analyzed. However, the topic could be implied by other laws (e.g., appellate

representation may be part of the work of a statewide defender system where state criminal procedure law provides for automatic right of appeal).

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

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

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

State Legislation and Court Rule Parallels to Standards for the Administration and Performance of Criminal Defense

L = Law, R = Rule, S = Standard or guideline, * = Partial eligibility determinations authorized, + = Partial state funding, and ± = County contributes to cost of state public defender agency

State	State Defender Agency	Local Defender Agency	State Funds Local	Authority to Assign Counsel	Contract Agency Authorized	Capital Case Representation	Client Eligibility	Recoup-ment	Attorney Fees	Appeals Representation	Post-Conviction Appointment	Attorney Performance
AL		L	L	L	L		R*		L	L, R	L	
AK	L				L		L	L, R			L	
AZ			L			R					L	
AR	L			L, S	S	L, R, S						
CA	L	L	L+	L	L	L, R	L*	L	L, R	L	L	L
CO	L				L			L		L	L	
CN	L			L			L	L			L	S
DE	L			L	R				R			
DC	L, R			L, R				L, R				
FL		L	L	L, R		L	L			R		
GA		L, S	L	L, S	L, S	L, S	R, S	L, S	S	L, S	L	
HA	L			L					L			
ID		L		L		L, R	L*	L		L	L	
IL		L		L		L			L	L		
IN	L	L, S	L+	L, S	L, S	R, S	S	S	S	S		
IA	L	L		L	L		L			L		
KS		L, R	L	L, R	L, R	L, R	L*, R	L	R	L	L, S	R
KY		L	L+	L	L		L	L		L		
LA		L	L+			R, S	L*					
ME				L			R*		R	R		
MD	L			L			L*	L		L, R		
MA	L			L, R	L	S	L*					L
MI				L, R			R			R, S		
MN		L	L+				L*, R	L		L	L	
MS	L	L		L	L		L			L	L	
MO	L			L	L	R	L*	L		L	S	S
MT		L	L							L		
NE		L	L	L		L, S	L, S	L	L	L, S	L, S	

State	State Defender Agency	Local Defender Agency	State Funds Local	Authority to Assign Counsel	Contract Agency Authorized	Capital Case Representation	Client Eligibility	Recoup-ment	Attorney Fees	Appeals Representation	Post-Conviction Appointment	Attorney Performance
NV	L	L		L	L	R	L*	L		L	L	L
NH	L			L	L		L	L	L	L	L	
NJ	L				L		L	L	L	L	L, R	L
NM	L			L	L		L	L	L	L	L	
NY		L		L, R		L, R	L*		L	L, R	R	L
NC		L	L	L, R		L, R	L*	L	L	L, R	I	
ND					S		S	L, S	S	R	L	
OH	L	L	L+	L, R	L	L	L*	L	L	L	L	
OK	L	L		L, R	L	L, R	R	L	L, R	L	L	
OR	L	L		L	L		L*	L	L			s
PA		L		L			R	L	L	L	L, R	
RI	L			L, R			L				L	
SC		L	L	L, R		L	L*, R	L	L, R	L, R		
SD		L		L, R	L		L	L, R	L, R	L	L	
TN		L	L	L		R	L*			L	L	
TX		L		L	L	L	L		L	L		
UT			L+	L	L	R	L	L	L	L	L	
VT	L			L	L		L*	L		L	L	
VA	L		L+	L		L, S	L		L			
WA		L		L	L, S	S	L*, R*	L	S	R, S	R	S
WV		L	L	L			L		L	L	L	
WI	L			L	L		L	L	L, R	L	L	L
WY	L		L±	L, R			L, R*	L	L	L		

The Ten Commandments of Public Defense Delivery Systems

By

James R. Neuhard, Director, Michigan Appellate Defender Office,

and

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

Poverty is not an excuse to provide less than competent representation.

Public defense delivery systems must efficiently and effectively provide high-quality, zealous, conflict-free representation to those charged with crimes who cannot afford to hire an attorney. To meet this goal, [1]

Thou shalt...

1. **Assure that the public defense function, including the selection, funding, and payment of appointed counsel, is independent.** The indigent defense function should be independent from political influence and subject to judicial

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[1] These 10 principles summarize the dominant themes in the most well-established major national standards concerning the government's duty to furnish quality criminal defense services to those who cannot afford to hire an attorney. The standards are referenced in footnotes herein as follows: National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973) ("NAC"); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) ("NSC"); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992) ("ABA"); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993) ("ABA Defense Function"); National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) ("Model Act"); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985) ("Contracting"); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989) ("Assigned Counsel"); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980) ("Appellate"); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989) ("Death Penalty"); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995) ("Performance Guidelines").

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] Ensuring that the judiciary is independent from undue political pressures is an important means of furthering the independence of indigent defense.[4]

2. **Assure that where the caseload is sufficient, the public defense delivery system consists of both a defender office[5] 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.[6] The appointment process should never be ad hoc,[7] but should be according to a coordinated plan[8] directed by a full-time administrator who is an attorney familiar with the varied requirements of criminal practice in the jurisdiction.[9] Since the responsibility to provide defense services rests with the state to assure uniform quality statewide, systems should be funded and organized at the state level.[10]

3. **Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours.** Counsel[11] should be furnished upon arrest, detention, or request,[12] and in no event more than 24 hours thereafter.[13]

4. **Provide counsel sufficient time and a confidential space to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[14] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[15] To ensure confidential

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[2] NAC 13.8, 13.9; NSC 2.8, 2.18, 5.13; ABA 5-1.3, 5-1.6, 5-4.1; Assigned Counsel 2.2; Contracting II-1, 2; Model Act §10(d).
[3] NSC 2.10-2.13; ABA 5-1.3(b); Assigned Counsel 3.2.1, 2; Contracting II-1, II-3, IV-2.
[4] Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).
[5] NAC 13.5; ABA 5-1.2. "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.
[6] ABA 5-1.2(a) and (b); NSC 2.3; ABA 5-2.1.
[7] NSC 2.3; ABA 5-2.1.
[8] ABA 5-1.2(a) and (b); NSC 2.3; ABA 5-2.1.
[9] ABA 5-2.1 and commentary; Assigned Counsel 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 Code of Professional Conduct).
[10] NSC 2.4; Model Act §10; ABA 5-1.2(c) ; *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defense is obligation of state).
[11] "Counsel" includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments.
[12] NAC 13.3; ABA 5-6.1; Model Act §3; NSC 1.2-1.4.
[13] NSC 1.3.
[14] ABA Defense Function 4-3.2; Performance Guidelines 2.1-4.1.
[15] NSC 5.10; ABA Defense Function 4-2.3, 4-3.1, 4-3.2; Performance Guidelines 2.2.

communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel. [16]

5. **Assure that counsel's workload matches counsel's capacity.** workload of both 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.[17] National caseload standards should in no event be exceeded, [18] but the concept of workload (i.e., caseload adjusted by factors such as case complexity and an attorney's nonrepresentational duties) is a more accurate measurement.[19]

6. **Assure that 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 zealous, high-quality representation.[20]

7. **Assure that 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.[21] On appeal, the attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. **Provide counsel with parity of resources with the prosecution and include counsel as an equal partner in the justice system.** There should be parity of workload, salaries, and other resources (such as technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and indigent defense. [22] Assigned counsel should be paid a reasonable fee in addition to actual overhead and

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[16] Defense Function 4-3.1.
[17] NSC 5.1, 5.3; ABA 5-5.3; ABA Defense Function 4-1.3(e); NAC 13.12; NLADA Contracting III-6, III-12; Assigned Counsel 4.1,4.1.2; ABA Model Code of Professional Responsibility DR 6-101 (lawyers' obligation not to take on more cases than they have competence and time to handle).
[18] Numerical caseload limits are specified in NAC 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 5.1) or "under no circumstances exceed" (Contracting 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 (see NLADA/ABA Death Penalty standards) today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by a guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998).
[19] ABA 5-5.3; NSC 5.1; Appellate 1-F.
[20] Performance Guidelines 1.2, 1.3(a) ; Death Penalty 5.1.
[21] NSC 5.11, 5.12; ABA 5-6.2; NAC 13.1; Assigned Counsel 2.6; Contracting III-12, III-23.
[22] NSC 3.4; ABA 5-4.1, 5-4.3; Contracting III-10; Assigned Counsel 4.7.1; Appellate (*Performance*). See NSC 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every five attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf*. NAC 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

expenses.[23] 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, should provide an overflow or funding mechanism for excess, unusual, or complex cases, [24] and should separately fund expert, investigative, and other litigation support services.[25] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the adversarial balance and on the other components of the justice system. Indigent defense should participate as an equal partner in improving the justice system.[26]

9. **Provide and require counsel 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.[27]

10. **Supervise and systematically review counsel for quality and efficiency according to nationally and locally adopted standards.** The defender office, its professional and support staff, and assigned counsel or contract defenders should be supervised and periodically evaluated for competence and efficiency.[28]

Discussion[29]

The "commandments" presented here are designed for experts and non-experts alike to quickly assess a defense delivery system and to clearly communicate its needs to policymakers.

While all counsel are bound by the Rules of Professional Conduct, specific standards concerning public defense have been adopted both nationally and locally. More standards, regulations, case law, and statutes have been written for this area of law than for any other. The result is an often daunting mix of mandatory and hortatory standards, guidelines, court rules, and regulations so comprehensive that few can fully read or assimilate it.

The recognition of the need for national standards for the provision by the government of criminal defense services began in 1967 with the American Bar Association's *Standards for Criminal Justice, Providing Defense Services*, now in its third edition. This was

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[23] ABA 5-2.4; Assigned Counsel 4.7.3.
[24] NSC 2.6; ABA 5-3.1, 5-3.2, 5-3.3; Contracting III-6, III-12, and *passim*.
[25] ABA 5-3.3(b)(x); Contracting III-8, III-9.
[26] Defense Function 4-1.2(d); note 19, *supra*.
[27] NAC 13.15, 13.16; NSC 2.4(4), 5.6-5.8; ABA 5-1.5; Model Act, §10(e); Contracting III-17; Assigned Counsel 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997).
[28] NSC 5.4, 5.5; Contracting III-16; Assigned Counsel 4.4. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.
[29] By James R. Neuhard.

followed in 1973 with the *Report of the Task Force on the Courts*, Chapter 13, "The Defense," by the President's National Advisory Commission on Criminal Justice Standards and Goals, and then with the *Guidelines for Legal Defense Systems in the United States* by the National Study Commission on Defense Services. The American Bar Association and the National Legal Aid and Defender Association followed these with a series of standards covering appeals, juvenile defense, death penalty, contract defender systems, assigned counsel systems, and defender training, plus related model materials such as model public defender legislation and model contracts for public defense services.

At the local level, states enacted defender legislation that included numerous regulations, governance mechanisms, and system design requirements. States and local governments passed court rules and system regulations, modeled on or influenced by the national standards.

Collectively, these standards cover the wide diversity of areas where criminal defense systems provide counsel. The body of work is impressive, extremely useful, and scholarly in its integration of the Rules of Professional Conduct into often dissimilar areas of practice. However, for the most part, the standards themselves are written for lawyers who provide the service and are difficult to assimilate for those not familiar with or involved in the area.

In addition, effectively communicating the needs of a criminal defense system to legislators will become more difficult as terms shorten and as the number of lawyers continues to decline in our legislatures. This is not to suggest that lawyers are the only political constituency for quality indigent defense. Often the most knowledgeable and the strongest supporters of quality indigent defense systems are non-lawyers. However, it takes more time for non-lawyers to understand the issues and move indigent defense to a priority.

The introductions in the various national standards set out why the particular standards were necessary. The reasons include

- increasing areas of specialization, such as death penalty representation, appeals, and juvenile practice,
- scandals in the selection and payment of attorneys,
- staggering caseloads,
- salaries often half those of prosecutors,
- litigation by appointed counsel over fees that do not even cover overhead,
- low-bid contracts without concern for quality,
- high turnover of staff and appointed counsel,
- no training, investigation, expert witnesses, or sentencing specialists,
- inexperience, incompetence, and innocents being convicted,
- poor or nonexistent research capabilities or access to basic libraries, and

- gross underfunding.

Traditional governmental funding processes and marketplace incentives have not operated effectively to improve or moderate these problems. Unlike the private sector, indigent clients do not choose their attorneys and cannot fire them for unsatisfactory services. Legislators who fund and choose the type of defense delivery system do not directly oversee, receive, or use the services the system provides. Further, defendants who do use the services are not an influential constituency to voice their concerns to legislators.

Contributing to the problems and the difficulty of change is the diffusion of governance responsibilities. Responsibility directly or indirectly for the quality of indigent defense services resides in part with the funding authority, the judiciary, boards or commissions, grievance processes, and the executive branch. Funders and executive officers are not in a position to judge the performance of the system. Clients have little or no say in who their attorneys will be, whether attorneys stay on the appointment list, and whether they are well paid or have their fees cut.

In most jurisdictions that lack organized systems, with few exceptions, judges choose the attorneys and determine their pay. This immediate control by the judge may create the perception of patronage or concerns that the assigned lawyers chosen or paid by the judge will not willingly confront the judge who selects and pays them. Often there are complaints from the bar about too-low fees, the cutting of vouchers, or unfair denial of access to the work. Turnover is often high, training is almost nonexistent, and the quality of representation is subjective to the judge. This power far exceeds any similar power a judge has over the prosecutor or, for that matter, any other counsel in the court.

In the end, the national standards embodied and distilled in these commandments provide clear principles to assess the current system, no matter the system in place.

The concept of using standards to address quality concerns is not unique to the field of indigent defense. There are other areas of government where strong pressures of favoritism, greed, partisanship, or profits can undermine concerns for fundamental quality. Commissioners, county supervisors, and legislators long ago ceased taking the lowest bid to build a hospital or a bridge. They realized standards and codes were necessary to compare bids with confidence and to assure quality and protect public safety and health. Inspections and oversight help assure that the standards are complied with. With proper enforcement, standards help assure professionals' compliance with national norms in areas where the legislators themselves may lack e xpertise.

Ultimately, there remains this question: if "fixing" the problem requires more tax dollars, why should we, the taxpayers, pay for it? Why should an elected official require that the lawyers selected and paid by the state provide competent representation to accused individuals who cannot afford to hire a private lawyer? One reason is that those charged with a crime face the loss of their dignity, their families, their jobs, their liberty, and even their lives. Further, if defendants are wrongfully convicted or sentenced, the guilty go free and the state bears the cost of needless years of imprisonment. But equally at stake is the very soul of our justice system and our sense of justice. At the core of the system is the concept of fundamental fairness. This touchstone of American justice accounts for all

the protections built into the process of accusation, arrest, trial, and appeal. But all those protections are of little value without "the guiding hand of counsel."

We have a well-developed adversarial criminal justice structure. However, without competent counsel, the system of justice is not adversarial—a flaw that threatens not just a few but the overwhelming majority of those arrested and processed through our criminal courts. In many urban settings, over 90 percent of the criminal defendants cannot afford to pay for counsel, even though the majority of defendants are employed when they are arrested. What used to be referred to as "appointment of counsel for the indigent" does not capture by any degree the reality of the populations requiring the appointment of counsel.

The sheer force of the government's power to accuse will overwhelm the untrained, the inexperienced, and the unprepared. Our system assumes and expects that defense counsel will test the government's case at every step. We can take no solace that "endless appeals" or "technicalities" protect the innocent unless a competent attorney is there to make us all stop and give individual attention to each case no matter the clamor, the passion, or the routineness that surrounds it.

If one leg of the structure comprising the prosecution, the court, and the defendant is fundamentally and chronically weak, the justice system's classic three-legged stool will collapse. There are no market forces that will cause self-correction of our systems of representation of low-income individuals charged with a crime. And if such representation collapses, so too does our entire system of criminal justice and our nation's dream of fundamental fairness.

Parity: The Failsafe Standard

By

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

This *Compendium of Standards for Indigent Defense Systems* reflects the breadth and complexity of the task of prescribing the essential elements of systems for providing quality legal defense services for people accused of crime who lack the resources to retain private counsel. Unfortunately, the very thoroughness of these standards may impede their adoption and implementation in jurisdictions around the country. If the most critical themes of all the standards were distilled, it has been theorized , the job of understanding their value would be facilitated, and their implementation hastened.

An effort to advance this goal is made in the preceding essay, "The Ten Commandments of Public Defense Delivery Systems." It captures the essence of the major sets of standards compiled in this dense compendium for quick reference by busy defenders, policymakers, and funding authorities.

But one of the commandments is qualitatively different from the others. Most standards throughout the country are written as absolute norms, rather than relativistic ones: There must be adequate funding to ensure independent, quality representation…Individual lawyers should receive reasonable compensation…Staff levels should be projected through detailed resource planning…Defender systems must provide training, supervision, and evaluation…Offices must have adequate computer technology, office space, and legal research capacity…No defender should have excessive caseloads—e.g., no more than 150 felonies per year…There should be at least one supervisor for every 10 staff attorneys, and one investigator for every three attorneys.

But what if the application of such standards would make a jurisdiction's public defender system better resourced than other agencies, such as the prosecution or the judiciary? What if, for example, the jurisdiction's prosecutors routinely carry 500 felonies, or the lack of adequate and up-to-date computer systems is a problem experienced by all agencies? Standards describing a fixed norm of "adequate" defender staffing and services would be at risk of being dismissed across the board as unrealistic in such a jurisdiction.

At the other end of the spectrum, what if prosecutor resources are substantially better than the minimum national indigent defense standards—e.g., caseloads never exceed 25 felonies per year, and salaries, benefits, space, working conditions, equipment, staffing

ratios, and resources for experts and investigations are well above "adequate"? The prosecution then has an advantage in recruiting and retaining competent attorneys, and in preparing and presenting its cases, while the quality of services provided by the public defender's office suffers due to staffing disruptions and shortages, a seniority or competence gap with the prosecutor's office, and the draining of additional resources to recruit, train, and retain a higher volume of short-term staff. Adherence to fixed norms of indigent defense standards would throw the adversarial system of criminal justice fundamentally out of balance, to the detriment of indigent individuals facing criminal charges.

This is why all major national indigent defense standards contain a core, failsafe, relativistic commandment: that there should be parity of resources between public defense and prosecution.

The U.S. Department of Justice endorsed the concept of parity in the same year that *Gideon v. Wainwright* was handed down. Because the adversary system demands a "constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process," the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice found in its 1963 final report that "the proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions."

And when *Gideon*'s mandate was extended to misdemeanors in 1972, in *Argersinger v. Hamlin*, Chief Justice Burger wrote in his concurring opinion that "society's goal should be 'that the system for providing the counsel and facilities for the defense should be as good as the system which society provides for the prosecution'" (citing ABA *Standards Relating to Providing Defense Services*).

All the national standards developed over the past quarter century contain explicit statements of parity. The *Guidelines for Legal Defense Systems in the United States*, promulgated over several years by the National Study Commission on Defense Services in the mid-1970's with Justice Department support, direct that, in order to attract and retain qualified personnel, salaries for all staff should "in no event be less than" those paid for comparable positions in the prosecutor's office. [30] The guidelines also provide that other resources and facilities should similarly be "not less than that provided for other components of the justice system with which the defender must interact, such as the courts, prosecution and the police."[31]

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[30] Guideline 3.2.

[31] Guideline 3.4. [In fact, the earliest national standards set the bar even higher, out of concern that prosecutor resources were commonly just as inadequate as defender resources. In 1973, standards for courts and indigent defense systems were promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, which had been appointed by the Administrator of the Law Enforcement Assistance Administration to write standards for all criminal justice agencies to fulfill the standards mandate of the 1967 President's Commission on Law Enforcement and the Administration of Justice. These standards prescribed that chief public defenders should be paid at a rate comparable to the presiding judge of the trial court of general jurisdiction, and compensation for assistant public defenders in their first five years of service should be comparable to that of associates in local private law firms (NAC Chapter 13, "The Defense," Standard 13.7 Defender to be Full Time and Adequately Compensated; and Standard

Standards developed by the American Bar Association similarly provide, "The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices."[32] Commentary to the standards discusses the example of parity set by the federal system, and indicates that the purpose is to avoid a recruitment and retention disadvantage vis-à-vis prosecutorial offices. The ABA standards similarly call for parity in technology and access to legal research tools or a law library.[33]

Other major national indigent defense standards have similar provisions. The standards regarding contract defender offices, the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, adopted by NLADA in 1984 and by the ABA in 1985, provide that all "staff, employees, subcontractors and retained forensic experts must be compensated at rates commensurate…with compensation paid to persons doing similar work in public agencies in the jurisdiction."[34] Salary parity is also directed for appellate defenders in *Standards for Appellate Defender Offices*.[35] For private attorneys appointed to represent indigent individuals, the *Standards for the Administration of Assigned Counsel Systems* direct that compensation shall be "reasonable" and "at a rate commensurate with that paid for other contracted government legal work (e.g., work contracted for by attorneys general, county legislatures, or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction."[36] Commentary to these standards stresses that "market" compensation for privately retained defense counsel remains the preferred rate.

Guidance from the U.S. Department of Justice has reinforced these principles. Attorney General Janet Reno has often stated her belief in the principle of a level playing field. "Our criminal justice system is interdependent," she stated at the Department's National Symposium on Indigent Defense in February 1999. "If one leg of the system is weaker than the others, the whole system will ultimately falter." The final report of the symposium, published by the Justice Department, discusses resource parity in the context of the ABA and NLADA national standards, and concludes that

> Salary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads the innately linked notions of "equal pay" for "equal work." The concept of parity includes all related resource allocations, including support,

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13.11 Salaries for Defender Attorneys). The commentary to both standards also discussed the importance of balance between the ability of the prosecution and the defense to recruit qualified staff.]

[32] ABA Standards for Criminal Justice, Providing Defense Services, 5-4.1.

[33] Standard 5-4.3 and commentary.

[34] Guideline III-10. These contracting guidelines are effectuated in a *Model Contract for Public Defense Services*, promulgated by NLADA and the American University Criminal Courts Technical Assistance Project in February 2000; section VII(F) and XII provide for parity of compensation for attorneys and support staff.

[35] NLADA, 1980 (Personnel Standards).

[36] NLADA, 1989, standard 4.7.1.

> investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.
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> (*Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense*, Bureau of Justice Assistance, U.S. Department of Justice, March 2000, at 14).

The DOJ report's statements relating to comparability of staffing and workloads, and various "related resource allocations," are essential adjuncts to the concept of salary parity. If an assistant public defender receives the same total compensation as her counterpart in the district attorney's office, but is expected to do twice as much work, with half as much support—whether in terms of secretaries, paralegals, investigative services, computers, or access to legal research—the adversarial scales are still out of balance. Parity must embrace comparability of both resources and workload. Additionally, comparability of workload may vary from jurisdiction to jurisdiction, depending on factors such as prosecutorial declination or plea bargaining policies, rates of indigency among defendants, and the complexity of the law or the existence of statutory provisions requiring more defense work or discouraging negotiated dispositions, such as mandatory minimum sentences, inflexible sentencing guidelines, three-strikes laws, or sexual civil-commitment or capital cases.

The DOJ report discusses in greater detail the implementation of parity in several jurisdictions, including the states of New Mexico and Connecticut, and the federal system. An NLADA salary survey presented at the DOJ symposium indicated that many larger public defender programs do have salary parity.

But significant challenges remain. Salary parity remains the exception rather than the rule, especially among smaller programs. And salary parity is just one small part of overall parity of resources and workload, which is even more elusive.

Ironically, though the federal system has been a leader in terms of salary parity, federal policymakers in Congress and the executive branch to this day are prone to creating serious imbalances in the way federal money is allocated to assist state and local criminal justice systems.

One such problem area is student loan forgiveness. Since 1990, state and local government employees who are "essential" to the enforcement of the criminal law have been eligible for forgiveness of one important type of student financial assistance for undergraduate and graduate education: the Perkins student loan program (second in size to the Stafford loan program only). The Department of Education extended the forgiveness program to prosecutors but refused NLADA's request to include indigent defenders as well, expressing the view that defenders are not "essential" to the enforcement of the criminal law. The department's letter did not discuss the U.S. Supreme Court's holding to the contrary in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Bipartisan legislation was introduced in both houses of Congress, and a version actually passed the House of Representatives, to correct this imbalance.

Another problem area is federal support for training. In the mid-1990s, Congress spent $26 million building the National Advocacy Center in Columbia, South Carolina, to train

federal prosecutors, and subsequently began appropriating some $5 million annually to train local prosecutors there as well. A similar college in Reno, Nevada, for training state and local judges also receives substantial federal funding. There is no counterpart for training state and local indigent defense providers. As Attorney General Reno told the Second National Symposium on Indigent Defense in June 2000, "Public defenders need access to training resources to the same degree that federal, state, and local prosecutors have the same."

In a third area relating to parity, new proposals are from time to time put forward by the executive branch and Congress to directly fund the hiring of state and local prosecutors in order to prosecute particular types of crimes in the news and public consciousness. For example, two proposals debated in 1999 provided for states to receive $150 million to hire prosecutors to handle gun-related offenses and offenses by juveniles, and Congress appropriated $100 million for fiscal year 2001 to allow states to hire "community prosecutors." Though the amounts of proposed federal support are very substantial, the proposals never include matching funds for the constitutionally mandated provision of legal representation services in the new cases which will be filed by the new prosecutors.

Attorney General Reno told the June 2000 Indigent Defense Symposium, "We have to ensure that we provide the same level of support and oversight for indigent defense services that we provide for other agencies and functions, or our criminal justice system will not be a system and it won't work."

The enduring symbol of the criminal justice system is the scales of justice. They embody the adversarial balance between the awesome power of the government to forfeit a person's liberty, property, or life, and the fundamental rights of individuals to have such penalties exacted from them only upon proof beyond a reasonable doubt in a fair proceeding, with the assistance of counsel possessed of the competence and resources to test the government's evidence and insist upon all the trappings of due process. Giving the prosecution greater resources than the defense tilts the scales toward the government and away from individual rights. Reserving that disadvantage for the poor calls into question the system's integrity and fairness, and ultimately its very legitimacy. The requirement of parity embodies and helps safeguard the adversarial balance.

Trends in Defense Services Standards

By

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For the last 37 years, since the Supreme Court decided *Gideon v. Wainwright,*[37] it has been the law in America that persons charged with serious crimes and unable to afford counsel are entitled to be represented by an attorney free of charge. Moreover, the Supreme Court has insisted in the abstract that the right to counsel means nothing less than the right to effective, meaningful assistance of counsel.[38] The popular understanding of meaningful assistance of counsel has been shaped by novels like Harper Lee's *To Kill a Mockingbird*, where Atticus Finch risks his livelihood and his children's security to zealously defend his client.[39] Reality is different.

Almost as soon as *Gideon* was decided, the United States began waging an all-out war on crime. The now familiar tactics include criminalization of behavior which was formerly simply undesirable, such as loitering, panhandling, trespassing, and drinking alcohol in public; escalated enforcement of the law through additional arrests, which simultaneously provides the police with a pretext to search offenders for drugs and weapons and to check for warrants; and an increase in the sanctions available as punishment for violation of the law. The battle plan has been successful in reducing crime, but it has not been cheap.

America is incarcerating more of its population than any other country on earth.[40] Even though serious crime finally began to decline in the late 1990s, after a dramatic rise in the two prior decades, incarceration continues to increase, more than tripling since 1980.[41] Because those who are accused must be represented, the criminal defense industry has expanded along with correctional services. In many jurisdictions, indigent defense

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[37] 372 U.S. 335 (1963).

[38] *McMann v. Richardson*, 397 U.S. 759 (1970); *Evitts v. Lucy*, 469 U.S. 387, 396 (1985).

[39] Philadelphia: J. B. Lippincott Co., 1960.

[40] "No matter what the question has been in American criminal justice over the last generation, prison has been the answer." Eric Schlosser, "The Prison Industrial Complex," *The Atlantic Monthly*, Dec.1998, at 51.

[41] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*, Washington, D.C. (1998).

systems represent the overwhelming majority of defendants, as many as 90 percent of those arrested.[42]

Providing effective, meaningful assistance of counsel to so many has become increasingly expensive. Naturally, the cost of defense services has been a pressing concern for governments, while the adequacy of the services has been less of a worry. As a result, public defense has starved and clients have suffered.[43] Although everyone arrested has a right to a lawyer, as more and more people are arrested, that guarantee means less and less. Lawyers working in underfinanced, overburdened public defender offices handle too many cases and can give only minimal attention to each client. Investigations are omitted. Social work intervention is eliminated. Legal research is minimized. Motion practice becomes the exception instead of the rule. As salaries decline and working conditions for public defenders and assigned counsel lawyers degenerate, fewer qualified attorneys agree to represent the indigent accused, and problems caused by too many arrests and not enough funding are compounded.

Although lack of resources is the primary cause of inadequate criminal defense services, there are other factors which contribute to ineffective assistance of counsel. Paramount among these is the striking absence, in most delivery systems, of quality control. Once lawyers are hired, approved for felony duty, or accepted onto an assigned counsel panel, they are often free to practice as they wish without supervision or further evaluation. Closed cases are rarely analyzed. Dispositions are not reconsidered. Malpractice is not reported. Moreover, there is little motivation for the individual attorney to independently improve the quality of practice since, in the criminal justice system, raises and promotions are not awarded for zealous representation. Gratitude is rare and often misplaced, and prestige is rarely won by those who zealously represent the accused.

Part of the explanation for the almost total lack of monitoring or evaluation can be attributed to the difficulty of defining quality criminal defense work. Part of it can be attributed to the general reluctance of lawyers to engage in evaluation.[44] Whatever the difficulty, evaluation cannot be ignored. In Los Angeles, where the pervasive police criminality exposed by the Rampart scandal[45] went undetected by counsel for the accused (in fact the majority of the framed defendants pleaded guilty), defender offices are now looking for ways to audit and improve their service delivery. Those efforts must be supported.

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[42] Robert L. Spangenberg and Marea L. Beeman, "Indigent Defense Systems in the United States," 58 LAW AND CONTEMPORARY PROBLEMS 31 (Winter 1995).

[43] See generally: Stephen B. Bright, "Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake," 783 ANNUAL SURVEY OF AMERICAN LAW 836 (1999); and Richard Klein, "The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel," 13 HASTINGS CONSTITUTIONAL LAW QUARTERLY 625 (1986).

[44] Lawrence M. Grosberg, "Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11," 32 VILLANOVA LAW REVIEW 575 (1987).

[45] The Rampart scandal refers to the widespread planting of evidence and physical intimidation of Los Angeles residents by a high-profile unit within the Los Angeles Police Department. Harvey Weinstein and Jim Newton, "The Rampart Scandal Civil Rights Lawyers Form a Gathering Storm for L.A.," *Los Angeles Times*, March 1, 2000.

It is impossible to underestimate the pervasive degenerative effect of the combination of financial pressures and the absence of accountability. The lack of monitoring and evaluation adversely affects the caliber of the work, the public's appreciation of the work, the clients' trust in the services provided, and the support of local legislatures.

The deficiencies in public defense are common knowledge. In 1997 the American Bar Association's Special Committee on Criminal Justice in a Free Society recommended a moratorium on the imposition of the death penalty because "grossly unqualified and undercompensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offence…but rather on the nature of the legal representation the defendant receives." [46] A former chief judge of the D.C. Circuit Court of Appeals put it this way:

> The battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify…. The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed…represented all too often by 'walking violations of the Sixth Amendment.'[47]

In every study of wrongful convictions, investigators inevitably conclude that ineffective assistance of counsel or bad lawyering has played a significant role. Of the 12 men originally sentenced to death in Illinois who have been exonerated since 1987, "four were represented at trial by an attorney who had been disbarred or suspended." [48] Twenty-six men, at one time sentenced to death, have received a new trial or a new sentencing hearing because reviewing courts determined that their trial counsel was ineffe ctive.[49] Thirty-three defendants sentenced to death were represented at trial by an attorney who had been or was later, disbarred or suspended. [50] The Innocence Project found that 27 percent of the first 68 wrongfully convicted individuals whose convictions the Project helped to reverse had "sub-par or outright incompetent l egal help."[51]

In addition to increased funding, another way to force change might be the creation, adoption, and implementation of standards for the administration of defender organizations. Standards identify the essential tasks, the non-negotiable characteristics of a defense organization, informing the outside community, as well as the defenders themselves, of the minimum acceptable level of operations. For example, if an organization adopts standards that require hiring an investigator for every 10 lawyers or a social work professional for every eight, that organization has committed to investigating cases and exploring alternative sentences. Standards can be used internally by an office

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[46] 61 LAW AND CONTEMP. PROBS. 219 (August 1998).

[47] David Bazelon, "The Realities of Gideon and 69 GEORGETOWN L. J. 811 AT 838 (1976).

[48] Ken Armstrong and Steve Mills, "Inept Defenses Cloud Verdict," *Chicago Tribune*, November 15, 1999, Chicago Tribune Internet Edition: wysiwyg://55/http://www.chicagotribune.org/item/0,1308,37842-0-37872,00.html

[49] Id.

[50] Id.

[51] Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence* (Doubleday, 2000).

as a framework for continuing legal education or review, and externally in lobbying efforts, or in litigation to leverage the funds necessary to allow an organization to meet its standards. Standards are a useful force for change because they operate on multiple levels. They are educational, informing the public about what goes into providing quality defense services and ultimately engendering support for increased spending. They provide notice to the defense provider, outlining what is expected of a publicly funded defense office. They can be a yardstick with which to measure the performance of an office.

Because the method of providing services varies from county to county across the nation, standards for the administration of defense services must vary as well. [52] Where a criminal justice system depends heavily upon assigned counsel, the local administrative standards must concentrate on delineating the essential qualifications for appointment (see Standard E. of the Indiana Standards or 105-3-2 of the Kansas Regulations) and on ensuring rotation of assignments (Georgia Guideline 2.4), prompt compensation of counsel fees, and fair adjudication of fee disputes. Where public defender offices exist, standards need to focus on estimating reasonable caseloads, attorney-supervisor ratios, adequate support services, and the sufficiency of continuing legal education. Where contracts exist, standards require, at a minimum, that awards not be made exclusively on the basis of cost (see Standard L. of the Indiana Standards) and may mandate inclusion of the administrative costs associated with providing legal representation in fee awards (Washington Standard 5: Administrative Expenses) or insist that contracts be awarded only to firms with prior criminal experience. No matter whether standards address assigned counsel plans, public defender offices, or contract work, their intent should be the same: to ensure that the best possible defense services are delivered to clients.

In order to have relevance and force, the defense community whose operations will be guided by the rules must be involved in drafting them. The standards must conform to the community's internal, unarticulated or express standards. They must be enforceable, so that failure to comply will result in a sanction. Finally, they must be specifically tailored to the needs of the jurisdiction and to the type of defender system upon which the locality depends.

In New York City, for example, the First Department, Appellate Division, an intermediate appeals court, which in addition to deciding appeals administers the trial and appellate courts in Manhattan and the Bronx, works together with private bar associations to monitor the provision of defense services. The court established a committee, whose members were selected by local bar groups and the court, to monitor the defense organizations and ensure that each provides quality services [53] —at a time when the provision of defense services was becoming highly politicized in New York City.

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[52] The American Bar Association and the National Legal Aid and Defender Organization have promulgated national standards for the provision of defense services, which have been adopted by many jurisdictions. They are however, by necessity, general and motivational, providing inspiration rather than specific guidance. See: Criminal Justice Standards Committee of the American Bar Association, *Standards for Criminal Justice, Prosecution Function and Defense Function*, 3rd Ed.(1993).

[53] *Rules to Implement an Indigent Defense Organization Oversight Committee*, NEW YORK RULES OF COURT, PART 613, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Infuriated by a strike by staff attorneys, the mayor decided to award contracts for the delivery of defense services to new organizations which would compete with The Legal Aid Society (LAS), the city's traditional primary defender.

The Indigent Defense Organization Oversight Committee (IDOOC) understood that it would be comparing LAS, a venerable law office whose primarily young, idealistic staff represents tens of thousands of individuals each year, to brand new defender organizations backed by the mayor's office. IDOOC needed an evaluation process which would guarantee review on the merits, insist on scrutinizing the work (rather than the leadership), and ensure that information gleaned would be more than simply anecdotal. IDOOC adapted the American Bar Association accreditation process, which measures schools against a set of standards generated by the legal education community. The process requires the organization being evaluated to draft a self-study explaining how it complies with the standards. The monitoring body then conducts site visits to confirm the information in the self-study and drafts a report.

First, IDOOC drafted standards for organized providers of criminal defense services at the trial and appellate level. The standards were designed to measure the support provided by the various organizations to staff. Since detailed standards are easier to use in monitoring than vague pronouncements that are open to multiple interpretations, IDOOC tried to draft detailed, explicit standards. The training standard, for example, includes sections discussing continuing legal education and trial advocacy training, as well as new attorney training. The standards further require a 1:10 supervisor to attorney ratio, periodic performance evaluations of the staff by the supervisors, advertisement of opportunities for promotion, the existence of support services, and implementation of case management and quality control systems. The most important IDOOC standard is the limit on attorney caseloads, since no attorney can provide quality services to too many clients. Portions of these standards are included in this volume of administration standards.

Finally, to provide added incentive to meet the standards, IDOOC decided that failure to meet any one standard would create a rebuttable presumption that the organization as a whole was not providing quality services. The burden would be on the organization to explain how it was providing quality representation despite the failure. "In such cases the defense organization must demonstrate that it has adopted equivalent practices and procedures suitable to its particular structure and method of operation to ensure adherence to each of the Performance Standards." [54]

The LAS as well as the new providers read and commented on the draft. After adjustments were made, the Appellate Division promulgated the standards. Then the monitoring process began. Volunteer lawyers spent many hours in the various offices asking attorneys, supervisors, and staff questions designed to elicit information about the quality of practice. Judges were interviewed as well. The results were surprising. Applying the standards to the operation of the defense offices revealed problems in the management and delivery of services and alerted the courts and the public to dangerous

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[54] Indigent Defense Organization Oversight Committee, *General Requirements for All Organizations Providing Defense Services to Indigent Defendants*. 1996. Supreme Court of New York Appellate Division, First Department.

trends in the operation of the local criminal justice system within which the defender organizations function.

When the contracts for the new defenders were first put out to bid, observers feared that the city would fund the new contractors stingily, forcing the sacrifice of quality for efficiency, while undercutting the work of LAS. Those fears were misplaced. The new organizations did undercut the older established provider, but in an unexpected way by providing an excellent product. The city funded the new providers generously, permitting slightly higher salaries. Some senior experienced staff attorneys deserted LAS to join the upstarts, just as LAS was forced by punishing budget cuts to eliminate supervisory positions. At the same time, the new contracts were very different from LAS's traditional agreement with the city. The new providers were expected only to handle a fixed number of cases for a fixed price. LAS, on the other hand, as the default provider, was responsible for all other arrests, no matter how many, for a fixed price. Since LAS is not in a position to accurately predict the number of future arrests, its staffing allocations were constantly in a state of crisis, rushing to catch up to changing circumstances. Meanwhile, the new defense offices could accurately predict their workload and ensure sufficient staffing to meet client needs. Finally, since the new providers were forbidden to hire recent law graduates, they were inadvertently protected from the expense of training new lawyers, which was shouldered entirely by LAS. These observations illustrated that the new providers were actually in a position to provide better services than LAS.

The information revealed by the monitoring process has forced LAS to take a hard look at some of its bedrock assumptions and has pushed observers to think more expansively about providing criminal defense services. Presumably, if problems in the delivery of services continue to grow and changes do not result, the Appellate Division could act to prevent the funding sources from awarding contracts to organizations which fail to meet the standards. But even beyond the potential for enforcement, the report and the standards upon which the report is based surely focus the public, the funding sources, and the defenders on the real issues: what defenders must do to serve their clients and the public and how a defender office can help its staff provide the best poss ible services.

The recent spate of highly publicized exonerations of wrongly convicted individuals illustrates the importance of an adequate defense and reveals how often our society fails to provide it. Criminal defense services must be improved. Financial resources must be committed to representation of the indigent. In some areas, litigation may be required to force systemic change.[55] Everywhere, public education and outreach are essential to teach the community about the value of defense services and to build support for increased funding. Task forces and collaborative efforts can bring the prosecution, police, corrections, and court personnel together with the defense to collectively improve the quality of criminal justice. Information about the state of indigent criminal defense

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[55] The Connecticut Civil Liberties Union successfully sued the State of Connecticut on behalf of indigent defendants. The lawsuit was settled, the state agreeing to raise the rates of assigned counsel, to substantially (by 30 percent) increase the funding and staff positions for the regular public defender system, and to adopt training requirements, oversight systems, and specific performance standards for attorneys representing poor people in criminal court. September 1999 letter from the CCLU Legal Director on file with the author.

should be routinely gathered and shared. Successful ideas must located and reproduced. Experiments such as the ones in progress in New York City, where new contract defender offices have fashioned a team approach to representation, need to be studied and, if successful, replicated.[56] Defense offices must engage in a continual process of reinvention and self-evaluation. Standards, including the examples collected in this compendium, are one practical tool in that effort.

[56] David E. Rovella, "The best defense…Rebuilding clients' lives to keep them from coming back ," THE NATIONAL LAW JOURNAL, January 31, 2000, at 1.

Trends in Juvenile Justice Standards

By

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The inclusion of juvenile justice standards in the *Compendium of Standards for Indigent Defense Systems* reflects the growing importance of the field of juvenile justice. Given the increased criminalization of juvenile sentencing laws, the growing use of juvenile records in criminal court proceedings, and the expansion of the scope of waiver and transfer hearings, juvenile justice representation is no longer a backwater in the larger justice system.

However, *Compendium* Volume V, "Standards for Juvenile Justice Defense," shows that relatively little attention has been paid to the development of standards for this growing field. The lead in developing juvenile justice standards has primarily been taken by the American Bar Association and a few state groups. The result is that in many jurisdictions, the only applicable standards are those for criminal adult defense services. This trend overlooks some very significant differences between the two types of defense work.

The principles underlying the ABA Juvenile Justice Standards can serve as useful guideposts for developing additional, local standards for juvenile defense services. The Juvenile Justice Standards Project was initiated in 1971 at the Institute of Judicial Administration (IJA) at the New York University School of Law. The IJA was the secretariat for the ABA's effort to develop its *Standards for Criminal Justice.* When IJA staff members attempted to annotate the differences between the ABA criminal standards and prevailing juvenile justice law, they recognized the need for dedicated juvenile justice standards. In 1973, the IJA and ABA created the IJA/ABA Joint Commission on Juvenile Justice Standards. The commission adopted the following statements of purpose:

> The juvenile justice system stands in dire need of thorough dissection preparatory to the promulgation of a comprehensive set of standards. Standards generally are adopted for the following purposes:
>
> 1. *To achieve uniformity* in the law for greater fairness, efficiency, and predictability in the consequences of the same conduct, action, or behavior, regardless of jurisdiction;

2. *To develop linkages* within the system by: defining the roles of affected individuals and agencies; eliminating gaps and duplication in services; and coordinating the planning, operation, and monitoring of programs;
3. *To reexamine accepted concepts and premises* underlying the current laws in the light of objective findings derived from recent studies and other developments. Basic principles should be reaffirmed, revised, or replaced, as a result of taking a fresh look at the system;
4. *To codify* the relevant case law, administrative decisions, selected statutory innovations, and fundamental principles approved in the standards in a form readily translatable into a model act or acts. [57]

About 300 interdisciplinary professionals worked over 10 years to produce the *IJA-ABA Juvenile Justice Standards*' 23 volumes. The ABA House of Delegates approved 17 volumes in 1979 and three more in 1980. The remaining three volumes, "Standards Relating to Schools and Education," "Standards Relating to Noncriminal Misbehavior," and "Standards Relating to Abuse and Neglect" were never adopted by the ABA House of Delegates. The standards commission also created commentary to accompany the black-letter standards. While the commentary is absent from the juvenile justice volume of this *Compendium*, it is available on Westlaw in the ABA-JJS library and from the Juvenile Justice Clearinghouse of the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention at (800) 638-8736.

Although their volumes are varied, the *Juvenile Justice Standards* all observe these general principles:

1. Sanctions should be proportionate to the seriousness of the offense.
2. Sentences or dispositions should be fixed or determinate as declared by the court after a hearing, not indeterminate as determined by correctional authorities based on subsequent behavior or administrative convenience.
3. The least restrictive alternative to accomplish the purpose of the intervention should be the choice of decision makers at every stage, with written reasons for finding less drastic remedies inadequate required of every official decision maker.
4. Noncriminal misbehavior (status offenses or conduct that would not be a crime if committed by an adult) should be removed from juvenile court jurisdiction.
5. Limitations should be imposed on detention, treatment, or other intervention prior to adjudication and disposition.
6. Visibility and accountability of decision making should replace closed proceedings and unrestrained official discretion.

---

[57] Barbara D. Flicker, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 3 (2d ed. 1982).

7. Juveniles should have the right to decide on actions affecting their lives and freedom, unless they are found incapable of making reasoned decisions.
8. Parental roles in juvenile proceedings should be redefined with particular attention to possible conflicts between the interests of parent and child.
9. There should be a right to counsel for all affected interests at all crucial stages of proceedings and an unwaivable right to counsel for juveniles.
10. Strict criteria should be established for waiver of juvenile court jurisdiction to regulate the transfer of juveniles to adult criminal court. [58]

These principles are still valid today. As recently as 1996, the Honorable Patricia M. Wald, formerly a judge on the U.S. Court of the Appeals for the District of Columbia Circuit, currently a judge on the International Criminal Tribunal for former Yugoslavia, and a member of the original IJA/ABA Joint Commission on Juvenile Justice Standards, concluded that "the IJA-ABA standards still represent the most comprehensive, balanced vision of a just and potentially effective system for dealing with youthful offenders that exists."[59]

[58] IJA/ABA, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH, xviii-xx (Robert E. Shepherd, Jr., ed. 1996).
[59] *Id.* at xii.

List of Standards and Table of Key Elements

Standards Included

National

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

American Bar Association, *Standards for Criminal Justice: Providing Defense Services*, 1992

National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on the Courts*, 1973

National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act*, 1970

National Legal Aid and Defender Association, *Defender Training and Development Standards*, 1997

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

National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, 1984

National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, 1989

State and Local

Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, 1997

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

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

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

Minnesota Office of the State Public Defender, *Caseload Standards for District Public Defenders in Minnesota*, 1991

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

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

North Dakota Legal Counsel for Indigents Commission, *Indigent Defense Guidelines and Procedures*, 1998

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

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

Key Elements

		National Standards						State Standards									
Category	**Standard**	**ABA Stand-ards**	**NLADA Legal Defense Systems**	**NLADA Assigned Counsel Systems**	**NLADA Contracting**	**Model Act**	**NAC**	**CT**	**GA**	**IN**	**KS**	**MN**	**NE**	**NY**	**ND**	**OR**	**WA**
A. Defense Services Administration and Standards																	
	Purpose of standards	✓		✓				✓									
	Role of counsel							✓								✓	✓
B. Scope of Representation																	
	Case selection	✓	✓		✓	✓	✓		✓								
	Duration of representation		✓		✓												
	Early intervention	✓		✓	✓	✓	✓		✓						✓		
	Appearance at all stages	✓		✓		✓	✓										
	Termination or removal of attorney	✓															✓
	Procedures to identify conflict of interest				✓			✓			✓			✓	✓		

		National Standards						State Standards									
Category	**Standard**	**ABA Stand-ards**	**NLADA Legal Defense Systems**	**NLADA Assigned Counsel Systems**	**NLADA Contract ing**	**Model Act**	**NAC**	**CT**	**GA**	**IN**	**KS**	**MN**	**NE**	**NY**	**ND**	**OR**	**WA**
C. Financial Eligibility																	
	Financial criteria	✓	✓	✓		✓	✓		✓	✓	✓		✓		✓		
	Eligibility	✓					✓		✓						✓		
	Contribution, reimburseme nt requirements	✓	✓	✓		✓	✓		✓	✓					✓		
	Publicly provided support services for non-indigent clients	✓								✓							
D. Right to Counsel																	
	Preassignme nt communicati on	✓		✓		✓	✓		✓								
	Waiver of right to counsel	✓		✓		✓											
	Facilitating attorney-client communicati on	✓															

		National Standards						State Standards									
Category	**Standard**	**ABA Stand-ards**	**NLADA Legal Defense Systems**	**NLADA Assigned Counsel Systems**	**NLADA Contract ing**	**Model Act**	**NAC**	**CT**	**GA**	**IN**	**KS**	**MN**	**NE**	**NY**	**ND**	**OR**	**WA**
E. Defense Services Plan																	
	System/plan required	✓		✓					✓	✓							✓
	Plan protects independence	✓	✓	✓	✓	✓	✓		✓	✓				✓			
	Governing board	✓	✓	✓	✓	✓			✓	✓				✓			
	Facilities		✓			✓	✓										
	Support services	✓	✓	✓	✓	✓	✓		✓	✓	✓			✓			✓
	Training	✓	✓	✓		✓	✓			✓				✓	✓		✓
	Attorney supervision		✓	✓	✓				✓					✓			✓
	Recruitment and hiring		✓	✓										✓			
	Case overload and case mgmt systems		✓											✓			
	Related standards																✓
F. Mixed Systems																	
	Statewide system		✓			✓	✓										
	Case allocation		✓														
	Related provisions		✓														

		National Standards						State Standards									
Category	**Standard**	**ABA Standards**	**NLADA Legal Defense Systems**	**NLADA Assigned Counsel Systems**	**NLADA Contracting**	**Model Act**	**NAC**	**CT**	**GA**	**IN**	**KS**	**MN**	**NE**	**NY**	**ND**	**OR**	**WA**
G. Public Defender Offices																	
	Chief public defender	✓	✓	✓	✓	✓	✓		✓		✓						
	Prohibition on private practice	✓	✓	✓	✓		✓										
	Compensation		✓	✓	✓	✓	✓			✓				✓			✓
	Responsibility for administration of criminal justice	✓				✓	✓										
H. Assigned Counsel Systems																	
	Integrated defense system plan	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓				
	Plan administrator	✓	✓	✓	✓		✓		✓								
	Attorney panel qualifications	✓	✓	✓	✓				✓	✓							
	Rotation of assignments	✓	✓		✓				✓		✓						
	Attorney compensation	✓	✓	✓	✓	✓			✓	✓	✓				✓		✓
	Attorney expenses	✓		✓	✓					✓	✓				✓		
	Related provisions			✓													

		National Standards						State Standards									
Category	**Standard**	**ABA Standards**	**NLADA Legal Defense Systems**	**NLADA Assigned Counsel Systems**	**NLADA Contracting**	**Model Act**	**NAC**	**CT**	**GA**	**IN**	**KS**	**MN**	**NE**	**NY**	**ND**	**OR**	**WA**
I. Contract Defense																	
	Authorization of contract services	✓	✓	✓	✓	✓			✓	✓	✓		✓				
	Compensation			✓	✓					✓					✓		✓
	Contract termination and minimum term			✓	✓				✓								✓
	Contracting procedures	✓		✓						✓	✓						
	Contract provisions	✓		✓	✓					✓				✓	✓		✓
	Prohibition on substitution of attorneys			✓						✓							✓
	Related provisions			✓					✓								✓

A. Defense Services Administration and Standards

The standards in this section address the following topics:

1. Purpose of standards
2. Role of counsel

See also the Federal Office Management Assessment Guide (1995) , which is used by the Defender Service Division of the Administrative Office of the United States Courts to evaluate federal public defender offices.

1. Purpose of Standards

Commentary. Few sets of standards explicitly state the purposes they serve; especially lacking is any definition of the intended audience. The Connecticut guidelines included here specifically state that the judiciary should not use the guidelines either in disciplining attorneys or in determining adequacy of representation in challenges to a conviction. By contrast, the ABA Defense Function Standards countenance some use by the judiciary. See also, Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part 1.1, "The Function of the Guidelines."

ABA Standards for Criminal Justice: Providing Defense Services

Standard 4-1.1. The Function of the Standards

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

Standard 5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 1 Scope

These Standards apply whenever private counsel, rather than defender offices or contracting entities, are being assigned to provide representation for persons who are financially unable to retain counsel (as defined in Standard 2.3) and who are entitled to representation.

Standard 2.1 Provision of Quality Representation

a. Provision of quality representation to all persons eligible under Standard 2.3 is the overarching purpose of these Standards, and shall inform the creation and maintenance of all Assigned Counsel Programs.

b. Assigned counsel shall provide to their clients quality representation equivalent to that provided by a skilled, knowledgeable and conscientious criminal defense lawyer to paying clients.

c. Assigned counsel shall provide quality representation in all relevant legal proceedings involving their clients.

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

Purpose:

These guidelines are intended to be used as a guide to the representation of clients, and the obligations due a client are not limited by the guidelines articulated here. However, these guidelines are not intended to be used as criteria for the judicial evaluation of performance or alleged misconduct of defense counsel to determine the validity of a conviction. These guidelines are intended to encourage public defenders and special public defenders contracted by the Division of Public Defender Services to perform to a high standard of representation and to promote professionalism in the representation of clients.

2. Role of Counsel

Commentary. Some sets of standards begin with a general statement defining the role of defense counsel. Included here are standards from Connecticut, Oregon, and Washington. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 1.1, "Role of the Public Defender."

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

Guideline 1.1. Role of Defense Counsel

(a) All counsel should abide by the policies adopted by the Connecticut Public Defender Services Commission and the chief Public Defender in regard to the representation of a client.

(b) Counsel should zealously represent and advocate for each client and render effective assistance of counsel.

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

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

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

Principle 1

The paramount obligation of counsel is to provide quality representation and diligent advocacy for the client at all stages of the representation.

Principle 2

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

Washington Defender Association, Standards for Public Defense Services

Standard Two. Duties and Responsibilities of Counsel

…Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

B. Scope of Representation

Although a defense provider is generally responsible for representing criminal defendants, it is not always clear when that responsibility begins or for how long it continues. Hence, issues concerning attorney appearance include two separate princ iples:

- The attorney must appear in all cases where incarceration is threatened.
- The duration of the attorney's representation for trial and sentencing extends to all case stages.

This section includes standards that address the following topics:

1. Case selection
2. Duration of representation
3. Early interaction
4. Appearance at all stages
5. Termination or removal of attorney
6. Conflict of interest procedures

1. Case Selection

Commentary. U.S. Supreme Court decisions hold that defendants who cannot afford counsel have a right to counsel at government expense in criminal proceedings where significant liberty issues are at stake. See *Gideon v. Wainright* and *Agersinger v. Hamlin*. The ABA, NLADA, and NAC standards go further and require publicly funded defense counsel in all criminal matters even where not constitutionally required. The Model Public Defender Act does not go so far. At the state level, defendant eligibility for defense services is largely controlled by statute and in some instances by state Supreme Court holdings or administrative rules. Only two states make reference to case type eligibility. The Georgia guidelines below follow the lead of the national standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-5.1. Criminal cases

Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding thereby subjecting the defendant to incarceration.

Standard 5-5.2. Collateral proceedings

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

Standard 5-5.4. Impact Litigation

(a) The legal representation plan should permit pursuit of litigation which affects:

  (i) substantial numbers of similarly situated clients of the program, or

  (ii) fundamental rights which cannot otherwise be effectively protected.

(b) Any such litigation should be undertaken only when it is in the best interests of the affected clients.

NLADA Guidelines for Legal Defense Systems in the United States

1.2 Time of Entry

Effective representation should be available for every eligible person as soon as:

(a) The person is arrested or detained, or

(b) The person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

1.3 Procedures for Providing Early Representation: Program Responsibilities

In order to ensure early representation for all eligible persons, the defender office or assigned counsel program should:

(a) Respond to all inquiries made by, or on behalf of, any eligible person whether or not that individual is in the custody of law enforcement officials;

(b) Establish the capability to provide emergency representation on a 24-hour basis;

(c) Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services;

(d) Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;

(e) Prepare, distribute and make available by posting in a conspicuous place in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of any person who may require the services of the defender or assigned counsel and the nature and availability of such services, including the telephone number and address of the local defender office or assigned counsel program; and

(f) Publicize its services in the media.

Upon initial contact with a prospective client, the defender or assigned counsel should offer specific advice as to all relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pretrial release, and make a preliminary determination of eligibility for publicly provided defense services.

Where the defender or assigned counsel interviews a prospective client and it is determined that said person is ineligible for publicly provided representation, the attorney should decline the case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, should immediate service be necessary to protect that person's interest, such service should be rendered until the person has had the opportunity to retain private counsel.

Guideline 4.5. Prisoner Legal Assistance Programs

Every defender system should make an assessment of the availability of postconviction representation of the criminally confined in its jurisdiction and, if indicated, establish a separate division to deliver that representation in a comprehensive fashion.

The defender system should seek to utilize and incorporate existing community resources including, but not limited to, law students, paraprofessionals, jailhouse lawyers and

volunteers to assist in delivering the services. These individuals, however, should be carefully selected, properly trained and supervised, and their duties precisely defined.

Since the legal claims of prisoners may require of defender staff attorneys many skills and/or substantive law knowledge not necessarily possessed by criminal law practitioners, this fact should be reflected in the program's hiring policies, training programs, law library content and internal office structure.

In the event that the defender system opts, due to lack of available resources, lack of expertise, or for others reasons to limit its inmate representation to certain specified types of cases, the Defender Director should identify and coordinate with alternative prison legal services programs and initiate an effective referral system for inmate requests.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-18 Standards of Recommendation

…

The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that a counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 1. Definitions

In this Act, the term:

…

(4) "serious crime" includes

(i) a felony;

(ii) a misdemeanor or offense any penalty for which involves the possibility of confinement for more than 6 months or a fine of more than $500; and

(iii) an act that, but for the age of the person involved, would be a serious crime.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.1 Availability of Publicly Financed Representation in Criminal Cases

Public representation should be made available…in all criminal cases….

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

Guideline 1.1 Nature of Cases and Proceedings for Which Counsel Should Be Provided

Counsel shall be provided to all persons eligible as herein defined whenever such a person is accused of a felony by indictment, warrant or warrantless arrest or a misdemeanor, other than a traffic offense or violation of a municipal ordinance, for which such a person could be imprisoned under the State law of Georgia.

Guideline 1.2 Time of Entry

Counsel shall be appointed for every eligible person in custody within 72 hours of arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment.

A person released from custody within 72 hours who has not been appointed counsel shall be notified at least ten (10) days prior to the next critical stage of the proceedings against him/her of the right to receive court-appointed counsel and the procedure to be followed to have eligibility determined and counsel appointed.

Guideline 1.3 Appointment of Counsel

The Administrator of the indigent defense program or designee shall within 72 hours of detention:

(a) Appoint counsel for those who are indigent and without counsel ;

(b) Clearly advise detained persons of their right to have counsel and that if they cannot afford a lawyer, one will be appointed to represent them;

(c) Allow or assist a person claiming to be indigent and without counsel to immediately complete an Application for Appointment of Attorney and Certificate of Financial Resources for a determination of indigency or not.

2. Duration of Representation

Commentary. Two NLADA standards require vertical representation of the client. At the same time, these standards also address one important implementation of vertical representation: when representation ends. The Guidelines for Legal Defense Systems call for vertical representation in each case through postconviction. This principle may seem to contradict the NLADA standards relating to appellate services, which separate responsibility for trial and appellate representation. The NLADA contracting guidelines provide that once an attorney is assigned to a case, he or she shall complete the representation in that case either through trial or through the appellate process.

NLADA Guidelines for Legal Defense Systems in the United States

5.11 Continuity of Representation

Defender offices should provide for continuous and uninterrupted representation of eligible clients from initial appearance through sentencing up to, but not including, the appellate and postconviction stages by the same individual attorney. Defender offices should urge changes in court structure and administration to reduce fragmentation and to facilitate continuous representation.

If necessary, the procedures for early representation, including initial contact, should permit a limited exception to continuous representation. However, the defender office should implement procedures for early case assign ment and for informing the client of the name of the attorney who will represent him after the initial period covered by the exception.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-12 Duration of Representation

The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms of the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act of the appeals court which is accepted as final on the merits by defense counsel and his or her client.

Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

3. Early Intervention

Commentary. Effective representation requires early entry into the case. Almost all the national standards advocate in general terms early entry by defense counsel. However, only two state standards specify when counsel is appointed. Neither of these latter standards provides for pre-arrest/custody representation.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.1. Initial provision of counsel

Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.1. Availability of Publicly Financed Representation in Criminal Cases

¶1 Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

…

(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

Section 4. Determination of Financial Need

(a) The determination whether a person covered by section 2 is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 9, whichever occurs earlier. Thereafter, the court shall determine, with respect to each proceeding, whether he is a needy person.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-18. Standards of Recommendation

…The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.5 Early Representation

a. It is the responsibility of the Assigned Counsel Program, along with other components of the criminal justice system, to ensure that counsel is provided to the accused at the earliest possible stage in the proceedings.

b. Upon request, counsel shall be appointed for persons who have not been taken into custody and who require representation for criminal proceedings.

c. Assigned counsel shall contact their new clients as soon as possible after appointment.

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

Guideline 1.2 Time of Entry

Counsel shall be appointed for every eligible person in custody within 72 hours of arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment.

A person released from custody within 72 hours who has not been appointed counsel shall be notified at least ten (10) days prior to the next critical stage of the proceedings against him/her of the right to receive court-appointed counsel and the procedure to be followed to have eligibility determined and counsel appointed.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

7. Interview Schedule:

For client defendants who are in custody, the FIRM shall provide initial interviews with clients within 24 hours of the time when appointments are made on normal working days (Monday through Friday), or by the next working day if the appointment is made on a weekend or holiday.

For client defendants who are not in custody, the FIRM shall provide initial interview with clients within 72 hours of the time when appointments are made.

An initial contact should be made whenever possible, prior to release of defendant from custody.

4. Appearance at All Stages

Commentary. Early representation, appearance at all stages, and duration of representation are different facets of the principle to provide defense services where and when needed. This can include even postconviction proceedings. National standards encourage defense service providers to make counsel available at every stage of the case.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.2. Duration of representation

Counsel should be provided at every stage of the proceedings, including sentencing appeal, certiorari and postconviction review…. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.6 Duration and Continuity of Representation

a. The duration of representation by counsel assigned under these Standards shall be until all appropriate avenues of relief, direct and collateral, are exhausted or until counsel is replaced by subsequent or substitute counsel.

b. There shall be continuity of representation by assigned counsel at the trial stage. There shall be continuity of representation by assigned counsel on appeal, which shall be provided by different counsel than at the trial stage, except when the best interests of the clients dictate otherwise.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.1. Availability of Publicly Financed Representation in Criminal Cases

…The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

Standard 13.4. Public Representation of Convicted Offenders

Counsel should be available at the penitentiary to advise any inmate desiring to appeal or collaterally attack his conviction. An attorney also should be provided to represent: an indigent inmate of any detention facility at any proceeding affecting his detention or early

release; an indigent parolee at any parole revocation hearing; and an indigent probationer at any proceeding affecting his probationary status.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

(a) A needy person who is being detained by a law enforce ment officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel;

…

(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

(2) to be represented in any appeal; and

(3) to be represented in any other postconviction proceeding that the attorney or the needy person considers appro priate, unless the court in which the proceeding is brought determines that it is wholly frivolous.

Section 17. Representation in State and Federal Courts

This Act applies only to representation in or with respect to the courts of this state. It does not prohibit the Defender General, a deputy defender general, or other public defender from representing a needy person in a Federal court of the United States, if:

(1) the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

(2) representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the legisl ature.

5. Termination or Removal of Attorney

Commentary. Once established, the attorney–client relationship should continue until either of the two parties discontinues it. Only for good cause can a third party intervene to end the relationship. Among standards, only the ABA Defense Services Standards and the Washington standards include these principles.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.3. Removal

Representation of an accused establishes an inviolable attorney–client relationship. Removal of counsel from representation of an accused, therefore, should not occur over the objection of the attorney and the client.

Washington Defender Association, Standards for Public Defense Services

Standard Sixteen. Cause for Termination or Removal of Attorney

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney's contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney–client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

6. Conflict of Interest Procedures

Commentary. Conflicts between an attorney's duty to represent a client and an attorney's personal interests or the interests of another client are not uncommon. Such conflicts are, perhaps, the most frequent cause of termination of the attorney–client relationship before case completion. Thus, procedures are needed to identify as early as possible the possibility of conflicts that might later require withdrawal. See, generally, the several Florida court rules pertaining to appointment of special public defenders in conflict cases.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-13 Conflicts of Interest

The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

(a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and

(b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and

(c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

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

Guideline 4.1. Conflicts

(a) Counsel should adhere to the Rules of Professional Conduct regarding conflicts of interest.

(b) Counsel should be cognizant of the existence of any potential and actual conflicts of interest which would impair counsel's ability to represent a client, such as if the representation of one client's interests are materially adverse to those of a current or former client.

(c) Except for preliminary matters such as arraignment or an initial hearing, counsel should not represent a client when a conflict of interest exists between co-defendants

or multiple defendants such that the representation of one client *will be directly adverse* to the other client.

(d) Counsel should not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another current or former client or a third person, or by the lawyer's own interests, unless:

(i) The lawyer reasonably believes the representation will not be adversely affected; and

(ii) The client consents after consultation, which consent should be docum ented by counsel in counsel's file. When the representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.

(e) Counsel who has formerly represented a client should not thereafter use information relating to the former representation to the disadvantage of a former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(f) Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case, unless required by the Rules of Professional Conduct.

(g) The filing or existence of a habeas corpus petition or grievance against counsel in regard to his/her quality of representation shall not create a conflict of interest per se. Withdrawal by counsel from the representation of a client under such circumstances should occur if ordered by the court upon motion by the client or if counsel is of the opinion that the filing or existence of the habeas corpus petition or grievance will interfere with counsel's ability to adequately represent the client.

(h) Counsel should withdraw upon the filing of a civil lawsuit against counsel by a client alleging malpractice, a finding of probable cause in connection with a grievance complaint, or if counsel has been scheduled to testify at a habeas corpus trial in which (1) counsel is the subject of the claim of ineffective assistance of counsel which has been raised in the petition; and, (2) the pleadings have been closed.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-11. Conflict cases

(a) If a conflict of interest will not permit the public defender to represent a defendant, the court shall appoint the designated conflicts office for that county or an assigned attorney who has entered into a contract to represent defendants in conflict cases. If a conflicts office has not been designated for that county, if a contract attorney has not been designated to handle conflicts cases, or if the nature of the conflict requires it, the court shall appoint a qualified attorney from the panel. Each court-appointed attorney in conflict cases shall work independently of the public defender.

(b) Requests for investigative, expert, and other services by court-appointed attorneys shall be made in accordance with K.A.R. 107-7-1.

105-10-1a(b). Public defense system at trial level

…

(b) If the director has provided notice pursuant to K.A.R. 105-10-3, to the administrative judge of the judicial district in which a case is filed, of the board's designation of a conflicts office for a county, the designated conflicts attorney office shall be appointed and shall provide indigent felony and related defense services at the trial level for those cases that cannot be handled by the public defender office due to potential conflicts of interest, with the exception of those cases that the designated conflicts attorney office cannot handle due to a potential conflict of interest.

105-21-3. Withdrawing from cases

Any public defender may withdraw from any court-appointed case when that defender determines that there exists a possible conflict of interest in further representation of the defendant.

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

IX. Compliance with Standards of Professional Responsibility

…

B. Evaluation Criteria

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

   <u>*Specific Guideline:*</u>

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

…

3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:

   …

   (c) no conflicts of interest exist between each lawyer's legal work unrelated to

the contract and the interests of any client assigned to the defense organization?

Specific Guidelines:

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

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

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

4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations' clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?

5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?

6. Does the defense organization have adequate procedures to ensure that its lawyers do not otherwise abuse the attorney–client relationship to create fee-generating opportunities?

7. Does the defense organization have adequate procedures for receiving and responding to client complaints?

8. Does the defense organization maintain adequate procedures for identifying and resolving ethical issues?

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

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Model Contract for Counsel Services

…

9. Conflict of Interest:

If at any time after an appointment has been made, the FIRM discovers a conflict of interest pursuant to the North Dakota Code of Professional Responsibility, the FIRM shall promptly notify either the judge who made the appointment or the judge of the court in which the matter is pending . If the judge agrees that there is a conflict of interest, the judge shall revoke the appointment and appoint other counsel for the indigent person from within the FIRM where possible, or by outside assigned counsel. If outside counsel is appointed in the event of a conflict of interest, no deductions may be made from compensation to be received by the FIRM for monies paid to appointed counsel.

C. Financial Eligibility

The basic holding of both *Gideon v. Wainwright* (felony matters) and *Argersinger v. Hamlin* (misdemeanors) is that financial inability to pay for criminal defense counsel should not be a bar to justice. Where defendants cannot pay for an attorney when facing loss of liberty or life, the state must.

Client eligibility issues include these:

1. Financial criteria
2. Eligibility determination
3. Contribution and reimbursement requirements
4. Publicly provided support services for non-indigent clients

1. Financial Criteria

Commentary. Although all persons who are financially unable to obtain adequate representation without suffering hardship must be provided representation at public expense, translating this principle into practical working guidelines is difficult. While the ABA Defense Services Standards make no effort to define need or hardship, some state standards set specific criteria, such as income levels defined by the federally established poverty level (Nebraska, North Dakota). Most states, however, specify client eligibility financial standards in their state legislation. See, e.g., Wisconsin Statutes Annotated §977.07(2) and Wyoming Statutes §7-6-103(c), Rules of Criminal Procedure, Rule 44(d).

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.1. Eligibility; ability to pay partial costs

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

NLADA Guidelines for Legal Defense Systems in the United States

1.5 Financial Eligibility Criteria

Effective representation should be provided to anyone who is unable, with out substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.

(a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in deter mining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.

(b) The cost of representation includes investigation, expert testi mony, and any other costs which may be related to providing effective repre sentation.

1.6 Method of Determining Financial Eligibility

The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney–client relationship.

A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal. The record on appeal should include all evidence presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.3 Financial Eligibility

a. Any person who cannot retain private counsel without substantial hardship to that person, or to his or her family, shall be eligible to receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists.

b. Rules, regulations and procedures concerning the determination of in itial eligibility and/or continuing eligibility shall not interfere with assigned counsel's independence to advocate for his or her clients on any relevant matter, including the question of their financial status. Individual assigned counsel shall not have responsibility for determining initial or continuing eligibility of clients.

c. Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not require assigned counsel to make any disclosures of facts concerning his or her clients' financial status beyond those disclosures mandated by the binding ethical rules of the jurisdi ction.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

…

(c) A needy person's right to a benefit under subsection (a) or (b) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

Section 4. Determination of Financial Need

…

(b) In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person. In each case, the person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.2. Payment for Public Representation

¶2 The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents, and the cost of subsistence for the defendant and those to whom he owes a legal duty of support. In applying this test, the following criteria and qualifications should govern:

1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.
2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.
3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.
4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

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

Guideline 1.5 Financial Eligibility

Eligible accused persons include all applicants for an attorney with a net income below the Poverty Guidelines as established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. The local committee may set and revise the eligibility standards in accordance with, but no lower than, the Poverty Guidelines.

The following special needs of a family unit may be deducted from net income in determining eligibility:

(1) child care expenses for working custodial parents,

(2) legally required support payments to dependents, including alimony for the support of a child/children,

(3) unusual, excessive, or extraordinary medical or other expenses.

"Net income" shall include only a client's take-home pay, which is the gross income earned by a client minus those deductions required by law or as a condition of employment.

"Family unit" includes the defendant, his/her spouse, if living together, any minors who are unemployed and unmarried, and any infirm or permanently disabled person living with the defendant and for whom the defendant has assumed financial responsibility. The income of a minor who is attending school full time, but has after-school employment or does odd jobs, shall not be attributed to that of the family unit. Other persons, if living within the same household, may be deemed members of the family unit.

In the event an accused person is discovered to have been ineligible at the time of the appointment of an attorney, the court shall be notified. The court may discharge the appointed attorney and refer the matter to the private bar. The attorney should be paid for the time spent on the case and recoupment sought from the ineligible person.

Regardless of the prima facie eligibility on the basis of income, a person who has sufficient assets that are easily converted to cash by sale or mortgage may not be qualified for representation if it would not impose a substantial financial hardship to convert them to cash.

Counsel may be appointed for any accused person who is unable to obtain counsel due to special circumstances such as emergency, hardship, or documented refusal of the case by members of the private bar because of financial inability to pay for counsel.

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

C. Eligibility for Appointment of Counsel

The comprehensive plan shall include the applicable rules and procedures for the determination of eligibility for the appointment of counsel at public expense, and shall contain the following provisions:

1. *Substantial hardship.* Counsel will be provided to all persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families.
    a. *Ability to Post Bail*. Counsel will not be denied to any person merely because the person is able to obtain pretrial release through a surety bond, property bond, or a cash deposit.
    b. *Employment*. Counsel will not be denied to any person merely because the person is employed.

2. *Determining Eligibility.* The determination of eligibility for the appointment of counsel will include an estimation as to the costs of retaining private counsel and a determination as to whether the person's disposable income and liquid assets are adequate to cover the costs of retaining private counsel.

   a. *Costs of Private Counsel*. The determination of the costs of retaining private counsel shall be based upon the nature of the criminal charge, the anticipated complexity of the defense, the estimated cost of presenting a legal defense, and the fees charged by lawyers in the community for providing defense services in similar cases.

   b. *Income*. Income shall include all salaries and wages after taxes, including interest, dividends, social security, unemployment compensation, workers' compensation, pension, annuities, and contributions from other family members.

   c. *Expenses*. Expenses shall include, but are not limited to, all living expenses, business or farm expenses, including food, utilities, housing, child support and alimony obligations, education or employment expenses, child care, medical expenses, and transportation.

   d. *Disposable Income*. Disposable income shall be determined by assessing monthly income and subtracting monthly expenses.

   e. *Liquid Assets*. Liquid assets shall include, but are not limited to, cash, savings and checking accounts, stocks, bonds, certificates of deposits, and equity in real and personal property exceeding the statutory allowances in I.C. 34-2-28-1 that can be readily converted to cash.

3. *Confidentiality*. If the accused is questioned about indigency in circumstances where the attorney–client privilege does not apply, the accused shall be advised that any statements made or information given may be used against him or her.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-4-1. Determination of eligibility

(a) At the commencement of proceedings against any defendant, the defendant may make application for legal representation at state expense by submitting, to the court, an affidavit of indigency on forms provided by the board. The court shall determine if the defendant is indigent, based upon consideration of the following factors, as defined in K.A.R. 105-4-2:

   (1) The defendant's liquid assets;

   (2) The defendant's household income;

   (3) The defendant's reasonable and necessary expenses incurred to support the defendant's household;

   (4) The anticipated cost of private legal representation; and

(5) Any transfer of property by the defendant without adequate monetary consideration after the date of the alleged commission of the offense.

(b) An eligible indigent defendant is a person whose combined household income and liquid assets equal less than the sum of the defendant's reasonable and necessary living expenses plus the anticipated cost of private legal representation.

(c) The court may also consider any special circumstances affecting the defend ant's eligibility for legal representation at state expense.

(d) If the court determines that the defendant is financially able to employ counsel, after counsel has been appointed, the court shall require the defendant to reimburse the board in accordance with the provisions of K.S.A. 1982 Supp. 22-4510 for all or part of the expenditures made on the defendant's behalf.

105-4-2. Definition of terms

Terms used to determine eligibility for indigents' defense services shall have the following meanings:

(a) Liquid assets. The defendant's liquid assets shall be defined as cash in hand, stocks and bonds, accounts at financial institutions, real property or homestead having a net value greater than $50,000, and any other property that can be readily converted to cash, with the following exceptions.

(1) The defendant's car, clothing, and household furnishings; and

(2) Any other property, except a homestead having a net value greater than $50,000, which is exempt from attachment or levy of execution by K.S.A. 60-2301, et seq.

The net value of the homestead shall be determined as the fair market value less the mortgage, other encumbrances, and the reasonable cost of sale. The net value of any property transferred after the date of the alleged commission of the offense shall be included in the determination of the defendant's liquid assets.

(b) Household income. The defendant's household income shall be defined as the defendant's income and the income of all other persons related by birth, marriage or adoption who reside with the defendant. Income shall include the total cash receipts, before taxes, from all resources, including money wages and the net receipts from nonfarm or farm self-employment. Further, income shall include regular payments from a governmental income maintenance program, alimony, child support, public or private pensions, annuities, and income from dividends, interest, rents, royalties, or periodic receipts from estates or trusts.

(c) The defendant's reasonable and necessary living expenses. The board shall calculate a table which establishes the amounts the board will allow as the defendant's reasonable and necessary expenses incurred to support the defendant and the defendant's household. The table shall represent 125% of the federal poverty income guidelines that are adopted in accordance with 42 USC 9847 and are published in the Federal Register. The board shall cause this table of reasonable and necessary living expenses to be published in the Kansas Register in May of 1984 and at such times thereafter as the federal poverty income guidelines are revised. Revisions in the

federal poverty income guidelines shall not be adopted until considered and approved by the board.

(d) Transfer of property. If the defendant has transferred property aft er the date of the alleged commission of the offense, the court shall determine the reason for the transfer of property and shall determine whether adequate monetary consideration was received. If adequate monetary consideration was not received, the court shall presume that the transfer was made for the purpose of establishing eligibility unless the defendant furnishes clear and convincing evidence that the transfer was made exclusively for another purpose. If a transfer was made either for the purpose of establishing eligibility or without adequate monetary consideration, and the property is reconveyed to the defendant or an adjustment is made by which the defendant receives full value, the defendant shall, if otherwise qualified, be eligible to receive legal representation at state expense.

105-4-5. Partial indigency

(a) The court shall find any defendant to be partially indigent if the defendant is able to pay some part of the cost of legal representation and if the payment or payments does not impose manifest hardship on the defendant or the defendant's household. Any defendant may be found to be partially indigent if the defendant's combined household income and liquid assets are greater than the defendant's reasonable and necessary living expenses but less than the sum of the defendant's reasonable and necessary living expenses plus the anticipated cost of private legal representation.

(b) A defendant found to be partially indigent may be ordered by the court to pay, to the clerk of the district court, a sum not more than the amount expended by the board of behalf of the defendant.

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

VII. Nebraska Commission on Public Advocacy Standards to Determine Indigency

These rules shall apply to any party who has a right to be represented by an attorney of the Commission on Public Advocacy. The eligibility for appointment of an attorney at public expense shall be determined in conformance with these rules.

A. Definition of Terms

The following definitions shall apply to these rules:

1. **Income** shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.

2. **Indigent** for purposes of this rule shall mean:

   (a) A party who is:

(i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

(ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or

(iii) Serving a sentence in a correctional institution and has no available funds; or

(iv) Held in custody in jail and has no available funds; or

(b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

B. Affidavit of Indigency

A party who desires to proceed as an indigent represented by an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources (FORM 1). The party shall be advised of the penalties for perjury. The defendant has an ongoing duty to update the affidavit as his or her financial status changes.

C. Determination of Indigency

If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent under these rules. The court shall record its finding on the affidavit of indigency (FORM 1) and file it with the papers in the case. The county or prosecuting attorney shall have no standing in the determination of indigency or the appointment of counsel.

D. Assignment of Counsel/Notice of Assignment

If the court finds that a party is indigent, the court shall appoint an attorney or the Commission on Public Advocacy to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel (FORM 2) and shall file a copy in the case file.

E. Review of Indigency Determination

(1) A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.

(2) A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

1. Guideline for Determining Eligibility for Indigent Defense Services

Section A. Adults

Consideration should be given to:

1. income resources;
2. non-income resources;
3. expenses and liabilities; and
4. estimated cost of defense services

of the defendant in determining eligibility for defense services.

1. Income Resources

   These guidelines for gross income levels are offered as income levels at or below which eligibility for defense services should be considered.

Household Size	**1**	**2**	**3**	**4**
Annual Gross Income	10,063	13,563	17,062	20,5653
Monthly Gross Income	839	1,130	1,422	1,714
Weekly Gross Income	210	283	356	429
Household Size	**5**	**6**	**7**	**8**
Annual Gross Income	24,063	27,563	31,063	34,563
Monthly Gross Income	2,005	2,297	2,589	2,880
Weekly Gross Income	501	574	647	720

(Add $3,500 for each additional member in households of more than eight.)

These income levels reflect 125% of the official poverty level threshold as defined by the Department of Health and Human Services (63 F.R. 9236, February 24, 1998). They are provided for information only and are updated annually to reflect 125% of the poverty level threshold as published by the Department of Health and Human Services. The income levels should be adjusted to meet local standards. For persons with incomes above these levels, consideration should be given to the exceptional factors in Section A.4.

The commission has undertaken to provide judges annually with the current income guidelines.

a. How to Determine Income Resources

   The defendant's income resources include total cash receipts before taxes of the defendant and those persons who are legally responsible for the defendant. Seasonal income should be considered on an annualized basis.

Spouse income should not be included in the calculation of defendant's income, but should be considered in determining the actual extent of defendant's living expenses and liabilities.

Consideration should be given to the following specific factors:

a. money, wages and salaries before any deductions;

b. income from self-employment after deductions for business or farm expenses;

c. regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments;

d. public or private employee pensions, and regular insurance or annuity payments;

e. income from dividends, interest, rents, royalties, estates or trusts;

f. benefits from a governmental income maintenance program (AFDC, SSI, unemployment compensation, or state or county general assistance or home relief);

g. food or rent received in lieu of wages;

h. money which is received from sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury;

i. non-cash benefits (Food Stamps, etc.); and

j. payments from rental of Indian Trust Land and Tribal per capita payments authorized by the Indian Claims commission.

The following factors should not be included in determining defendant's income:

a. bail funds;

b. spouse income.

b. How to Determine Household Size

All individuals who are actually dependent on defendant for financial support should constitute a single household for purposes of assessing income levels for eligibility for defense services.

2. Non-Income Resources

These guidelines for non-income financial resource levels are offered as resource levels at or below which eligibility for defense services should be considered.

For persons with non-income resources above these levels, consider ations should be given to the exceptional factors in Section A.4.

a. Homestead Exemption

Only equity in homestead property exceeding the statutory allowances in Sections 28-22-02 and 47-18-01, NDCC, should be considered. Statutory homestead exemption property should not be considered.

All claimed homestead property must be contiguous property.

Mobile Homes should be considered as homestead property.

b. Personal Property Exemption

Only equity in personal property exceeding the statutory allowance in Sec tions 28-22-03 and 28-22-05, NDCC, should be considered. Personal property exempted by statute should not be considered.

c. Other Real Property and Personal Property

The following factors should be considered in making a determination of financial eligibility:

- Equity in homestead property in excess of the statutory allowances in Sections 28-22-02 and 47-18-01, NDCC
- All equity in non-homestead real property
- Personal property in excess of the statutory allowance in Sections 28-22-03 and 28-22-05, NDCC

The following factors should <u>not</u> be included in assessing non-income resources:

- Indian Trust Land

3. Expenses and Liabilities

The defendant's expenses and liabilities include all living expenses, business or farm expenses, fixed debts and obligations (including federal, state and local taxes).

Consideration should be given to the following specific factors:

a. food
b. utilities
c. housing
d. child support and alimony obligations
e. education or employment expenses
f. child care
g. medical expenses
h. transportation

Spouse income should be considered in determining the extent of defendant's actual living expenses and liabilities.

4. Exceptional Factors

A defendant whose income resources or non-income resources exceed these guidelines may still be eligible to receive legal assistance based on the following factors:

a. Current income prospects, taking into account seasonal variations in i ncome;

b. Age or physical infirmity of household members;

c. The estimated cost of obtaining private legal representat ion with respect to the particular matter for which assistance is sought;

d. The nature of the criminal charge; and

e. The anticipated complexity of the defense.

2. Eligibility Determination

Commentary. Only four sets of standards discuss by whom and how client eligibility is determined. These include the ABA and NAC among the four national standards and two states, Georgia and North Dakota. These standards do not endorse a single approach, citing the defender, the court, and the defense system administration, among other possibilities. The North Dakota guidelines are notable for setting out procedures for privately retained counsel to raise indigency questions.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.3. Determination of eligibility

Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court. When the eligibility determination is not made by the court, confidentiality should be maintained, and the determinations should be subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.3. Initial Contact with Client

The first client contact…should be governed by the following:

2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.
3. Where, pursuant to court order or a request by or on behalf of an accused, a publicly provided attorney interviews an accused and it appears that the accused is financially ineligible for public defender services, the attorney should help the accused obtain competent private counsel in accordance with established bar procedures and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the accused.

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

Guideline 1.4 Determination of Financial Eligibility

The financial eligibility of a person applying for publicly provided counsel should be determined by the Administrator of the indigent defense program or designee.

Upon a determination of indigency the Administrator or designee shall immediately notify the public defender, contract attorney or the panel attorney designated to represent the person, the indigent accused, the sheriff, the clerk and the district attorney of the appointment of counsel for the indigent accused. The original authorization of appointment shall be filed with the indictment, warrant or petition in the case; a copy of the authorization shall be forwarded to the clerk, the public defender, contract attorney or panel attorney appointed to represent the indigent defendant, the indigent defendant, the sheriff and the district attorney.

For jurisdictions in which defendants are brought before a judicial officer within 72 hours of arrest, are advised of their right to appointed counsel, are permitted to orally request appointment of counsel, are questioned as to their financial eligibility, and are appointed a lawyer immediately if eligible, the Council will waive the requirement that an application be made in writing. Notice should be given as specified above.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

IV. Guidelines for Determining Eligibility for Indigent Defense Services

…

In order to aid case processing, and meet the court's constitutional responsibilities, the following policing should be considered:

1. Close questions regarding defendant's indigency should be resolved in favor of eligibility. Close questions between partial eligibility and full eligibility should be resolved in favor of full eligibility. This will assist case processing, protect constitutional rights, and will be balanced by more active recoupment procedures.
2. Early appointment of counsel is desirable. Counsel should be appointed at the earliest feasible time (as soon as possible and no later than the initial appearance on the criminal charge, and definitely within three working days of the arrest) at the request of the defendant or on the court's own motion.
3. The eligibility determinations for defense services based on financial resources should not impose an extensive time burden on court officials.
4. The attached information forms should be used as the means of providing the court with all relevant information for a review of the appointment decision (See Attachments immediately following p. 1.10). No formula is suggested. Judges are encouraged to recognize general indications of poverty in welfare recipients or

previous appointment of defense counsel as indicated on the short form application. The additional financial information is available for consultation in unusual cases at the request of the judge or counsel.

5. The administrative costs of making eligibility determinations should be co nsidered.
6. Defendants should be reminded of the penalties for giving false information in the eligibility determination process.
7. Early in the proceedings, defend ants must be notified by the judge presiding in the case and by appointed defense counsel that all defendants are subject to recoupment for the fees and expenses of counsel, and of the established rate of these expenses at the end of the proceeding, including juvenile proceedings. See Section 29-07-01.1, NDCC.
8. Before an eligibility determination is made, the judge should inquire closely regarding the defendant's efforts to obtain the service of a private attorney.
9. Any indication of anticipatory transfer of assets by defendant to create the conditions for eligibility for defense services should be scrutinized and dealt with decisively.
10. Except in exceptional circumstances, any anticipated change to indigent defense counsel from private counsel midway in a case should be avoided by a finding of eligibility for appointed defense counsel and appointment of the same counsel and recourse to partial eligibility payments or recoupment procedures.
11. The judge may wish to inquire periodically through out the proceedings regarding substantial changes in defendant's financial status. However, this information should not be permitted to disrupt the flow of court proceedings, but should be considered in the civil collection process at the end of the court proceedings.

9. Guidelines for Attorney Withdrawal in Criminal Cases

Application of Guidelines

These guidelines apply to district courts and the Supreme Court when considering…a privately retained attorney's motion for a declaration of indigency status which is accompanied by a request by the moving attorney to be appointed by the court as indigent defense counsel.

Purpose of Guidelines

It is of primary importance to the members of the bar and to the public that a lawyer who undertakes representation of a client in criminal proceedings, whether initially retained by the defendant or appointed by the court, continue to represent the client at least through the trial stage of the proceedings, unless the continued representation would result in the violation of a disciplinary rule. Continuity of counsel in criminal proceedings should be mandated in order to protect the rights of the defendant by avoiding wherever possible the adverse effect and possible prejudice to the client caused by an atto rney's withdrawal.

Guidelines

In order to eliminate the delay in criminal cases and expense associated with the substitution of counsel prior to trial, the following policies should be adopted:

…

2. A motion for withdrawal which is based upon the indigency status of the defendant and accompanied by a request for court appointed counsel should not be considered by the court as a circumstance which justifies the removal of counsel and the substitution of court appointed counsel, nor should a motion for the declaration of indigency status on behalf of the defendant justify the appointment by the court of the moving counsel as assigned counsel, unless either motion is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof.
3. When a motion to withdraw as counsel is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof, and the defendant meets the financial eligibility requirements for indigent defense services, the court should appoint new counsel to provide indigent defense services for the defendant. If the court has contracted for indigent defense services, the case may be assigned under the provisions of the contract.
4. When a motion for the declaration of indigency status on behalf of the defendant is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof; the motion includes a request that the moving counsel be appointed by the court as assigned counsel; and the defendant meets the financial eligibility requirements for indigent defense services, the court in its discretion may appoint the moving counsel or appoint new counsel to provide indigent defense services for the defendant.
5. Privately retained counsel involved in criminal proceedings should be allowed to file in writing with the court a motion for the declaration of indigency status on behalf of the defendant anytime during the interval after five days before the preliminary hearing or the waiver thereof and the start of the trial. If the defendant at the time of the hearing on the motion meets the financial eligibility requirements for indigent defense services:

    a) The defendant should be eligible for payment by the appropriate court of expenses, approved by the court in advance, incurred in defending the defendant after the date of the court's declaration of the defendant's indigency. Payment of the expenses for defense services for the defendant should be provided pursuant to the Guidelines for Payment of Counsel Fees and Expenses for Defense Services.

    b) Counsel should be required to continue to provide legal services to the defendant through the trial without cost to either the public or the defendant.

4. Model Contract for Counsel Services for Indigent Defendants

(16) Non-Privileged Information:

The FIRM shall advise all clients serviced by this contract that information regarding their financial circumstances which is probative of determining indigency is not

privileged information, unless the information is probative of the guilt or innocence of the client in which case the information shall be protected by the lawyer–client privilege.

The FIRM has the continuing responsibility to bring to the attention of the judge who is presiding in the matter any non-privileged information regarding the financial resources of defendants which bears on their eligibility for counsel services under this contract.

3. Contribution and Reimbursement Requirements

Commentary. Defendant eligibility for defense services is not always a black/white proposition. Some defendants can pay a portion of the defense costs without suffering "substantial hardship" but cannot afford all the costs. Most national standards and three of the state standards (Georgia, Indiana, North Dakota) include provisions for defendant contribution to the costs of public defense.

A related question is whether a defendant who has received publicly funded defense services should later be required to pay for the services should his or her financial condition improve. Only the ABA Defense Services Standards speak to this issue. The North Dakota guidelines do, however, provide forrecoupment in the event that financial eligibility is later found to have been erroneous. See also,Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G2.2(c), "Eligibility of Accused," which provides for appointment when eligibility is unclear and reimburses for "all or a portion of the actual costs" if later found ineligible.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.2. Reimbursement, notice and imposition of contribution

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedura l safeguards are provided.

NLADA Guidelines for Legal Defense Systems in the United States

1.7 Partial Eligibility

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.

(a) The defender office or assigned counsel program should deter mine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.

(b) The amount of contribution to be made under this section should be determined i n accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.4 Contribution and Recoupment

a. Persons eligible for representation by assigned counsel (Standard 2.3) shall not be asked to contribute toward, nor to reimburse the jurisdiction for, the cost of assigned counsel.

b. Jurisdictions that do require payment by eligible persons of some portion of the cost of assigned counsel shall establish a procedure for determining the amount of contribution to be paid. This procedure shall be implemented prior to or early in representation by assigned counsel, and shall include a hearing on the ability of the person to pay.

c. Any payment by or on behalf of a person represented by assigned counsel toward the cost of representation shall be made to a fund or through a mechanism established for that purpose, and not directly to assigned counsel. Assigned counsel shall not be responsible for collection of payment.

d. Payment toward the costs of representation by assigned counsel shall never be made a condition of probation or other sentence-related supervision.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 4. Determination of Financial Need

…

(c) To the extent that a person covered by section 2 is able to provide for an attorn ey, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.2. Payment for Public Representation

¶1 An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

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

Guideline 1.6 Recovery from Defendant of Payment for Legal Representation

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he/she is able to provide a cash contribution to the cost of his/her defense without imposing a substantial financial hardship upon defendant or dependents, such contribution may be required as a condition of continued representation at public expense. The indigent defense administrator or designee should determine the amount to be contributed. The contribution shall be paid directly to the fund for indigent defense of the affected county. A defendant who disagrees with a required contribution shall be provided a hearing by the court. If a defendant enters a *nolo contendere*, first offender, or guilty plea or is convicted the court may impose as a condition of probation repayment of all or a portion of the county's cost for providing legal representation if it does not impose a substantial financial hardship upon defendant or dependents, with payment to be made through the probation department to the fund for indigent defense of the affected county.

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

Standard D. Payment by Accused of Defense Costs

The comprehensive plan shall contain the policies and procedures for ordering indigent persons in criminal cases to pay some or all of the costs of defense services under I.C. 88-9-11.5, and shall specify the procedures for determining the actual costs to the county for defense services provided to the accused.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

1. Guidelines for Determining Eligibility for Indigent Defense Services

Section C. Partial Eligibility

Defendants may be found to be partially eligible for defense services. However, consideration should be given to avoiding complex financial or collection arrangements and any payment responsibility which could disrupt case processing responsibilities of the court.

Specific consideration should be given to the following factors:

a. Collection of defendant's contribution by prepayment should be considered to avoid administrative burdens on court personnel. Percentage payment requirements should be discouraged to avoid financial uncertainty and administrative problems. Lump sum payments should be based on present ability to pay.

b. All payments should be made directly to the county or state which pays for appointed counsel. No payment directly to counsel should be permitted.

c. Defendant should be notified that partial payment is not a waiver of recoupment procedures.

3. Guidelines for Defendant Reimbursement of Indigent Defense Costs

The Commission strongly encourages judges to closely examine the financial status of defendants when appointment of counsel, based upon alleged indigency, is requested or considered. The hasty appointment of counsel for defendants who have financial resources to partially or entirely bear the cost of privately retained counsel results in an inefficient allocation of indigent defense resources and compromises the ability to provide constitutionally required counsel services for those who are in fact indigent. Appropriate appointment of counsel should reduce the need for aggressive reimbursement efforts. However, if reimbursement of indigent defense costs is undertaken, all such efforts should be in compliance with applicable statutory requirements.

Model Agreement for Collection Agency Services for Defendant Reimbursement of Indigent Defense Costs

_____, ("COLLECTOR") and _____, State's Attorney of _____ County ("CLIENT") agree that the CLIENT's accounts placed with the COLLECTOR are subject to the terms and conditions of the following agreement.

1. Prior to CLIENT's decision to initiate collection effort, or the Court's direction to do so, COLLECTOR will assist CLIENT in gathering information concerning the employment status, resources and assets of potential accounts.

2. Collection effort will be commenced and continue on accounts during the entire period such accounts are held by COLLECTOR. Collection activities must be in compliance with federal, state and local laws or regulations, including the fact that COLLECTOR shall, if required, at all times be licensed by the proper state authority.

3. Collections made by COLLECTOR on CLIENT's designated accounts for _____ county will be deposited within _____ days in a trust account maintained in a reputable bank acceptable to CLIENT. Such collections, less COLLECTOR feeds held in trust by COLLECTOR, are the property of _____ county and are not available for any other use by COLLECTOR or COLLECTOR's other clients.

   Collections made by COLLECTOR on CLIENT's designated accounts for the state of North Dakota will be deposited immediately in a trust account maintained in a reputable bank accepted to CLIENT. Such collections, less COLLECTOR fees held in trust by COLLECTOR, are the property of the state or North Dakota and re not available for any other use by COLLECTOR or COLLECTOR's other clients.

4. All collections made by COLLECTOR on CLIENT's accounts for _____ county and the state of North Dakota will be remitted respectively to the _____ county treasurer and the state treasurer within ____ days, less COLLECTOR's collection fee, accompanied by remittance advice, consisting of the: account number, name, date payment was received by COLLECTOR, gross amount of collection, collection fee due COLLECTOR, and net amount remitted. A copy of the remittance advice will be sent simultaneously to CLIENT.

5. CLIENT agrees to provide COLLECTOR with information on all direct payments received by CLIENT from accounts placed for collection with COLLECTOR. COLLECTOR will prepare a statement containing the account number, name, gross amount of direct payment to CLIENT and collection fee due COLLECTOR. This statement must be combined with the appropriate remittance advice listing collections made by COLLECTOR. COLLECTOR shall deduct the collection fee due COLLECTOR on payments made direct to CLIENT from the amount due CLIENT on collections made by COLLECTOR.

6. Status reports on all accounts must be supplied to CLIENT by COLLECTOR quarterly, beginning _____, and upon request.

7. CLIENT agrees to pay the COLLECTOR as its s ole compensation a contingent fee equal to (a) _____ percent on first assignment: (b) _____ percent on accounts requiring the following types of special collection effort: legal action, forwarding to other Collection Agencies; or (c) _____ percent on all second assignments.

   Costs incurred by COLLECTOR in instituting legal action may be recovered by COLLECTOR if such costs have been added to the balance originally due by decision of the court, prior to remitting to CLIENT the proceeds of collections made on the account as a result of legal action.

   In the event CLIENT credits a customer's account with the full balance thereof by way of an adjustment, such accounts must be returned by COLLECTOR to CLIENT

and no fee will be paid to COLLECTOR. In the event the amount of any credit adjustment is less than the outstanding balance, no contingent fee is payable to the COLLECTOR hereunder with respect to the amount of such adjustment only.

Collector agrees that it will not settle any customer account for l ess than the total amount of the balance due without first obtaining written authorization from CLIENT.

8. COLLECTOR shall keep CLIENT advised, when requested, of the status of legal actions instituted hereunder, and shall furnish copies of summons, pleadings, orders, citations, judgments, and all other papers filed by either party in the legal action when requested to do so by CLIENT.

   In the event any action, complaint, or counterclaim is instituted or interposed by the debtor against CLIENT, COLLECTOR shall immediately advise CLIENT of same, and forward copies of all pleadings or other papers by it or its attorneys.

9. Audits of COLLECTOR may be performed from time to time by CLIENT or persons retained by client and may include a review of collection effort, maintenance of trust account, adequacy of cash controls, promptness of recording and remitting payments, compliance with this agreement and any other normal audit procedures and tests.

10. Comparative Profit & Loss and Balance Sheet Statements on the business of the COLLECTOR, properly certified by an independent auditor, must be supplied to CLIENT by COLLECTOR no later than 90 days after the close of the COLLECTOR's calendar or fiscal year, if requested by the CLIENT.

11. Accounts paid by CLIENT with C OLLECTOR for collection may be withdrawn by CLIENT at any time, by either oral or written request. Upon receipt of such requests, COLLECTOR shall return the account along with all documents and records pertaining to such account. COLLECTOR also agrees to cause any suit instituted by it to be settled or dismissed, as CLIENT may direct. Bankrupt accounts must be returned immediately to CLIENT by COLLECTOR with proper notation. No compensation will be paid COLLECTOR on any returned or withdrawn accounts.

12. COLLECTOR hereby agrees to indemnify and hold CLIENT harmless from any loss, damage, attorney's fees and court costs which CLIENT may suffer due to any efforts by COLLECTOR to collect referred accounts. COLLECTOR agrees to save CLIENT harmless from any liability resulting from acts, errors, or omissions by COLLECTOR.

13. COLLECTOR will provide CLIENT with written evidence of insurance naming CLIENT as an additional insured and containing a provision that the carrier will notify CLIENT at least 10 days in advance of the termination or cancellation of coverage or any material change in coverage, in carriers, and limits acceptable to CLIENT, in the following areas:

    A. Personal Injury Liability Insurance, Including Contractual Liability

       (To include, but not limited to, false arrest, detention, accusation, imprisonment or malicious prosecution. Also libel, slander, defamation or violation of rights of

privacy, wrongful entry or eviction, other invasion of right of private occupancy, or abuse of process.)

B. Comprehensive General Liability Insurance, Including Contractual Liability

C. Workmen's Compensation and Occupational Disease Insurance, Including Employers Liability Insurance

(To comply with laws of the State(s) in which the work is to be performed or elsewhere as may be required. Employers Liability Insurance must be provided with a limit of not less than $50,000.00.)

D. Automobile Liability Insurance (owned or non-owned)

E. Employee Dishonesty Bond

14. This agreement is effective as of the date shown in effect until terminated as hereinafter provided.

Either party may terminate this agreement by giving the other party at least 30 days prior written notice of date of termination; provided, however, that CLIENT may terminate this agreement immediately in the event COLLECTOR violates any of the terms or provisions of this agreement, or if CLIENT in its sole judgment, determines there has been an adverse change in COLLECTOR's financial condition. Termination or cancellation of this agreement by either party does not affect the collection, enforcement or validity of any accrued obligations owing between the parties. In the event of termination, COLLECTOR shall promptly turn over to CLIENT all accounts placed with COLLECTOR, together with all documents and records pertaining to such accounts. In the event COLLECTOR refuses to turn over such documents and records, CLIENT has the right to enter the premises of the COLLECTOR for the purpose of recovering such documents and records. COLLECTOR shall also promptly turn over to CLIENT the amount of all collections made on CLIENT accounts previously remitted to CLIENT, less the applicable collection fee.

15. Except as otherwise provided herein or by law, neither this agreement nor any of its rights, duties or obligations, or payments due or to become due, hereunder, may at any time be assigned, sold, or pledged by the COLLECTOR.

COLLECTOR has the right to forward any accounts to other collection agencies. However, CLIENT is not responsible for any cost incurred either by COLLECTOR or by any person designated by COLLECTOR with respect to the collection of such accounts. CLIENT liability hereunder is limited to the fee payable to COLLECTOR as specified in paragraph 7 above. In the event CLIENT is required to pay such costs, the amount thereof must be deducted from the contingent fees payable to the collector hereunder.

In the event accounts are forwarded by COLLECTOR to other agencies, then COLLECTOR agrees to be responsible to CLIENT for the amounts collected by such other agencies.

16. Nothing contained in this agreement requires CLIENT to place any set number or type of accounts with COLLECTOR and CLIENT is expressly given the right to

place as many or as few accounts with COLLECTOR as it may from time to time determine, including the right to place no accounts even though this agreement may be still in force. This agreement does not give COLLECTOR the exclusive right to collect CLIENT's accounts and CLIENT is free to enter into such other agreements as it may choose for the collection of its accounts.

17. COLLECTOR at the request of CLIENT shall state in writing the names of all of its employees, agents and attorneys working on any of CLIENT's accounts at the time of such request. CLIENT at its sole discretion may then request that certain employees, agents and attorneys of COLLECTOR not perform any further work on CLIENT's accounts, which request must be granted by COLLECTOR.
18. Nothing contained herein creates an employer–employee relationship, a partnership or joint venture between parties and COLLECTOR's only relationship with CLIENT is that of an independent contractor.

4. Publicly Provided Support Services for Non-Indigent Clients

Commentary. Some standards authorize public funding of defense support services to clients of privately retained counsel. This is consistent with standards that provide for client contribution to the costs of defense services. Only the ABA Defense Services Standards and the Indiana standards explicitly provide for public support of non-indigent clients.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.4. Supporting services

…[S]upporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.

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

N. Court Authorized Expenditures for Non-Indigent Persons

The comprehensive plan shall authorize expenditures for investigative, expert, or other services for a person who has retained private counsel for trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense. Such services are eligible for reimbursement from the public defense fund.

D. Right to Counsel

The *Gideon-Argersinger* requirement that defendants in criminal cases be provided counsel when they cannot afford private counsel and face potential incarceration requires a clear offer of counsel. Most standards do not address how or when the information should be communicated to arrestees. Failure to address this issue has led to excessive delay in assigning counsel to clients in some jurisdictions. If the counsel offer is refused, there must be an explicit refusal; otherwise, there later may be a claim of non-waiver. Two additional related topics are telephone access to counsel and facilities for private discussion between the defendant and counsel.

The standards in this section address the following topics:

1. Pre-assignment communication
2. Waiver of right to counsel
3. Facilitating attorney–client communication

1. Pre-Assignment Communication

Commentary. Procedures for implementing the right to counsel begin with informing the defendant of that right. Because of the critical nature of this step, the failure of most sets of standards to include this step is somewhat surprising. While most of the national standards include a statement relating to the right to counsel, only the Georgia guidelines among all the state standards do so.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-8.1. Providing counsel to persons in custody

(a) A person taken into custody or otherwise deprived of liberty should immediately be informed, preferably by defense counsel, of the right to legal representation. An offer of counsel should be made in words easily understood, and it should be stated expressly that one who is unable to pay for representation is entitled to counsel.

(b) Custodial authorities should provide access to a telephone, the telephone number of the defender, assigned counsel or contract for services program, and any other means necessary to establish communication with a lawyer.

(c) The defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody. An attorney or representative from the appropriate program should be available to respond promptly to a person in custody who requests the services of counsel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.7 Waiver Safeguards

a. All persons eligible for representation by assigned counsel shall be informed of that right.

b. Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.

c. The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

Standard 2.8 Standby Counsel

a. If a person eligible for representation by assigned counsel waives counsel on the record, in favor of self-representation, standby counsel shall be appointed.

b. Standby counsel shall be available to advise the pro se defendant on preparation and presentation of his or her case, and shall be prepared to represent the defendant if the waiver of counsel is withdrawn at any point.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 3. Notice and Provision of Representation

(a) If a person who is being detained by a law enfo rcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officer, [magistrate], or court concerned shall:

(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the appropriate public defender that he is not so represented.

This shall be done upon commencement of detention, formal charge, or postconviction proceeding, as the case may be. As used in this subsection, the term "commencement of detention" includes the taking into custody of a prob ationer or parolee.

(b) Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

…

(e) Information given to a person under this section is effective only if:

(1) it is in writing or otherwise recorded;

(2) he records his acknowledgment of receipt and time of receipt, or, if he refuses to make this acknowledgment, the person giving the information records that he gave the information and that the person informed refused so to acknowledge it; and

(3) the material so recorded under paragraphs (1) and (2) is filed with the court next concerned.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.3. Initial Contact with Client

The first client contact and initial interview by the public defender, his attorney staff, or appointed counsel should be governed by the following:

1. The accused, or a relative, close friend, or other responsible person acting for him, may request representation at any stage of any criminal proceedings. Procedures should exist whereby the accused is informed of this right, and of the method for exercising it. Upon such request, the public defender or appointed counsel should contact the interviewee.

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

Guideline 1.3 Appointment of Counsel

The Administrator of the indigent defense program or designee shall within 72 hours of detention:

(a) Appoint counsel for those who are indigent and without counsel ;

(b) Clearly advise detained persons of their right to have counsel and that if they cannot afford a lawyer, one will be appointed to represent them;

(c) Allow or assist a person claiming to be indigent and without counsel to immediately complete an Application for Appointment of Attorney and Certificate of Financial Resources for a determination of indigency or not.

2. Waiver of Right to Counsel

Commentary. The right to counsel, like most other rights, may be waived. Formal waiver of the right to counsel on the record is required to document the fact of waiver. Three of the national standards (ABA, NLADA, Model Act) establish procedures for ensuring that any waiver is knowing and is documented.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-8.2. In-court waiver

(a) The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.

(b) If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.7 Waiver Safeguards

a. All persons eligible for representation by assig ned counsel shall be informed of that right.

b. Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.

c. The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 7. Waiver

A person who has been appropriately informed under section 3 may waive in writing, or by other record, any right provided by this Act, if the court, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and famili arity with the Englis h language, and the complexity of the crime involved.

3. Facilitating Attorney–Client Communication

Commentary. Among standards studied, only the ABA Defense Function Standards address the necessity of private interviews between the attorney and the client, including telephone access to counsel and facilities.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-2.1. Communication

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

Standard 4-3.1. Establishment of Relationship

…

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

E. Plan for Defense Services or Public Defender

Most standards that provide guidance for the administration of a criminal defense services system require a comprehensive plan that ranges from protecting independence through providing for a case management system. The standards in this section address the following topics:

1. System/plan requirement
2. Protection of independence
3. Governing board
4. Facilities
5. Support services
6. Training
7. Attorney supervision
8. Recruitment and hiring
9. Case overload and case management system
10. Related standards

See also the Federal Office Management Assessment Guide (1995) , which is used by the Defender Service Division of the Administrative Office of the United States Courts to evaluate federal public defender offices.

1. System/Plan Requirement

Commentary. Several standards require the adoption of a written plan that describes how the jurisdiction will provide defense services. Included below are standards promulgated by the American Bar Association, the National Legal Aid and Defender Association, and the states of Georgia, Indiana, and Washington.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.2. Systems for legal representation

(a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.

(b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.

(c) Conditions may make it preferable to create a statewide system of defense.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.1 Establishment of Legal Representation Plan

a. Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these Standards.

b. Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with one or more other methods of providing representation. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons.

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

a. Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.

b. The plan shall delegate to assigned counsel a substantial portion of all eligible cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.

c. None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

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

Guideline 4.3 Proposals for an Indigent Defense Program by the Local Governing Committee

A proposal for the establishment of a public defender system, a panel of private attorneys, a legal aid and defender society, a contract system or a combination of the above shall comply with these guidelines and shall provide for:

(1) The independence of counsel;

(2) Early entry by counsel into a case;

(3) A procedure to determine indigency of persons in custody and appointing them counsel within 72 hours of incarceration;

(4) A procedure for determining that attorneys representing indigents are competent in the practice of criminal law; and

(5) A rate of compensation and schedule of allowable expenses to be paid for indigent defense services; and include the following:

   (a) A resolution from the county government authority of each county to be served by the program stating the intent of the county to participate in the proposed indigent defense program within these guidelines;

   (b) A statement that the local governing committee wishes to set up one or more of the above specified indigent defense programs within these guidelines;

   (c) A narrative description of the proposed operation of the program;

   (d) A completed proposal form;

   (e) All budget data required on the proposal form;

   (f) Copies of all written procedures and guidelines governing the operation of the program.

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

B. Comprehensive Plan

The county public defender board shall adopt a comprehensive plan for indigent defense services…and shall submit the plan to the Indiana Public Defender Commission.

Washington Defender Association, Standards for Public Defense Services

Standard Two. Duties and Responsibilities of Counsel

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

2. Protection of Independence

Commentary. All seven sets of national standards for the administration of defense services stress the importance of ensuring the independence of the defense agency and its attorney from outside pressures. Each includes both explicit statements about the importance of independence and specific provisions for its achievement. The latter include requirements that

- Case assignment be made by system administrators, not judges or elected officials,
- A board of governors administer the program with a membership that excludes members with potential conflicts, and
- Fixed-term, merit appointment for the defender and merit appointments for the staff be set.

Only three of the 10 jurisdictions with defense services administration standards have explicitly included provisions for ensuring independence of the defense function. Of these, the New York City standards are the most detailed.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.3. Professional independence

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same event as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

Standard 5-4.1

Selection of the chief defender and staff should be made on the basis of merit…. The chief defender and staff should be compensated at the rate commensurate with their

experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices. The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.

NLADA Guidelines for Legal Defense Systems in the United States

2.18 Administration of Defense System Funds

(a) Defender Systems

The defender system should be an independent agency and, as such, should prepare its own budget and submit its budget directly to the appropriating authority. Its budget should not be presented as part of the judicial or executive branch budgets, nor should it be subject to diminution or alteration by any branch of government other than the appropriating authority. The Defender Commission should review and advise the Defender Director on the budget before its submission and provide support for the budget request.

The defender system should operate under an annual or biennial lump sum appropriation which would enable the Defender Director to reallocate funds without prior approval of the appropriating authority. The payment of the defender on a case-by-case reimbursement basis, the direct provision of in-kind services or facilities to the defender system by the government, and other substitutes for providing a complete and sufficient budget are explicitly rejected as means of funding defender systems.

(b) Assigned Counsel Programs

The financial administration of assigned counsel program funds should be in the form of an open-ended budget whereby compensation would be paid in accordance with caseload and the nature and extent of the services rendered.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.2 Independence from Judiciary and Funding Source

a. The Assigned Counsel Program and individual assigned counsel shall be free from political influence and shall be subject to judicial supervision only to the extent that privately retained attorneys are.

b. The Assigned Counsel Program shall operate under and enforce a clear policy protecting the integrity of the relationship between assigned counsel and his or her client.

c. Assigned counsel shall reject any attempts at interference with the conduct of a particular case.

NLADA Guidelines and Awarding Governmental Contracts for Criminal Defense Services

Guideline II-1 Purposes

The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the Contractor….

Guideline II-2 Members

The Policy Board should consist of from three to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

(a) Appointees should be persons who will ensure the independence of Contractor.

(b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.

(c) No single branch of government should have a majority of votes on the Policy Board.

…

(g) The Policy Board should not include judges, prosecutors, or law enforcement officials.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

…

(d) Whenever appropriate, the Defender General may contract with private or public legal aid or other non-profit organizations that are equipped to provide the services to needy persons covered by this Act or to carry out any other function of the Office of Defender General. Each contract must provide (1) that the services performed shall meet the professional standards that this Act prescribes for services performed by the Office of the Defender General, and (2) that the services are subject to the Defender General's supervision and control.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.8. Selection of Public Defenders

¶1 The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. If a jurisdiction has a Judicial Nominating Commission as described in Standard 7.1, that commission also should choose public defenders. If no such commission exists, a similar body should be created for the selection of public defenders.

Standard 13.9. Performance of Public Defender Function

¶2 The public defender should seek to maintain his office and the performance of its function free from political pressures that may interfere with his ability to provide effective defense services. He should assume a role of leadership in the general community, interpreting his function to the public and seeking to hold and maintain their support of and respect for this function.

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

Guideline 2.8 Independence of Counsel

Any indigent program shall operate independently and be structured to preserve independence.

Independent counsel shall be politically autonomous and free from influence, guidance or control from any other authority in the discharge of his/her professional duties, within the bounds of the law and the Code of Professional Responsibility.

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

A. County Public Defender Board

A county with a population over 12,000 persons shall establish a county public defender board. Counties subject to I.C. 33-9-15 shall establish a county public defender board pursuant to this statute. Counties excluded from I.C. 33-9-15 shall establish a county public defender board under I.C. 33-1-3 with powers and duties consistent with I.C. 33-9-15. A lawyer who provides representation to indigent persons shall not be appointed to a county public defender board.

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

I. Professional Independence

A. Performance Standard: In order to guarantee the integrity of the attorney-client relationship, defense organizations and the lawyers they employ should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers.

B. Evaluation Criteria

1. Does the defense organization have an independent governing board which is charged, *inter alia*, with supporting and protecting the professional independence of the organization's lawyers?

   Specific Guidelines:

   (a) The defense organization should be governed by a board comprised of members selected in a manner independent of political influence and judicial supervision.

   (b) A majority of the governing board should be composed of lawyers admitted to practice in the State of New York.

   (c) Membership of the governing board should not include judges, prosecutors, law-enforcement officials or representatives of city government.

   (d) The governing board should be of sufficient size and diversity to reflect generally the racial, ethnic and gender composition of the community that the defense organization serves.

3. Governing Board

Commentary. A major step to ensuring independence of the defense function is the establishment of a governing board to provide policy direction and to act as a buffer against outside pressures. Requirements for a governing board are set forth by the ABA Defense Services Standards, three NLADA standards, and those for Georgia and Indiana.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.3. Professional independence

…

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

NLADA Guidelines for Legal Defense Systems in the United States

2.10 The Defender Commission

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or com ponents of the client population, and judgments as to which non -client groups should be represented.

Commission members should be selected under the following criteria:

(a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

(b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.

(c) No single branch of government should have a majority of votes on the Co mmission.

(d) Organizations concerned with the problems of the client commu nity should be represented on the Commission.

(e) A majority of the Commission should consist of practicing attor neys.

(f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

2.11 Functions of the Defender Commission

The primary function of the Defender Commission should be to select the State Defender Director. The Commission should also:

(a) Assist the State Defender Director in drawing up procedures for the selection of Assistants or Deputies;

(b) Receive possible client complaints, initiate statistical studies of case disposition, and monitor the performance of the Defender Director;

(c) Maintain a continuing dialogue with the State Defender Director in order to provide input and advice;

(d) Assist in ensuring the independence of the defender system by serving as a buffer and educating the public regarding constitutional require ments and the functions of the defenders;

(e) Serve as liaison between the legislature and the defender system upon request of the Defender Director; and

(f) Remove the Defender Director from office in the event that good cause is shown.

The Commission should not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases.

The Commission should meet on a regular basis and should be presided over by a chairperson elected by its members.

The Commission should serve without pay, and should be reimbursed for travel and other reasonable expenditures incurred as a result of membership.

A majority of commission members should constitute a quorum, and any resolution, policy adoption, or motion should require a vote of a majority of those present. However, selection of the Defender Director should require the vote of each member due to the importance of that decision. Voting by proxy should be prohibited.

2.12 Qualifications of the Defender Director and Conditions of Emplo yment

The Defender Director should be a member of the bar of the state in which he is to serve. He should be selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best avail able administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.

The Defender Director's term of office should be from four to six years in duration and should be subject to renewal. The director should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.

2.13 The Governing Body for Assigned Counsel Programs

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: design ing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the admin istrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special sel ection committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline II-1 Purposes

The Contracting Authority should appoint a Policy board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy boards should be constituted to ensure the independence of the contractor and to provide the Contracting Authority with expertise and support in such matters as criminal defense functions, determination of attorneys fees and salary levels, determination of reasonable caseload standards, interpretation of standards governing the provision of public defense services, response to community and client concerns, and implementation of the contract defense system.

Guideline II-3 Duties

Duties of the Policy Board shall be to:

(a) advise the contracting Authority about, and approve, the terms and minimum requirements of any contract for defense services;

(b) advise the Contracting Authority on fee schedules, rate of reimbursement, prevailing attorney fees and other issues related to the cost of public defense services;

(c) supervise the contract bidding and award process, if not retained by the Contracting Authority;

(d) select the contract defender…to whom contract will be let, if not retained by the Contracting Authority; and

(e) establish and apply minimum qualifications for lawyers whose services are provided by the Contractor, if this function is not assigned to the contractor as a condition of the contract.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.2.1 Creation of Board

a. The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board.

b. The majority of the members shall be attorneys but none shall be judges, prosecutors or law enforcement officials.

c. Members shall not receive a salary but shall be reimbursed for reasonable, actual and necessary expenses.

d. Terms of office shall be staggered.

Standard 3.2.2 Functions of Board

a. The Board shall establish policy and exercise general supervision over the operations of the Assigned Counsel Program.

b. The Board shall also hire an Administrator.

c. The Board shall refrain from interference in the conduct of individual cases.

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

Guideline 2.1 The Function of Local Governing Committees

The local governing committee shall be constituted as defined in O.C.G.A. §17-12-30 et seq.

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

A. County Public Defender Board

A county with a population over 12,000 persons shall establish a county public defender board. Counties subject to I.C. 33-9-15 shall establish a county public defender board

pursuant to this statute. Counties excluded from I.C. 33-9-15 shall establish a county public defender board under I.C. 33-1-3 with powers and duties consistent with I.C. 33-9-15. A lawyer who provides representation to indigent persons shall not be appointed to a county public defender board.

4. Facilities

Commentary. Standards that address the need for adequate physical facilities include the NLADA Guidelines for Legal Defense Systems, the Model Public Defender Act, and the National Advisory Commission Standards. Of these, the NLADA standards are the most detailed. The most significant difference among these standards is the omission of any reference to library facilities in the earlier Model Public Defender Act.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 3.4 Nonpersonnel Needs in Defender Offices

Defender offices should have a budget for operating expenses that provides for a professional quality office, library and equipment comparable to a private law firm of similar size. Facilities and resources should be at least comparable to, and in no event less than, that provided for other components of the justice system with whom the defender must interact, such as the courts, pro secution, and the police.

Defender office facilities should include separate offices for management, legal and social work staff, shared space for investigators, paraprofessionals and other support staff, secure space for confidential records, equipment and petty cash, and reasonable allocations of ancillary space related to staff size for reception and client waiting areas, conference rooms and library, mailroom and reproduction, supplies and storage. Separate toilet facilities should be provided for staff. Parking should be provided for staff who require the use of an automobile for field tasks.

Defender office budgets should include funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis and for the procurement of other necessary services. Defender offices should not be required to seek prior approval or post-expenditure ratification of payments for such services except in those limited cases where the expenditure is extraordinary.

Defender offices should be equipped with quality communications and reproduction equipment. Where data requirements so warrant, defender offices should have data processing facilities and services on lease or contract which are designed for defender requirements. If the defender office is included in a criminal justice information system, the system should be required to meet defender specifications regarding reporting frequency, data definition and format.

Defender offices should be exempt from governmental public bidding require ments for purchasing where the public bidding process cannot be completed for timely acquisition of services or equipment.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.14. Supporting Personnel and Facilities

¶3, 4, 5 The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to private counsel handling a comparable law practice.
2. Funds to provide tape recording, photographi c and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.

…

4. Sufficient funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

Each defender lawyer should have his own office that will assure absolute privacy for consultation with clients.

The defender office should have immediate access to a library containing the following basic materials: the annotated laws of the State, the State code of criminal procedure, the municipal code, the United States Code Annotated, the State appellate reports, the U.S. Supreme Court reports, Federal courts of appeal and district court reports, citators governing all reports and statutes in the library, digests for State and Federal cases, a legal reference work digesting State law, a form book of approved jury charges, legal treatises on evidence and criminal law, criminal law and U.S. Supreme Court case reporters published weekly, loose leaf services related to criminal law, and, if available, an index to the State appellate brief bank. In smaller offices, a secretary who has substantial experience with legal work should be assigned as librarian, under the direction of one of the senior lawyers. In large offices, a staff attorney should be responsible for the library.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 8. Use of State Facilities

An attorney representing a person under this Act is entitled to use any state, county, or municipal technical services and facilities for the development or evaluation of evidence that are available to the [state or local prosecutor].

Section 12. Personnel and Facilities

…

(d) The [appropriate administrative authority] of the state shall provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in jail) necessary to carry out the Defender General's responsibilities under this Act.

5. Support Services

Commentary. All the national standards and five state standards require support services to assist attorneys. Support services include investigation, experts, secretaries, social work staff, and other support staff. These services are to be available at every stage of the proceedings.

Most standards state that support services must be included in the budget for the defense service organization and be included as part of the defense organization's permanent staff. The Model Public Defender Act, however, provides for judicial authorization and for the state Defender General to employ support services staff. Both the Kansas and Washington standards also provide for court authorization of expert witnesses' fees. The Kansas standards also provide for court review of investigative expenses.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.4. Supporting services

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 3.1 Assigned Counsel Fees and Supporting Services

…

Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-8 Support Staff and Forensic Experts

The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important to ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

(a) *Secretaries*. The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.

(b) *Social Service Personnel*. The contract should provide an adequate number of social service personnel….

(c) *Mental Health Professionals*. The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.

(d) *Forensic and Other Experts*. The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9 Investigators

The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorney's selection, supervision, or direction of investigators.

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

(a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction….

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.6 Support Services

The Assigned Counsel Program shall ensure that the many support services necessary for the effective defense of clients are available to assigned counsel at every phase of the cases to which counsel are assigned.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

(a) A needy person who is being detained by a law enforce ment officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is entitled:

…

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation), as authorized or later approved by the court. The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court determines need, is unable to provide for their payment without undue hardship.

Section 12. Personnel and Facilities

(a) The Defender General may employ, in the manner and at the compensation prescribed by the [appropriate legislative authority], as many deputy defenders general, public defenders (including [district] public defenders), investigators, clerks, stenographers, and other persons as necessary to carry out his responsibilities under this Act. Persons employed under this section, other than civil service employees, serve at the pleasure of the Defender General.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.14. Supporting Personnel and Facilities

¶1 Public defender offices should have adequate supportive services, including secretarial, investigation, and social work assistance.

¶2 In rural areas (and other areas where necessary), units of local government should combine to establish regional defenders' offices that will serve a sufficient population and caseload to justify a supporting organization that meets the requirements of this standard.

¶3 …The budget should include:

…

3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense.

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys…. The public defender's office also should…support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

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

Guideline 2.7

…

The contract shall avoid creating conflicts of interest between the Contractor or individual defense attorney and clients. Specifically:

(a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys.

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

I. Support Services

The comprehensive plan shall provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: *Providing Defense Services* (3rd ed. 1990).

J. Caseloads of Counsel

…

Support Staff Standards

Table 2

Paralegal Felony	One for every four attorneys
Paralegal Misdemeanor	One for every five attorneys
Investigator Felony	One for every four attorneys
Investigator Misdemeanor	One for every six attorneys
Secretary Felony	One for every four attorneys
Secretary Misdemeanor	One for every six attorneys

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-7-3. Limitations

(a) Each claim for compensation shall be for investigative, expert or other services performed on or after the date of the order authorizing the services unless the judge

finds that timely procurement of necessary services could not await prior authorization.

(b) Each claim shall not exceed the estimated cost set forth on the order authorizing the services.

105-7-4. Investigators

Each individual performing services as an investigator shall be compensated at a rate not to exceed $20 per hour, unless a higher rate has been approved in advance by the director.

105-7-5. Psychiatric or psychological services

Each individual performing psychiatric or psychological services shall be compensated at a rate approved in advance by the director.

105-7-6. Interpreters

Each individual performing services as an interpreter for the defense shall be compensated at a rate not to exceed $15 per hour, unless a higher rate has been approved in advance by the director. No more than one interpreter per defendant may be compensated for services performed at the same stage of the proceeding.

105-7-7. Other services

Each individual performing other allowable defense services shall be compensated at a rate approved in advance by the director.

105-7-8. Maximum compensation

Any claim in excess of $300, in any one case, for investigative, expert, or other services and any claim in excess of $1,000 for psychiatric or psychological services shall require approval of the director.

105-7-9. Services not compensable

The following services shall not be compensable unless approved by the director:

(a) polygraph examinations;

(b) psychological stress evaluation exams;

(c) psychiatric or other services arising out of proceedings to determine competency to stand trial;

(d) other expert tests unless the results are admissible as evidence; and

(e) any other expert services not necessary for an adequate defense of the case.

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

VII. Support Services

A. Performance Standard: Quality criminal defense representation requires that lawyers be supported by adequate clerical and word-processing services and equipment, have access to an adequate and up-to-date library, and be able to call upon other professional services when necessary in individual cases.

B. Evaluation Criteria

1. Clerical

(a) Are lawyers supported by a full-time clerical staff with adequate word-processing equipment?

(b) Does the defense organization employ sufficient staff capable of communicating with non-English speaking clients?

(c) Does the defense organization have adequate filing and information-retrieval services and equipment?

(d) Does the defense organization employ competent information services management?

(e) Does the defense organization provide adequate working space to each lawyer, including private offices for interviewing clients?

(f) Does each lawyer have adequate access to a personal computer?

Specific Guideline:

Each defense organization's office should, at a minimum, contain telephones, computer equipment, facsimile facilities, adequate copying and mailing facilities and adequate working space for each lawyer, including private offices for interviewing clients.

2. Library

(a) Do lawyers have access to an up-to-date library, including computer-assisted legal research facilities?

(b) If the defense organization does not have its own on-site library, does it make available to its lawyers at their offices annotated statutes, practice treatises, manuals and periodicals covering substantive issues of criminal law and procedure that are updated on at least an annual basis?

(c) Does the defense organization maintain useful and easily accessible precedent files to avoid having to recreate recurring forms and motions?

(d) Does the defense organization circulate relevant appellate decisions on criminal law and procedure to its lawyers on a timely basis?

(e) Does each lawyer have ready access to the New York Law Journal?

3. Support Services

(a) Do lawyers have sufficient access, when client needs require, to the services of professionals necessary to provide quality representation at all stages of the case?

Specific Guideline:

Lawyers should have access, as client needs require, to paralegals, experienced investigators, psychiatrists, forensic pathologists, social and mental health providers, interpreters and other professionals.

(b) If supervisory approval is necessary for staff lawyers to obtain professional services, do adequate procedures exist to ensure a timely decision?

(c) Do lawyers and investigators have use of up-to-date audio and videotape recording, photographic and other investigative equipment to permit preservation of all needed evidence?

(d) Do appellate defense organizations employ sufficient paralegal staff to do the work of preparing records so that lawyers may devote their time to developing legal issues, writing briefs and arguing appeals?

(e) Does the defense organization have an effective procedure for recommending eligible clients for diversionary programs and alternatives to incarceration?

Washington Defender Association, Standards for Public Defense Services

Standard Four. Responsibility for Expert Witness Fees

Reasonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided. Expert witness fees should be maintained and allocated from funds separate from those provided for defender services. Requests for expert witness fees under Court Rule 3.1 f should be made through an *ex parte* motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution.

Standard Six. Investigators

Public defender offices, assigned counsel, and private law firms holding contracts to provide representation for poor people accused of crimes should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every four attorneys.

Standard Seven. Support Services

The legal representation plan should provide for adequate numbers of investigators, secretaries, paralegals, social work staff, mental health professionals and other support services. These professionals are essential to ensure the effective performance of defense counsel during trial preparation, in the preparation of dispositional plans, and at sentencing.

1. Secretaries At least one full-time secretary should be employed for every four staff attorneys. Fewer secretaries may be necessary, however, if the agency has access to

word processing or overload secretaries, or other additional staff performing clerical work.

2. Social Work Staff Social work staff should be available to assist in developing release, treatment, and dispositional alternatives.
3. Mental Health Professionals Each agency should have access to mental health professionals to perform mental health evaluations.

6. Training

Commentary. All the national standards include training, professional development, and continuing legal education requirements, except for NLADA's Guidelines for Contract Services. This latter set of standards assumes that defense contracts will be awarded to experienced attorneys with prior training.

Four state standards also include training requirements. All the national standards except for the ABA Defense Services Standards and the Washington standards provide for new attorney training (the latter for attorneys in offices with more than seven lawyers). See also NLADA's Defender Training and Development Standards in the Appendix of this volume.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.5. Training and professional development

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 5.6 Accreditation and Specialization

An accreditation program for defender offices and assigned counsel programs should be developed within the appropriate national professional organization to encourage compliance with national standards and to promote the general im provement of defense services.

A certification program for criminal law specialists should be considered.

Guideline 5.7 Training Staff Attorneys in a Defender System

The training of defenders should be systematic, comprehensive and at least equal in scope to that received by prosecutors. Every defender office should provide an orientation program for new staff attorneys. Intensive entry-level training should be provided at the state or local level and, to the extent possible, defender hiring practices should be coordinated to facilitate an entry-level training program during which newly hired attorneys are not assigned to regular office duties.

In-service training programs for defender attorneys should be provided at the state and local level so that all attorneys are kept abreast of developments in criminal law, criminal procedure and the forensic sciences. As a part of in-service training, defender attorneys

should be required to read appellate slip opinions, loose-leaf services and legal periodicals.

Every defender office should seek to enroll staff attorneys in national and statewide training programs and courses that have relevance to the development of trial advocacy skills.

Defender offices should provide training for investigative staff.

Guideline 5.8 Training Assigned Counsel

A single person or organization should assume the responsibility for training of assigned counsel panel members. Where there is an administrator, that individual should bear the responsibility.

Training programs should take into consideration the prior experience and skills of the attorneys. Special programs should be established for those less experienced attorneys who wish to qualify for the assigned counsel panel.

Formal training programs stressing lectures, demonstrations, and supervised participant involvement should be regularly scheduled. Joint sponsorship of such programs by defender organizations, local bar groups, and/or national organizations should be encouraged.

Reasonable attendance at training programs should be required of attorneys in order to remain on the panel.

If the operating budget is not sufficient, funds should be requested from outside sources to initiate formal training or to further develop formal training programs.

Assigned counsel should be encouraged to periodically attend other criminal law -related seminars in addition to the regular formal training programs.

Facilities for training programs should include audio and video tapes. Further, a national organization should consider providing, as a service, such tapes to defender offices and bar associations concerned with training attorneys who regularly accept appointments in criminal cases.

In addition to formal training programs, those responsible for the adequacy of assigned counsel performance should make the following resources available: an apprenticeship program, an initial hand-out or package of materials, an evaluation procedure, a motion and brief bank, a complete law library, information on experts, a newsletter, access to other attorneys for consultation, and law student assistance.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.2 Orientation

The Administrator shall ensure that lawyers new to the Program receive a mandatory orientation on Program policies and procedures before they are assigned cases.

Standard 4.3.1 Entry-Level Training

a. The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program.

b. Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its dire ction.

Standard 4.3.2 In-Service Training

a. The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.

b. The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.

c. The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.

d. The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

Standard 4.4.1 Mentoring

a. The Board shall establish a policy with regard to the provision of mentors more experienced, competent attorneys to advise less experienced attorneys on a Program roster.

b. Mentors shall be compensated for mentoring services according to Board specifications.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.15. Providing Assigned Counsel

…The public defender's office also should provide initial and inservice training to lawyers on the panel….

Standard 13.16. Training and Education of Defenders

The training of public defenders and assigned counsel panel members should be systematic and comprehensive. Defenders should receive training at least equal to that received by the prosecutor and the judge. An intensive entry -level training program should be established at State and national levels to assure that all attorneys, prior to representing the indigent accused, have the basic defense skills necessary to provide effective representation.

A defender training program should be established at the national level to conduct intensive training programs aimed at imparting basic defense skills to new defenders and other lawyers engaged in criminal defense work.

Each State should establish its own defender training program to instruct new defenders and assigned panel members in substantive law procedure and practice.

Every defender office should establish its own orientation program for new staff attorneys and for new panel members participating in provision of defense services by assigned counsel.

Inservice training and continuing legal education programs should be established on a systematic basis at the State and local level for public defenders, their staff attorneys, and lawyers on assigned counsel panels as well as for other interested lawyers.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

…

(e) The Defender General shall supervise the training of all public defenders, and for this purpose he may establish a training course.

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

M. Training and Professional Development

The comprehensive plan shall provide for effective training, professional development and continuing education of all counsel and staff involved in providing defense services at county expense.

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

III. Training

A. Performance Standard: All lawyers employed by defense organizations should receive initial training and continuing legal education sufficient to ensure that their skills and knowledge of criminal law and procedure enable them to provide quality representation.

B. Evaluation Criteria

1. Does the defense organization require all inexperienced lawyers to attend its own or outside training programs to acquaint them with all relevant aspects of criminal defense work, including substantive law, criminal procedure, collateral consequences of criminal convictions, ethics and professionalism?

2. Does the defense organization conduct internal seminars and workshops covering recent developments in criminal law and procedure and collateral consequences such as deportation and forfeiture?
3. Does the defense organization require trial lawyers to attend a trial advocacy course provided by the defense organization itself or a recognized provider of continuing legal education?
4. Does the defense organization require lawyers to at tend an annual continuing legal education course regarding substantive and procedural issues provided by the defense organization itself or a recognized provider of continuing legal education?
5. Does the defense organization conduct moot courts for trial proceedings and appellate arguments?
6. Does the defense organization require supervising lawyers to attend training programs that teach supervisory skills?
7. Does the defense organization provide training or orientation programs for professionals providing support services?
8. Does the defense organization encourage its lawyers to participate in the criminal justice activities and programs of bar and defender associations and to share the benefits of such participation with the entire staff?

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Model Contract for Counsel Services for Indigent Defendants

…

18. Continuing Legal Education:

    Each attorney of the FIRM shall attend three hours of continuing legal educati on in the field of criminal law during each calendar year of the contract. Certification of this attendance must be provided to the presiding judge of the judicial district on December 31 of each year.

Washington Defender Association, Standards for Public Defense Services

Standard Nine. Training

Attorneys providing public defense services should participate in regular training programs on criminal defense law, including a minimum of seven hours of continuing legal education annually in areas relating to their public defense practice.

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 in-house training programs on developments in criminal law, criminal procedure and the forensic sciences. Attorneys in civil commitment and dependency practices should attend training programs in these areas. Offices should also develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction.

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

7. Attorney Supervision

Commentary. Every organization with employees must provide for their supervision and discipline. However, only the several NLADA standards and three states provide supervisory standards. In addition, the Federal Office Management Assessment Guide requires that each defender office establish individual performance standards and conduct written performance evaluations. Employee queries of procedures are also provided for. See also, Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G 2.1(c)(e), requiring the court and county indigent defense governing committee to monitor the work of appointed counsel and remove them when necessary.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 5.4 Supervision and Evaluation of Defender System Personnel

The professional performance of defender staff attorneys should be sub ject to systematic supervision and evaluation based upon publicized criteria. Supervision and evaluation efforts should be individualized, and should in clude monitoring of time and caseload records, review and inspection of case files and transcripts, in -court observation and periodic conferences.

Guideline 5.5 Monitoring and Evaluation of Assigned Counsel Program Personnel

All evaluations of panel attorneys should be conducted by the administrator of the program. The results of evaluations should be reported to the attorney upon request of the attorney or in the discretion of the administrator.

A system of performance evaluations based upon personal monitoring by the administrator, augmented by regular inputs from judges, prosecutors, other defense lawyers and clients, should be developed. Periodic review of selected cases should be made by the administrator.

The criteria of performance utilized in evaluations should be those of a skilled and knowledgeable criminal lawyer.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-16 Supervision and Evaluation

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences.

A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal la wyer.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.4 Supervision of Attorneys

a. The Board shall establish policies regarding supervision of assigned counsel working within the Program. These policies shall include a procedure for handling complaints from clients and others.

b. The Administrator shall be responsible for supervision.

Standard 4.4.1 Mentoring

a. The Board shall establish a policy with regard to the provision of mentors more experienced, competent attorneys to advise less experienced attorneys on a Program roster.

b. Mentors shall be compensated for mentoring services according to Board specifications.

Standard 4.4.2 Monitoring

a. The Administrator, under the direction of the Board, shall establish a system for monitoring the performance of the attorneys on the Program roster(s). Monitoring shall be done by the Administrator or his or her designee.

b. The standard against which Program attorneys are measured shall be that of a skilled, knowledgeable and conscientious criminal defense lawyer adhering to the performance standards established under Standard 2.9.

c. The Administrator shall publicize the criteria used in monitoring, and shall inform monitored attorneys of results upon request, upon the decision to impose penalties (Standard 4.5.1), or to seek removal (Standard 4.5.2) and otherwise in the Administrator's discretion.

d. The Administrator shall not have access to privileged work product, and shall not invade attorney–client confidentiality.

Standard 4.5 Disciplinary Policies and Procedures

a. The Board shall establish policies and procedures for imposition of penalties, including removal from the Program roster, on attorneys for failure to observe Program policies and rules, including failure to provide the quality representation mandated by these Standards.

b. No attorney shall be removed from a case in which representation has already begun except with the consent of the client and in accordance with the governing ethical and judicial rules of the jurisdiction.

Standard 4.5.1 Penalties Less than Removal

The Board may permit, and the Administrator may establish, a schedule of penalties less than removal from the Program roster(s) for failure to comply with Program rules, policies, or required performance. Such penalties shall be coupled with a requirement that the attorney correct the deficiencies in question.

Standard 4.5.2 Removal from Program Roster(s)

a. Where an attorney has failed to correct deficiencies for which penalties under Standard 4.5.1 have been imposed, or where egregious deficiencies in performance have occurred, the Administrator shall give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. Such notice shall be given within a period of time established by the Board (or as part of the legal representation plan).

b. Where the alleged actions or inactions of the attorney involve a pattern of failing to provide competent representation to clients, or the Administrator has cause to believe that the attorney cannot provide competent representation to new clients, the Administrator may suspend assignments to the attorney i mmediately.

c. After notice has been given, the Administrator (or the Board, or a Removal Committee of the Board if the Board has so directed) shall, unless the attorney consents in writing to removal, conduct a hearing to determine whether cause exists for removal of the Attorney from the Program roster(s). The decision to remove or retain the attorney shall be made in writing.

d. Where the decision to remove is made by the Adminis trator or a Removal Committee, the attorney shall have the right to appeal the decision to the Board, whose decision shall be final.

e. Where removal has been for failure to provide competent representation to one or more clients, the Administrator may seek, in court, substitution of counsel in cases already assigned to the attorney in question, if there is reason to believe competent representation is not being provided in those cases.

f. Unless removed from pending cases by the court in which the cases a re lodged, an attorney removed from the Program roster(s) shall complete work in cases to which he or she was already assigned at the time of removal, and shall be entitled to compensation in the usual manner. If substitution of counsel is granted, the Program shall compensate the attorney for work done up to the date of removal unless ordered by the court not to do so.

Standard 4.5.3 Reinstatement After Removal

a. The Board shall establish a procedure for consideration of a removed attorney's application for reinstatement to the Program roster(s).

b. The procedure should include a requirement that the attorney demonstrate that the deficiencies which led to removal will not be repeated.

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

Guideline 3.1 Competent and Effective Counsel

The public defender or contract lawyer selected should be competent and effective in his/her role.

…

The committee shall observe the performance of the public defender or contract lawyer in order to be assured that he/she is performing the role effectively.

Indicators of performance are:

(a) Early entry into representation of indigents;

(b) Vigorous and independent representation of the client;

(c) Participation in training activities and continuing legal education;

(d) Effective and reasonable use of time and resources.

Guideline 3.2 Competence and Effectiveness of Attorneys in a Local Panel Program

The local committee shall select only competent attorneys as panel attorneys and their effectiveness on the job should be monitored and assessed. Indicators of performance are:

(a) Early entry into representation of indigents;

(b) Vigorous and independent representation of the client;

(c) Participation in training activities and continuing legal education;

(d) Effective and reasonable use of time and resources.

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

Requirement II. Qualification of Lawyers

…

B. Evaluation Criteria

1. Qualification for Counsel

(b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

(i) Misdemeanor Cases

…

(2) Alternatively, does the defense organization require that all lawyers who do not have previous criminal litigation experience be…supervised by experienced counsel at their initial court appearances and at their first misdemeanor trial?

…

(d) Criteria for Supervising Lawyers

(i) Does the defense organization require that trial supervising lawyers meet all qualifications for trial lawyers who handle felony cases and have sufficient experience, temperament and capability to discharge supervisory responsibilities?

(ii) Does the defense organization require that appellate supe rvising lawyers meet all qualifications for appellate staff lawyers, that they have briefed and argued complex appeals, and that they have sufficient experience, temperament and capability to discharge supervisory responsibilities?

Requirement IV. Supervision

A. Performance Standard: Quality representation requires that defense organizations provide adequate supervision on a continuing basis for lawyers and professionals providing support services, with the amount of supervision varying inversely to the experience of the persons supervised. Even a defense organization composed entirely of experienced professionals should provide supervision to monitor compliance with client needs and the requirements of the courts.

B. Evaluation Criteria

1. Does the defense organization maintain a satisfactory ratio of supervising lawyers to staff lawyers?

Specific Guideline:

The defense organization should provide at least one supervising lawyer for every ten staff lawyers.

2. Do supervising lawyers have both the time a nd authority to assume responsibility for:

(a) assuring discharge of all duties to clients and the courts;

(b) quality control;

(c) troubleshooting;

(d) on-the-job training; and

(e) meaningful critique and evaluation of staff lawyers' performance?

Specific Guidelines:

(a) At a minimum, supervising lawyers should be available to:

(i) discuss cases, strategy and ethical considerations;

(ii) help prepare witnesses;

(iii) review written work prior to submission;

(iv) conduct simulated moot court oral advocacy sessions;

(v) accompany staff lawyers to court when necessary; and

(vi) provide critique, feedback and evaluation of staff lawyers' performance.

(b) Supervising lawyers should supervise staff lawyers' compliance with the case management and quality control requirements of Section VIII.

3. Does the defense organization require that all lawyers with supervisory responsibility have their own caseloads that ensure maintenance of skills and knowledge, but are light enough to allow time for supervisory responsibilities?

4. Are law graduates and lawyers inexperienced in criminal defense work given intensive supervision?

5. Does the defense organization comply with the additional supervisory requirements of any applicable court-approved student practice order under which law students and recent law graduates provide legal services?

6. If the defense organization employs teams of lawyers with shared responsibility:

   (a) is there an adequate mix of more and less experienced lawyers on each team?

   (b) do the more experienced lawyers on the team have both the time and authority to discharge their supervisory responsibilities set forth in Evaluation Criterion IV.B.2?

7. Do trial defense organizations maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following :

   (a) pre-indictment issues, including decisions pertaining to whether evidence should be presented to the grand jury;

   (b) pre- or post-indictment plea bargaining opportunities;

   (c) adequacy of factual investigation;

   (d) timely filing of all indicated motions and notices;

   (e) preparation of witnesses and the client;

   (f) quality of legal arguments;

   (g) trial strategy;

   (h) preparation of direct and cross-examination, voir dire, opening statement and summation;

   (i) trial performance; and

(j) postconviction issues and sentencing?

8. Do appellate defender organizations maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following :

   (a) gathering and reviewing entire trial court record;

   (b) communication with trial counsel and the client;

   (c) identifying all potential appellate issues, including those raised by trial counsel or the client or that otherwise may not appear in the record;

   (d) conducting appropriate legal research;

   (e) filing post-judgment or appellate motions;

   (f) writing and editing motions and briefs;

   (g) preparing and presenting oral argument;

   (h) seeking further appeals in the event of an adverse decision by the Appellate Division;

   (i) briefing and arguing any further appeals?

   Specific Guideline:

   All appellate briefs, including those prepared by experienced lawyers, should be edited by an experienced colleague or a supervising lawyer.

9. Is there adequate supervision of professionals providing supp ort services?

Requirement VI. Evaluation, Promotion and Discipline

A. Performance Standard: Quality representation requires that defense organizations provide lawyers and other professionals with meaningful ongoing evaluation of their work according to objective criteria and maintain and fairly administer objective criteria for promotion and discipline or discharge.

B. Evaluation Criteria

1. Do lawyers receive regular evaluations of their work according to objective standards?

   Specific Guideline:

   Defense organizations should require lawyers to comply with, and should evaluate lawyers' work according to, published criteria that conform to objective standards, such as the NLADA's Performance Guidelines for Criminal Defense Representation (trial lawyers) or the ABA's Standards for Appellate Counsel (appellate lawyers).

2. Do lawyers receive evaluations frequently during their first year and at least annually thereafter?

   Specific Guideline:

Supervising lawyers should evaluate the performance of staff lawyers for the purposes of training, promotion and/or discipline on at least a monthly basis, and conduct a formal evaluation session with each staff lawyer at least twice during the lawyer's first year and at least annually thereafter.

3. Does the defense organization make known any available opportunities, and have an established procedure governed by objective criteria, for promoting lawyers?
4. Does the defense organization take effective action with respect to lawyers who do not perform according to established standards?
5. Does the defense organization have procedures for rewarding individual lawyers for performing meritorious work or handling extraordinarily complex cases?
6. Does the defense organization have procedures for evaluating the quality of work performed by professionals providing support services and for communicating such evaluations within the defense organization?

Washington Defender Association, Standards for Public Defense Services

Standard Ten. Supervision

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

Standard Eleven. Monitoring and Evaluation of Attorneys

The plan for public defense services should establish a procedure for systematic monitoring and evaluation of attorney performance based upon publicized criteria. Supervision and evaluation efforts should include review of time and caseload records, review and inspection of transcripts, in-court observations, and periodic conferences.

Performance evaluations made by a supervising attorney should be supplemented by comments from judges, prosecutors, other defense lawyers and clients. Attorneys should be evaluated on their skill and effectiveness as criminal lawyers or as dependency or civil commitment advocates.

8. Recruitment and Hiring

Commentary. Only two sets of administrative standards address recruitment and hiring of defender staff attorneys. The NLADA Guidelines for Legal Defense Systems call for active recruitment of qualified attorneys. The New York City standards include similar, more detailed criteria, which uniquely emphasize recruiting attorneys dedicated to public service. Compare these standards to those for attorney qualifications to participate in assigned counsel systems.

Virtually all comprehensive standards for the administration of defense services include requirements for counsel qualifications. In general, the standards require that counsel be familiar with criminal law and procedure, and that those requirements increase with the severity of the case. Such standards include the NLADA Assigned Counsel Standards and the standards from Indiana, Nebraska, New York City, and Washington state.

In addition to the standards provided here, similar counsel qualification requirements are included in state laws and court rules, including, for example, Tennessee Supreme Court Rule 13, Section 2; State of Michigan Sixth Circuit Court, Administrative Order 1996.2; and Arkansas Public Defender Commission, Minimum Standards (1997). Florida, which primarily uses public defender agencies, also provides by court order for the qualifications of private counsel who appear when there are conflicts of interest between the defender agency and the defendant. See, e.g., Second Judicial Circuit of Florida, "Conflict Attorney Policies" (1992); Eleventh Judicial Circuit, Circuit Conflict Committee, "Policies and Procedures" (1992); and Seventeenth Judicial Circuit, Administrative Order III-94-D-2, "In re: Appointment and Compensation of Special Public Defenders." See also, Alameda County Bar Association Court Appointed Attorneys' Program ¶F, "Experience Requirements for the Categories of Crime"; Cobb County (Georgia) Indigent Defense Program Guidelines; Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part X, "Panel Attorneys"; and Appellate Defender Commission, Michigan Appellate Assigned Counsel System Regulations.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.2. Eligibility to serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards. Counsel should not seek to avoid appointment by a tribunal to represent a person except for good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.3 Ad Hoc Appointment of Counsel

Appointment of counsel on a random or *ad hoc* basis is explicitly rejected as an appropriate means of furnishing legal representation in criminal cases.

5.9 Recruitment, Hiring, Promotion and Removal of Defender Office Personnel

Defender offices should actively recruit the best qualified attorneys available for staff positions by advertising on the local, state and national levels, and by formulating and promulgating hiring criteria and policies. Recruiting should include special efforts to employ attorney candidates from minority groups which are substantially represented in the defender office's client populations.

A national referral and placement service should be instituted in order to facilitate nationwide defender recruitment and placement.

Defender staff attorney appointments should be made by the Defender Director, based upon merit, entirely free of political and other irrelevant factors. Upon appointment, staff attorneys should be required to make a time commitment of from two to five years to defender work.

Defender office investigative staff should be systematically recruited, selected and supervised to ensure that the investigative function is properly discharged.

Defender promotion policies should be tied to merit and performance criteria, and removal of staff attorneys should be only for cause, except during a fixed probationary period which an office may employ for newly hired attorneys.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.1.1 Qualifications of Attorneys

a. The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality represent ation mandated by Standard 2.1.

b. The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.

c. An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 5. Competence to Defend

A person assigned the primary responsibility for representing a needy person must be licensed to practice law in this state and otherwise competent to counsel and defend a person charged with crime. Competence shall be determined by the court at the first court proceeding after the giving of primary responsibility.

Section 12. Personnel and Facilities

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(b) A deputy defender general or public defender must be licensed to practice law in the state and competent to represent a person charged with crime. He may not otherwise engage in the practice of criminal law, except as provided in section 17.

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

Guideline 2.1

(a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.

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

Guideline 3.1 The Public Defender or Contract Lawyer Selected Shall Be Competent and Effective in His/Her Role

In selecting a public defender or contract lawyer the local committee should satisfy itself that the lawyer selected is competent, meaning:

(a) Has an adequate educational background ;

(b) Has demonstrated ability to perform competent trial work and the administration of an office;

(c) He or she conducts their professional work in an ethical manner ;

(d) Is a member in good standing of the State Bar of Georgia .

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

E. Appointment of Counsel

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2. *Class A or B Felony*. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class A or B felony, an attorney shall:
   a. be an experienced and active trial practitioner with at least two (2) years of criminal litigation experience; and
   b. have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion.
3. *Class C Felony*. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class C felony, an attorney shall:
   a. be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or
   b. have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.

…

5. *Other criminal cases*. To be eligible to serve as lead counsel in other criminal cases, an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion.

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

III. Operating Policies and Procedures

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C. Counsel Eligibility Standards

The following classes of attorneys are created to set the minimum standards for counsel in capital and non-capital cases at trial, appellate, and postconviction stages.

Class A: Counsel qualified as lead counsel in capital cases.

Class B: Counsel qualified as co-counsel in capital cases.

Class C: Counsel qualified to serve as counsel in serious violent felonies and drug defense cases as defined by section VI.2.

Class D: counsel qualified as appellate lead counsel.

Class E: Counsel qualified as appellate co-counsel.

Class F: Counsel qualified as postconviction counsel.

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3. Qualifications for C:

   3.1 Member of the Nebraska bar or admitted *pro hac vice*.

   3.2 Experienced and active in the area of criminal law with not less than three years criminal litigation experience.

   3.3 Has acted as lead or co-counsel in at least three jury trials to verdict of any class of felony or complex serious misdemeanor.

   3.4 Demonstrates proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

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

II. Qualifications of Lawyers

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

B. Evaluation Criteria

   1. Qualifications for Counsel

      (a) General Criteria for Trial and Appellate Counsel

         (i) Does the defense organization require all lawyers to be proficient in essential litigation skills, including:

            (1) legal analysis;

            (2) manual and computer-assisted legal research;

            (3) persuasive writing;

            (4) oral advocacy;

            (5) communication with clients; and, as appropriate

            (6) the use of social service and investigative support services.

         (ii) Does the defense organization require that its lawyers keep up-to-date on developments in criminal practice and procedure?

(b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

(i) Misdemeanor Cases

(1) Does the defense organization require that all lawyers assigned to handle misdemeanor cases as lead or sole counsel have a minimum level of previous trial experience in the field of criminal law?

(2) Alternatively, does the defense organization require that all lawyers who do not have previous criminal litigation experience be trained in accordance with the Evaluation Criteria of Section III and supervised by experienced counsel at their initial court appearances and at their first misdemeanor trial?

Specific Guideline:

Each staff lawyer assigned by the defense organization to handle misdemeanor cases as lead or sole counsel must have appeared in court, either as lead or sole counsel or as co-counsel to an experienced criminal law practitioner, on at least five criminal cases within the previous three years, involving at least:

(i) three negotiated pleas or other non-trial dispositions; and

(ii) one litigated motion in which oral testimony was taken and a decision was rendered; and

(iii) one trial that proceeded to verdict.

(ii) Felony Cases

(1) Does the defense organization require that all lawyers have a minimum level of previous trial experience, and evaluate the degree of seriousness and complexity of that prior experience, before certifying lawyers as qualified to handle felony cases?

(2) Alternatively, does the defense organization require that, in addition to being qualified to handle misdemeanor cases, lawyers have participated in a specified number of actual felony trials, where other counsel was lead counsel, during which they handled a significant portion of the trial responsibilities, before certifying them as qualified to handle felony cases.

(3) Does the defense organization require that lawyers conducting their first felony trial be supervised by more experienced counsel?

Specific Guidelines:

(a) Each staff lawyer assigned by the defense organization to handle felony cases without supervision must have had court experience in at least thirty criminal cases during the previous five years, involving at least:

(i) fifteen negotiated pleas, dismissals, or other non-trial dispositions, at least five of which occurred post-indictment;

(ii) five hearings in which oral testimony was taken and a decision was rendered; and

(iii) two post-indictment jury trials that proceeded to verdict in which the lawyer was lead counsel.

(b) Alternatively, each staff lawyer assigned by the defense organization to handle felony cases without supervision must have had court experience in at least ten criminal cases as lead or sole counsel and twenty non-criminal cases including at least five jury trials as lead or sole counsel.

(c)) In addition, any lawyer assigned to handle a felony case who has not previously handled a felony case must be supervised by a lawyer who has previously handled felony cases.

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2. Recruitment and Hiring

(a) Does the defense organization maintain and publish hiring criteria designed to attract qualified applicants?

(b) Does the defense organization conduct a fair and active recruiting program, in conformity with the published hiring criteria, that endeavors to attract qualified lawyers and law graduates?

(c) Does the defense organization value commitment to public int erest work and defense of indigents accused of crime in addition to standards of excellence, such as experience, law school grades, clerkships, writing samples and references?

(d) Does the defense organization's evaluation of applicants include assessment of interpersonal management skills, including but not limited to :

(i) the ability to work with others;

(ii) the ability to be supervised; and

(iii) the ability to manage time so as to maintain professional standards?

(e) Does the recruitment and hiring process seek to achieve racial, ethnic and gender diversity?

(f) Does the recruitment and hiring process seek to attract sufficient numbers of lawyers who are capable of communicating with non-English speaking clients?

(g) Are lawyer compensation levels sufficient to attract and retain both supervising lawyers and staff lawyers who can and will discharge the responsibilities set forth above?

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

Principle 3

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

1. be proficient in the applicable substantive and procedural law;

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Standard 1.1—Prerequisites For Representation

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

Implementation

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

Washington Defender Association, Standards for Public Defense Services

Standard Fourteen. Qualifications of Attorneys

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
    a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
    b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. Trial attorneys' qualifications according to severity or type of case:

    b. **Adult Felony Cases Class A**. Each staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

i. Minimum requirements set forth in Section 1, and

ii. Either:

a. has served two years as a prosecutor; or

b. has served two years as a public defender; or

c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in five felony cases that have been submitted to a jury.

c. **Adult Felony Cases Class B Violent Offense or Sexual Offense**. Each attorney representing a defendant accused of a Class B violent offense or sexual offense as defined in RCW 9A.20.020 shall meet the following requirements:

i. Minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as prosecutor; or

b. has served one year as public defender; and

c. has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

d. **Adult Felony Cases All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation**. Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. Minimum requirements set forth in section 1, and

ii. Either:

a. Has served one year as a prosecutor; or

b. Has served one year as a public defender; or

c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

iii. Each attorney shall be accompanied at his or her first felony trial by a supervisor.

9. Case Overload and Case Management Systems

Commentary. All the national standards and several state statutes deal specifically with the often chronic problem of case overload so severe that it threatens the ability of the office to provide competent representation. A few jurisdictions have acted to resolve this problem. For example, Michigan's appellate defender legislation limits the defender to accepting only that number of appointments that would allow for quality representation and is within the budget approved by the legislature. Similar restrictions or requirements have been required of appointed counsel and contract offices.
The NLADA Guidelines for Legal Defense Systems, the New York City General Requirements, and the Washington Defender Standards include requirements for the defense agency to establish a case management system. The NLADA guidelines were adopted before the use of computers for case management became commonplace and, as a result, are somewhat dated. The New York City General Requirements are largely aimed at ensuring that cases do not "fall through the

The Washington standards, in contrast, are directed at compiling caseload statistics for reporting purposes. This objective is also part of the NLADA guidelines. See also, Missouri State Public Defender Guidelines for Representation, G 1-4, "General Duties of Public Defenders," Subsection (e), which provides for extensiverecordkeeping as part of each attorney's responsibilities.

Workload affects the productivity and effectiveness of a defense office more directly than any other variable. If attorneys are responsible for too many clients' cases, they cannot perform well. The standards that address caseload/workload generally build on the NAC standards promulgated in 1973. These numbers have endured and have become the basic starting point for adaptation in local jurisdictions or referencing in the national standards.

Workload standards estimate the average number of cases that an attorney can effectively handle. Because they represent an "average" caseload, care must be taken to review individual attorney performance. More common uses for workload measures are to evaluate the performance of an attorney unit (e.g., office) or to set limits on the number of cases accepted by the unit or even the individual attorney. All but one of the national standards (the Model Act) and all but two of the state standards explicitly provide for development of case workload standards. Several of the state standards even establish the workload number of each type of case for a single attorney. See also, Arkansas Public Defender Commission, Minimum Standards, "Public Defender; contract; terms," which authorizes inclusion of workload standards in public contracts and suggests specific case standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-5.3. Workload

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

NLADA Guidelines for Legal Defense Systems in the United States

5.1 Establishing Maximum Pending Workload Levels for Individual A ttorneys

In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors:

(a) objective statistical data;

(b) factors related to local practice; and

(c) an evaluation and comparison of the workloads of experienced, competent private defense practitioners.

5.2 Statistics and Recordkeeping

Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include, at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.

Every Defender Director should receive, on a weekly or monthly basis, detailed caseload and dispositional data, broken down by type of case, type of function, disposition, and by individual attorney workload.

5.3 Elimination of Excessive Caseloads

Defender office caseloads and individual defender attorney workloads should be continuously monitored, assessed and predicted so that, wherever possible, caseload problems can be anticipated in time for preventive action.

Whenever the Defender Director, in light of the system's established workload standards, determines that the assumption of additional cases by the system might reasonably result in inadequate representation for some or all of the system's clients, the defender system should decline any additional cases until the situation is altered.

When faced with an excessive caseload, the defender system should diligently pursue all reasonable means of alleviating the problem, including:

(a) Declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned;

(b) Actively seeking the support of the judiciary, the Defender Commission, the private bar, and the community in the resolution of the case load problem;

(c) Seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem;

(d) Hiring assigned counsel to handle the additional cases; and

(e) Initiating legal causes of action.

An individual staff attorney has the duty not to accept more clients than he can effectively handle and should keep the Defender Director advised of his workload in order to prevent an excessive workload situation. If such a situation arises, the staff attorney should inform the court and his client of his resulting inability to render effective assistance of counsel.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-12 Case and Work-Overload

The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

(a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or

(b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or

(c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.1.2 Workloads of Attorneys

a. The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.

b. The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorneys' obligation not to accept more work than they can effectively handle.

c. The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.12. Workload of Public Defenders

The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

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

Guideline 2.7 Contract Attorney Program

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The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time should handle a proportional caseload.

The contract shall provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

(a) the caseload assigned to the Contractor exceeds the allowable caseloads specified; or

(b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation; or

(c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline 6.1 Caseload Control in Programs

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

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

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

150 Felonies per attorney per year; or

300 Misdemeanors per attorney per year; or

250 Juvenile Offender cases per attorney per year; or

60 Juvenile dependence clients per attorney per year; or

250 Civil Commitment cases per attorney per year; or

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

These limits are not intended to be an aggregate. Attorneys whose representation involves handling cases within different categories listed above should adjust the caseload limitations proportionally.

In jurisdictions where attorneys also maintain private law practices, the local indigent defense committee should ensure that attorneys not accept or be assigned more cases than they can reasonably discharge. In these situations, the maximum number of cases should be determined after an examination of the percentage of time the lawyer devotes to public defense as compared to the attorney's total available time. If the caseload levels being contracted for approach the recommended levels, the attorney undertaking the work should not have a significant number of privately retained cases.

When an attorney's caseload exceeds the limitations set forth herein, the Georgia Indigent Defense Council may investigate the local indigent defense system to ensure that indigent defendants are receiving adequate legal services, bearing in mind the local prosecutor's and court's practices.

Programs where the caseload regularly exceeds the recommended limits should advise the Georgia Indigent Defense Council in writing, at the time of filing the application for funding, including a detailed explanation of the following:

number and types of indigent defense cases handled by the county; and

the number of attorneys assigned to indigent defense cases, including their individual caseloads and experience in handling indigent defense matters; and

the number and type of support staff members assisting attorneys assigned to indigent defense cases; and

the local prosecutor's charging and plea bargaining practices, including whether and why such practices may permit a defense attorney to adequately handle an increased caseload without detrimentally affecting the quality of representation; and

the local court's propensity for accepting negotiated or non-negotiated pleas and calendar controls, including whether and why such practices and controls may permit a defense attorney to adequately handle an increased caseload without detrimentally affecting the quality of representation; and

plans (if any exist), including time frame, for the hiring of or contracting with a sufficient number of indigent defense attorneys such as the county's indigent defense program caseloads do not exceed the suggested limitations set forth in Guideline 6.1.

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

J. Caseloads of Counsel

The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

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

Table 1

Type of Case	Full Time	Part Time (50%)
TRIAL	20	10
Non-Capital Murder and all felonies	120	60
Non-Capital Murder; Class A, B, C felonies	100	50
Class D felonies only	150	75
Misdemeanors only	300	150
Juvenile delinquency	200	100
Other (e.g., probation violation, contempt, extradition)	300	150

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

Table 2

Paralegal Felony	One for every four attorneys
Paralegal Misdemeanor	One for every five attorneys
Investigator Felony	One for every four attorneys
Investigator Misdemeanor	One for every six attorneys
Secretary Felony	One for every four attorneys
Secretary Misdemeanor	One for every six attorneys

Table 3

Type of Case	Full Time	Part Time (50%)
TRIAL		
Non-Capital Murder and all felonies	150	75
Non-Capital Murder; Class A, B, C felonies only	120	60
Class D felonies only	200	100
Misdemeanors only	400	200
Class D felonies and misdemeanors	300	150
Other (e.g., probation violation, contempt, extradition)	400	200

K. Excessive Caseloads

The comprehensive plan shall contain policies and procedures regarding excessive caseloads and shall, at a minimum, contain the following provisions:

1. *Individual Public Defenders*. Whenever a salaried or contractual public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the attorney is required to inform the county public defender, if any, or other authorities designated by the plan to secure professional independence for indigent defense services in the county.
2. *Chief Public Defenders*. Whenever the chief public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the chief public defender is required to inform the appropriate judges and refuse to accept the appointment of additional cases.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-21-3. Withdrawing from cases

(a) Any public defender may withdraw from any court-appointed case when that defender determines that there exists a possible conflict of interest in further representation of the defendant.

(b) The public defender may refuse to accept court-appointed cases when it is determined jointly by the public defender and the director that the current active caseload would preclude the public defender from providing adequate representation to new clients.

(c) When a decision is made to withdraw from a case or to not accept cases due to current caseloads, the public defender shall communicate this decision to the

administrative judge of the district, who shall appoint attorneys, in sequence, from the panel for a period established by the director.

Minnesota Office of the State Public Defender, Caseload Standards for District Public Defenders in Minnesota

Standard 2. Recommended Caseload Standards

The following caseload standards, per attorney, are recommended, with the understanding that each "type of case" line defines a full year's work for an attorney:

Type of Case	Full-Time	One-Half Time
Felony	100-150 per year	50-60 per year
Gross Misdemeanor	250-300 per year	125-150 per year
Misdemeanor	400 per year	200 per year

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

III. Operating Policies and Procedures

A. Caseload Standards for the Commission

Attorneys working for the Commission will provide each client with quality representation in accordance with constitutional, statutory, and professional standards. The Chief Counsel will not accept cases and assign workloads which, by reason of the foregoing standards, would in any way interfere with the rendering of effective assistance of counsel, leading to a breach of professional responsibility. The Chief Counsel will accept cases taking into consideration an attorney's duties under the Code of Professional Responsibility and cases will not be accepted when the caseload is such that preparation of cases would be inadequate in the circumstances. The Chief Counsel is admonished not to accept more assignments than the staff attorneys can reasonably discharge or to accept cases in which the representation will be materially limited by the attorney's responsibilities to another client.

In accordance with these principles, the Chief Counsel will assess the non-capital workload as well as the death penalty workload to determine whether the workloads are excessive. Therefore, these caseload standards are a guideline which will be useful in determining whether the workload of a particular attorney is excessive.

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2. Recommended Caseload Standards

The Commission recognizes that the cases it will accept will not likely fall into the general caseload statistical categories which compare the percentage of cases in which a plea is entered to the percentage of cases which go to trial. It is expected that the

commission's cases will be more likely to go to trial, compared to a normal caseload. This will reduce the number of cases each litigation attorney can handle. In addition the Commission also contemplates that travel, having to cover the entire state, will cause a reduction in the total caseload of the litigation attorneys. It is also assumed that the cases themselves will be more complex since the commission will be handling serious felony, with sizeable records; this too will reduce the normal caseload. These assumptions also hold true for the appellate attorneys. The more complex the cases and the larger the record, fewer appeals can be handled by the appellate attorneys. Therefore, the following yearly caseload standards, per attorney, are recommended, with the understanding that the Commission will be monitoring these standards very carefully over the next year, since there is no history to rely upon, making them subject to change:

a. Litigation grant attorney—10 non-capital felonies to begin within the first two months, then approximately 4 cases per month—a yearly total of 50 cases.

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

V. Workloads

A. Performance Standard: Lawyers and other professionals employed by defense organizations should maintain manageable workloads in order to permit them to render quality representation to each individual client.

B. Evaluation Criteria

1. Is there a system for weighting and assigning cases in order to apportion workload equitably among lawyers?

2. Are there established limits on the number of cases in each category assigned to each lawyer?

   Specific Guidelines:

   (a) Individual trial lawyers should not be required to accept assignment in any one-year period of more than 150 felony cases or more than 400 misdemeanor cases, with the maximum number of misdemeanors proportionately reduced by the number of felonies assigned.

   (b) Individual appellate lawyers should not be required to handle a caseload which exceeds 25 appeals in any one-year period.

   (c) Individual supervising lawyers' personal caseloads should not exceed 10% of the maximum caseload, unless the ratio of staff lawyers to supervising lawyers is less than 10:1, in which case supervising lawyers' caseloads may be proportionally higher (e.g., 20% of the maximum caseload if the staff lawyer to supervising lawyer ratio is 5:1).

3. Has the defense organization established objective limits on the number of cases that an individual trial lawyer has pending at any given time?

4. Are there procedures for reassigning cases to alleviate unanticipated increases in workloads that would exceed the workload limits set forth in Evaluation Criterion V.B.2?
5. Are there systems, limits and procedures to regulate the workloads of paralegals, investigators, social workers and other professionals?
6. Is there a contingency plan to alleviate an unanticipated increase in the defense organization's workload that would exceed its available resources?

VIII. Case Management and Quality Control

A. Performance Standard: Quality representation requires that defense organizations maintain adequate procedures for assuming responsibility for client matters when requested and for tracking and managing individual cases to ensure that quality is maintained at all stages and that all obligations to clients and the courts are met.

B. Evaluation Criteria

1. Case Management and Quality Control Criteria for Trial Organizations

…

(b) Does the defense organization have an adequate procedure for coordinating with the courts regarding assignment of cases?

(c) Does the defense organization monitor cases to ensure that each client is represented at every court appearance?

(d) Is there an adequate system to ensure continuity of representation of each client by the same lawyer or team of lawyers, and alternative coverage in the event that an assigned lawyer is unable to appear, and are clients advised of that system at the outset?

(e) Does the defense organization meet each individual client's needs by ensuring that:

(i) each client is interviewed as soon as practicable, the nature of the representation is explained, and confidentiality is discussed?

(ii) each client is consulted on all major developments and tactical decisions?

(iii) a prompt and thorough factual investigation is conducted in each case and the client is thereafter kept informed of all developments in the case and given a candid estimate of the probable outcome?

(iv) any decision to plead guilty is fully informed and voluntary?

(v) a post-disposition strategy is designed to achieve the most favorable sentence, including non-incarcerative alternatives, that can reasonably be obtained under the facts and circumstances of the case?

(vi) the client is informed of the right to appeal from the judgment and from the sentence imposed?

(f) Does the defense organization have an adequate system to ensure that all speedy-trial and release dates and all motion , notice, discovery and postconviction deadlines are met?

(g) Does the defense organization ensure that organized and accessible case files are kept on each case from inception, and that such files contain all court papers and other documents necessary for supervising lawyers to review for quality of representation and for assignment of alternative coverage as necessary?

(h) Does the defense organization ensure that its lawyers provide representation in accordance with objective performance standards for criminal defense representation?

Specific Guideline:

Defense organizations through their evaluation and promotion processes should require lawyers to comply with published criteria that conform to objective standards.

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

Chapter 5. Maximum Caseload Standards for Defense Counsel

Background

The Indigent Defense Task Force recognizes that there have been, and will continue to be, a variety of providers of indigent defense in the State of Oregon. Because of that variety, it is not possible to determine an appropriate weighted caseload for all providers. The Task Force determined that the Metropolitan Public Defender (MPD) offers the model that is most efficient in terms of scale. The MPD is the largest office by volume of cases in the state, and is the most experienced in managing caseloads. The MPD has a high level of staff support and clerical support. These levels of staff and clerical support are not available in other settings and substantially increase the ability of counsel to handle cases. As a result, adjustments to factor in the lack of available resources are necessary in determining maximum caseloads in other settings.

In 1993, the MPD established a unit valuation system to determine the number of cases each attorney in the office could handle each year. The MPD system gave cases a unit value based on the anticipated time demands. Unit values range from 100 to 1. The MPD assumed in the valuation that a "mythical competent attorney" could effectively handle 600 units per year. The MPD, in its contract proposal of October, 1993, proposed these unit values and has worked with them under the contract that was awarded.

Established Unit Values

The first step in the process of determining a weighted caseload is to determine the *average* time demand expected of a particular type of case. This analysis assumes that

some cases will take more time and other cases will take less and seeks to determine what the average time is only in relation to other cases. In other words, a minimum unit value is determined and unit values are attributed to each type of case. In essence, unit values are a comparison of the expected time commitment for handling certain types of cases in relation to other types of cases. Obviously substantial felonies are expected to take more time than misdemeanors. The unit value analysis put forth by the MPD proposal seeks to compare time anticipated for relative types of cases.

Maximum Caseload Per Attorney Per Year

The second step in the analysis is to determine the maximum number of units that a criminal defense attorney working a full load, i.e., a full time equivalent (FTE) attorney, could handle over the course of a year. The MPD proposal assumed that the "mythical competent defense attorney" could handle 600 units per year. This meant that in applying the unit valuation tables, a full caseload for an attorney would be 6 felony level 11 cases in one year or at the other end of the spectrum, 600 drug diversion cases in one year.

Assumptions

As stated in the introductory paragraph of this Chapter, the MPD has a high level of staff support. This reaches the level of one investigator and one trial assistant per attorney for felony and juvenile cases and .5 investigator and .5 trial assistant per attorney for misdemeanor cases. Where office support staff is less, corresponding adjustments would have to be made in determining the maximum caseload of a public defender office. Because the private bar does not handle the volume that would create the efficiencies derived through the MPD system, the maximum caseload values have little relevancy to private bar providers.

Additional Reasons for Adjustments

The MPD has unique circumstances that do not exist outside Multnomah County. The physical proximity of jail, courthouse, District Attorney and defender office, combined with the physical proximity of crime scenes and witnesses, virtually eliminate travel.

The concentration of volume allows for specialization within the office. This reduces the need for legal research. It also reduces time committed to plea bargaining, as the volume of similar cases that have gone before establish the likely results and penalties.

All counties other than Multnomah County have less case volume and greater travel time. Inefficiencies increase as either volume decreases or travel increases. As a result, the maximum caseload standards in this report would be impossible to approach outside of Multnomah County.

Conclusion

The Committee believes that the MPD proposal is a reasonable one to adopt as a *maximum* caseload standard in that the MPD office proposal was developed in Oregon by the largest and best staffed public defender office, which is believed to have maximum caseload-handling capability. It is anticipated that adjustments would be appropriate for defender offices that do not have the same amount of support staff per lawyer or the same volume of cases. Further adjustments would have to be made for less than full-time

attorneys and private attorneys who are taking conflict cases as a part of their practice. The adoption of a unit valuation system and a maximum caseload per FTE defense attorney is meant to be a guide, subject to review.

Table of Unit Values and Corresponding Maximum Caseload Per Attorney Per Year for Large Volume Defense Practice (MPD) in Multnomah County

Case Year

	Unit Valuation	@600/Atty/Year
Felony Level 11	100	6
Felony Level 10	15	40
Felony Level 9	15	40
Felony Level 8	4	150
Felony Level 7	2.5	240
Felony Level 6	2.5	240
Felony Level 1-5—includes contempt	2	300
Fugitive	1	600
Felony PV	1	600

Washington Defender Association, Standards for Public Defense Services

Standard Three. Caseload Limit and Types of Cases

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

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

> 150 Felonies per attorney per year; or
>
> 300 Misdemeanors per attorney per year…
>
> A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

Standard Eight. Reports of Attorney Activity and Vouchers

The legal representation plan shall require that the defense attorney or office maintain a case-reporting and management information system which includes number and type of cases, attorney hours and disposition. This information shall be provided regularly to the Contracting Authority and shall also be made available to the Office of the Administrator of the Courts. Any such system shall be maintained independently from client files so as to disclose no privileged information.

10. Related Standards

Commentary. Two final matters are (1) a mechanism for client complaints and (2) liability insurance.

The Washington standards are the only ones to include a requirement for a methodology to resolve client complaints. Most importantly, the standards set a one-week deadline for complaint disposition.

The NLADA Standards for Assigned Counsel and Guidelines for Criminal Defense Service Contracts require defense organizations to purchase liability insurance. The NLADA assigned counsel standards require participating attorneys to demonstrate that they have insurance, while the guidelines for contracting authorize inclusion in the contract of a requirement for liability insurance coverage. The guidelines also forbid the contract to limit governmental liability for malpractice by a contracting attorney.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-20 Insurance

The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys' representation of defendants.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.5.1 Insurance for Board and Administrators

a. The Program shall insure the Board and the Administrator for all insurable risks incident to the Program to a dollar amount specified by the Board.

b. The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the Program.

Standard 3.5.2 Insurance for Program Attorneys

All attorneys seeking appointment under the Program shall provide evidence of being adequately insured for all insurable risks to the Program caused by their representation of clients under Program auspices, to a dollar amount specified by the Program.

Washington Defender Association, Standards for Public Defense Services

Standard Fifteen. Disposition of Client Complaints

The legal representation plan shall include a method to respond promptly to client complaints. Complaints should first be directed to the attorney, firm or agency which provided representation. If the client feels that he or she has not received an adequate response, the contracting authority or public defense administrator should designate a person or agency to evaluate the legitimacy of complaints and to follow up meritorious ones. The complaining client should be informed as to the disposition of his or her complaint within one week.

F. Mixed Systems

Most criminal defense standards are written for a single type of defense system, involving either public defenders, a contract attorney office, or assigned counsel. ABA Defense Services Standard 1-1.2 requires a mixed system consisting of a Defender Office coupled with a substantial involvement of the private bar either through assigned counsel plans or contracts for service. Other organizational approaches may exist, such as a public defender/conflicts office or assigned counsel plan. In some states, public defender offices represent defendants in the urban jurisdiction while assigned counsel appear elsewhere.

The following groups of standards are included in this section:

1. Statewide defense
2. Case allocation
3. Related provisions

1. Statewide Defense

Commentary. Three sets of national standards consider whether defense services should be organized at the state level. Only the ABA standards do not address this issue. The NLADA Guidelines for Legal Defense Systems explicitly prefer creation of a state-level defender organization. The Model Public Defender Act recommends the establishment of a new Office of Defender General in the executive branch. The national Advisory Commission standards take no position on the creation of a state system but do recommend that the state, rather than localities, fund defense services.

NLADA Guidelines for Legal Defense Systems in the United States

2.4 State Level Organization with Centralized Administration

Defender services should be organized at the state level in order to ensure uniformity and equality of legal representation and supporting services, and to guarantee professional independence for individual defenders. The defender system should provide services by means of city, county, or multi-county programs to every jurisdiction in the state.

(a) Except in the case of pre-existing agencies, the planning and creation of local or regional defender offices should be undertaken by a state defender office which is responsible for providing all defender services.

(b) The role of the State Defender Director with respect to offices throughout the state should be as follows:

(1) The State Defender Director should appoint Deputy Defenders to head the local and regional offices and should set general policy and guide lines regarding the operation of such offices and the handling of cases; how ever, the daily administration of the local and regional offices and the hand ling of individual cases should be the responsibility of the Deputy Defenders.

(2) The State Defender Director should ensure that on-site evaluations of each defender office or assigned counsel program in the state, whether organized as part of the state defender system or as a preexisting entity, are conducted not less than once a year. The State Defender Director should be authorized to contract with outside agencies where necessary for this purpose.

(3) The State Defender Director should visit all offices and programs around the state on a frequent basis.

(4) The Office of State Defender should provide initial train ing for all new defender staff attorneys and conduct seminars for the continu ing education of the staff of all defender offices and coordinated assigned counsel programs in the state.

2.5 Preexisting Agencies in a State Defender System

The State Defender Director should be permitted to contract with pre existing qualified entities to provide defense services.

The State Defender Director should be responsible for ensuring compliance by contracted programs with national standards.

Where the on-going program has been determined to be in full compliance with national standards, it should be eligible to receive state funding for its program and the Office of the State Defender should provide any necessary back-up services.

Where the on-going defender or coordinated assigned counsel program fails to comply with national standards, that program should have 120 days in which to comply. If, upon reevaluation after that time, the program continues to fall short of national standards, the Office of State Defender should itself replace the prior program.

2.8 Regionalization of Defender Services

In states which have not yet established the Office of State Defender, local political subdivisions having a sufficient number of cases to occupy two or more attorneys on a full-time basis should be required to establish an organized defender system. If a local political subdivision lacks a sufficient number of cases to occupy the full-time services of at least two attorneys, it should be required to combine with other political subdivisions to establish a regional, organized defender system.

Statewide regulations should be established in conformity with national standards governing the staffing and budgetary requirements of local and regional defender offices to ensure provision of uniformly high quality defender services and to protect the independence of the office from political and judicial influence. Staffing requirements for regional offices should be related to travel time for attending court and jail facilities as well as to approved caseload standards.

In the absence of full state funding, participating local governments should allocate costs among themselves. Alternative bases for allocation should include, but not be limited to, population, caseload, and equal sharing.

5.12 Choice of Counsel in Defense Systems

In a mixed system where both defender and assigned counsel programs exist, the client should be given the option of selecting either system.

The initial assignment of attorneys in defender and assigned counsel programs should be an internal administrative function. However, to the extent administratively feasible and consistent with the overall effectiveness of the system, the client should be afforded an opportunity to choose a particular attorney.

Whenever an attorney–client relationship has been established between an eligible accused and his attorney, the defense system should not terminate or interfere with that relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship.

Whenever it reasonably appears to counsel for an eligible accused that he is unable, for any reason, to furnish effective representation to a particular client, he should withdraw from the case with the consent of the client and the approval of the court, and should

assist the client in securing new counsel. The defense system should not seek to prevent the individual attorney's withdrawal under these circumstances.

Whenever an eligible accused requests that different counsel be assigned to his case, the defense system should investigate the grounds for the request and should assign new counsel if (1) this constitutes the client's first such request, or (2) the investigation discloses that the attorney, for any reason, is unable to provide effective representation to the client. In all other cases the defense system should refuse to reassign the case, and should inform the client of his right to petition the court for reassignment of counsel.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

(a) The Office of Defender General is established in the executive branch of the state. The head of the office is the Defender General.

(b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [$].

(c) The Defender General has the primary responsibility for providing needy persons with legal services under this Act. He may provide these services personally, through deputies or assistants, through [district] public defenders employed under section 12 (a), or as provided by subsection (d). No other official or agency of the state may supervise the Defender General or assign him duties in addition to those prescribed by this Act. He may not practice law other than in the performance of his duties under this Act or engage in any other occupation, except as provided in section 17.

Section 11. Local Offices

The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.

Section 16. Reports

(a) An attorney who is assigned by a court to represent a needy person under section 3 (d) or 6 shall report to the Defender General on his representation of the needy person, as prescribed by the Defender General.

(b) The Defender General shall submit an annual report to the [Governor] [legislature] showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totaled by kind) made in carrying out the responsibilities imposed by this Act.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.6. Financing of Defense Services

Defender services should be organized and administered in a manner consistent with the needs of the local jurisdiction. Financing of defender services should be provided by the State. Administration and organization should be provided locally, regionally, or statewide.

Standard 13.8. Selection of Public Defenders

¶1 The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. If a jurisdiction has a Judicial Nominating Commission as described in Standard 7.1, that commission also should choose public defenders. If no such commission exists, a similar body should be created for the selection of public defenders.

¶2 An updated list of qualified potential nominees should be maintained. The commission should draw names from this list and submit them to the Governor. The commission should select a minimum of three persons to fill a public defender vacancy unless the commission is convinced there are not three qualified nominees. This list should be sent to the Governor within 30 days of a public defender vacancy, and the Governor should select the defender from this list. If the Governor does not appoint a defender within 30 days, the power of appointment should shift to the commission.

2. Case Allocation

Commentary. The NLADA Guidelines for Legal Defense Systems is the only set of standards to address the question of how cases are allocated in a mixed system.

NLADA Guidelines for Legal Defense Systems in the United States

2.2 Allocation of Cases

In a mixed defender and assigned counsel system, the percentage of cases handled by each component of the system should depend upon the relative sizes, expertise and availability of the defender staff and of the panel of private lawyers.

Cases should be allocated in accordance with a fair and well -promulgated plan. The administrator should be responsible for developing, promulgating and implementing this plan.

The plan should allocate a substantial share of cases to each component of the system and should not *a priori* preclude allocation of any specific type or types of cases from assignment to either component. Provision should be made for cases involving multiple defendants, conflicts of interest, and mat ters requiring special expertise.

3. Related Provisions

Commentary. The NLADA Guidelines for Legal Defense Systems include three miscellaneous standards relating to the following topics:

- Rural programs
- Planning capacity
- Use of law students

NLADA Guidelines for Legal Defense Systems in the United States

3.3 Projecting Defense System Personnel Needs

Defense system personnel needs should be projected by means of detailed resource planning. Such planning requires, at a minimum, detailed records on the flow of cases through the criminal justice process and on the resources expended on each case at each step in the process.

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.

Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.

Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.

Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.

The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.

Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.

Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.

4.2 Task Allocation and Supporting Services in Rural Programs

Defender programs in rural areas which are staffed by only two or three attorneys should meet standards prescribed for larger programs except that specialization should be avoided and case assignments and routine administra tive and public relations duties should be rotated to ensure that each staff attorney is fully familiar with the operation of the program and with all components of the criminal justice system.

4.4 Use of Law Students

Although law schools throughout the nation should be encouraged to estab lish closely supervised clinical criminal law courses in cooperation with local defender offices, it is deplorable that law students are now filling gaps that should be filled by the practicing bar. Law student programs should not be viewed as a long -term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

Law students utilized as supporting personnel in defender agencies should be carefully supervised, given a broad range of experience and, where appro priate, adequately compensated for their work.

Law students functioning as subcounsel in criminal matters should be thoroughly prepared in criminal law and procedure, ethics, and court practice before being permitted to handle actual courtroom appearances.

A law student should be permitted to handle as lead counsel motions, hearings, and trials only after the student has been certified under a student practice rule and provided that the supervising lawyer has determined that, to the best of his knowledge and belief, the student will not bias either the court or the jury against the defendant. The student should not be permitted to handle the case unless the client has consented in writing to student representation; however, the consent of the trial judge should not be required. The client's consent should be indicated on the court record prior to any courtroom proceeding.

Law students should not conduct initial substantive client interviews without the presence of a supervising lawyer.

Law students should not handle as lead counsel criminal cases in which the charges against the accused involve complex legal, evidentiary, or tactical decisions, or where there is a likelihood of a substantial deprivation of liberty upon conviction.

The requirement of close supervision necessitates that the supervising lawyer have a complete understanding of the case, be available to the student prior to any court appearance for consultation and be physically present and immediately available for consultation during the time the student is presenting a matter in court.

G. Public Defender Offices

A public defender office is the most obvious component of any set of standards for criminal defense. Most, if not all, of the standards applicable to defense services generally are applicable here. This section includes standards that relate only to defender offices. Topics covered are the following:

1. Chief public defender
2. Prohibition on private practice
3. Compensation
4. Responsibility for the administration of criminal justice

1. Chief Public Defender

Commentary. The chief public defender may be either elected or appointed. Where the chief defender is appointed, the standards require that selection be based on merit. This is because the independence of defense services requires the exclusion of political factors between the head of the defender agency and the attorneys staffing it. Merit selection standards are thus included in three national standards and two state standards (Georgia and Kansas). Where the defender agency is a state agency (e.g., in Connecticut), merit selection may be implicit under civil service laws.

A second way to help ensure the independence of the chief defender is to provide for a fixed minimum term of office or, in the alternative, removal for good cause only (see also comparable provisions under Contract Systems).

Three national sets of standards and those of Georgia speak to the chief defender's term of office.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-4.1 Chief Defender and Staff

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices…. Selection of the chief defender and staff by judges should be prohibited…. The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.13 The Governing Body for Assigned Counsel Programs

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: designing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the administrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special selection

committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

…

(b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [$].

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.8. Selection of Public Defenders

¶3 A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

¶4 A public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice. Power to discipline a public defender should be placed in the judicial conduct commission provided in Standard 7.4.

Standard 13.10. Selection and Retention of Attorney Staff Members

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit. Staff attorneys, however, should not have civil service status.

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

Guideline 2.3 Public Defender Program

The local committee may elect to provide indigent defense services through a Public Defender Program. The Public Defender shall be selected by the local committee from qualified applicants for the office. The Public Defender shall have the authority to operate the Public Defender's Office on a day to day basis and shall select and manage the staff of the office. The local committee shall not interfere with professional decisions involving representation of clients or the operation of the office.

…

…Removal of the Public Defender short of the agreed term should be for good cause only. The Contract shall define "good cause" such as is required for removal of the Public Defender as: failure by the Public Defender to comply with the terms of the contract to an extent that the delivery of services to clients is impaired or rendered impossible, or a willful disregard by the Public Defender of the rights and best interest of clients under this contract such as leaves them impaired. The individual actions of the Public Defender taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

A Public Defender should have a contract for at least a one-year term.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-10-3. Implementation Schedule for Public Defender System

The district court judge shall appoint the public defender, or any other attorney under the system established by the board, to represent all persons entitled to counsel who have not, before the system implementation date, had counsel appointed in the action pending before the court.

105-21-1. Qualifications

Each public defender shall be an attorney licensed to practice law in Kansas and shall be selected on the basis of merit. Primary qualifications shall be:

(a) demonstrated commitment to the provision of quality legal representation for eligible persons charged with or convicted of criminal conduct;…

2. Prohibition on Private Practice

Commentary. Along with provisions for ensuring the independence of the defender system are provisions for minimizing conflicts of interest. Chief among them is a limitation on acceptance of outside cases.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-4.2. Restrictions on Private Practice

Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.

NLADA Guidelines for Legal Defense Systems in the United States

2.9 Full-Time Defenders and Minimum Staff Size

Defender Directors and staff attorneys should be full -time employees, prohibited from engaging in the private practice of law. No defender office should be staffed by less than two full-time defenders. Where this cannot be accomplished by regionalization, it should be accomplished by merging the criminal and civil legal aid functions.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.7. Defender to be Full Time and Adequately Compensated

The office of public defender should be a full-time occupation. State or local units of government should create regional public defenders serving more than one local unit of government if this is necessary to create a caseload of sufficient size to justify a full -time public defender.

3. Compensation

Commentary. The prohibition on private practice leads directly to questions about the adequacy of the compensation paid to defender attorneys in attracting and retaining talented and dedicated counsel. The three national standards (NLADA, Model Act, and NAC) would peg defender salaries to a non-defender position (private bar, prosecutors, or judges). Provisions similar to these are also contained in the standards relating to contract services and assigned counsel. The New York City and Washington state standards also match defender salaries with those of prosecutors.

NLADA Guidelines for Legal Defense Systems in the United States

3.2 Defender System Salaries

The Defender Director's compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. The Director's compensation should be comparable with that paid to presiding judges, be professionally appropriate when compared with the private bar, and be in no event less than that of the chief prosecutor.

The starting levels of compensation for staff attorneys should be adequate to attract qualified personnel. Salary levels thereafter should be set to promote the Defender Director's policy on retention of legal staff and should in no event be less than that paid in the prosecutor's office. Compensation should be professionally appropriate when analyzed or compared with the compensation of the private bar.

In order to attract and retain qualified supporting personnel, compensa tion should be comparable to that paid by the private bar and related positions in the private sector and should in no event be less than that paid for similar positions in the court system and prosecution offices.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 11. Local Offices

The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.7. Defender to be Full Time and Adequately Compensated

…The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction.

Standard 13.11. Salaries for Defender Attorneys

Salaries through the first 5 years of service for public defender staff attorneys should be comparable to those of attorney associates in local private law firms.

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

G. Compensation of Salaried or Contractual Public Defenders

The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

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

II. Qualification of Lawyers

…

B. Evaluation Criteria

…

(2) Recruitment and Hiring

Specific Guidelines:

Defense lawyers should receive total compensation packages, including fringe benefits, comparable to compensation packages paid to Assistant District Attorneys in the First Department who are of equal seniority, experience and level of responsibility.

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

4. Responsibility for Administration of Criminal Justice

Commentary. A final subset of defender standards addresses the relationship between defender agencies and both the private bar and the larger community outside the justice system. The intent of these standards is, of course, to increase support for the defense function.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2. The Function of Defense Counsel

…

(d) Defense counsel should seek to reform and improve the administra tion of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

…

(f) Whenever appropriate, the Defender General may appear in legislative or administrative proceedings for the purpose of assuring adequate representation to the persons covered by this Act.

(g) The Defender General shall consult and cooperate with interested professional groups with respect to the causes of crime, the development of effective means for discouraging crime, the rehabilitation of convicted criminals, the administration of criminal justice, and the administration of the Office of the Public Defender.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.9. Performance of Public Defender Function

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.
2. The public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community.
3. The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.
4. He should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of them. Specifically:
    a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.
    b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overloads, and cooperate in resolving these.
    c. He must maintain the bar's faith in the defender system by affording vigorous and effective representation to his own clients.
    d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

Standard 13.13. Community Relations

The public defender should be sensitive to all of the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.
2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.
3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

H. Assigned Counsel Systems

Assigned counsel plans are simply lists of attorneys who have agreed to accept and who are qualified to represent clients in criminal cases. They are widely used, especially in rural areas. Plans can be either formal or informal. Formal plans are those administered by a full-time manager who supervises the list of attorneys eligible for court appointment; ensures that assignments are appropriate; reviews attorney qualifications; and protects the independence of plan attorneys. Informal plans, often referred to as "ad hoc," are often no more than lists assembled by trial courts of local attorneys willing to take on criminal work. The judge responsible for court appointment controls the list and how it is used.

This section includes standards on the following topics:

1. Integrated defense system plan
2. Plan administrator
3. Attorney panel qualifications
4. Rotation of assignments
5. Attorney compensation
6. Attorney expenses
7. Related provisions

1. Integrated Defense System Plan

Commentary. Since assigned counsel plans are responsible for the representation of so many defendants, all the national standards (except those limited to contract services) specifically address the administration of these plans. Of the several state standards in this compendium, three (Georgia, Indiana, and Kansas) also address assigned counsel. Additional examples of assigned counsel standards include these:

- Arkansas Public Defender Commission, Minimum Standards, Attorney Qualifications Certification Criteria (1987)
- Alameda County Bar Association Court Appointed Attorneys' Program (1988)
- Massachusetts Supreme Judicial Court, Rule 3.10 (1993)
- Michigan Sixth Circuit Court of Appeals Administrative Order 1996-2, Plan for Appointing Lawyers to Represent Defendants (1996)
- Oregon Judicial Department, Policy Statement, Indigent Defense Programs (1990)
- Appellate Defender Commission, Michigan Appellate Assigned Counsel System Regulations (1985, revised 1999)

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.1. Systematic Assignment

The plan for legal representation should include substantial participation by assigned counsel. That participation should include a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments.

NLADA Guidelines for Legal Defense Systems in the United States

2.3 Ad Hoc Appointment of Counsel

Appointment of counsel on a random or *ad hoc* basis is explicitly rejected as an appropriate means of furnishing legal representation in criminal cases.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.1 Establishment of Legal Representation Plan

a. Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these standards.

b. Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with

one or more other methods of providing representation. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons (Standard 2.1).

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

a. Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.

b. The plan shall delegate to assigned counsel a substantial portion of all eligib le cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.

c. None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 13. Court Assigned Attorneys

If a court assigns an attorney under section 3 (d) or 6, it shall prescribe a reasonable rate of compensation for his services based on the complexity of the issues, the time involved, and other relevant considerations, and shall determine the direct expenses, necessary to representation, for which he should be reimbursed. Payment or reimbursement shall be made out of the [appropriate fund] of the state.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.5. Method of Delivering Defense Services

Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime. Cases should be

divided between the public defender and assigned counsel in a manner that will encourage significant participation by the private bar in the criminal justice system.

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

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

Guideline 2.2 Method of Providing Counsel

The local governing committee shall propose to the Council a plan for a local indigent defense program, either a public defender system, a panel of private attorneys, a legal aid and defender society, a contract system or a combination of the above to provide adequate legal defense for indigents accused of felonies, or misdemeanors.

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

(a) Appointments of private attorneys shall be made on an impartial and equitable basis ;

(b) The cases shall be distributed among the attorneys to ensu re balanced workloads through a rotation system;

(c) More difficult or complex cases shall be assigned to attorneys with sufficient levels of experience and competence to afford adequate representation ;

(d) Less experienced attorneys should be assigned cas es which are within their capabilities, but should be given the opportunity to expand their experience under supervision; and

(e) Cases in which the death penalty is sought shall be assigned only to attorneys of sufficient experience, skill and competence to render effective assistance of counsel to defendants in such cases. The American Bar Association "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" may be referred to as a suggestion for the determination of the experience, skill and competence of the attorneys.

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

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-1. Panel of Attorneys

(a) The administrative judge of each district shall c ompile a list of volunteer attorneys eligible for assignment to represent indigent defendants for each county in the district. The list shall be known as the panel for indigent defense services.

(b) The administrative judge shall revise the panel annually , as incoming attorneys register with the clerk of the district court and when removal or withdrawal of attorneys from the panel or any other cause makes revision appropriate.

(c) Each attorney on the voluntary panel shall accept felony appointments for a minimum period of one year, with renewable one-year service terms thereafter. The administrative judge may waive this requirement for good cause shown.

(d) In compiling the list, the administrative judge shall consider the criteria contained in K.A.R. 105-3-2, the training, the resources and the experience of each attorney. The judge may consider any other relevant factor or factors relating to the attorney's ability to provide effective assistance of counsel to indigent defendants.

(e) An administrative judge may refuse to place an attorney on a panel. Should the administrative judge refuse to place an attorney on a panel, that judge shall promptly notify the attorney and the board of this decision. The decision shall become effective upon notice to the attorney and shall remain effective until the board or administrative judge places the attorney on the panel.

(f) An attorney who is refused placement on a panel may inform the board that the attorney wishes to appear and offer evidence for placement on the panel at a hearing before the board. Any such evidence shall be reviewed by the board for determination of whether or not the administrative judge abused that individual's discretion in refusing to place the attorney on the panel. The hearing shall be conducted as a summary proceeding.

2. Plan Administrator

Commentary. Most of the national standards that address assigned counsel systems require that there be an administrator. The only state standard providing for administration of the assigned counsel system at trial (Georgia) places that responsibility with the Public Defender Office. Michigan places it for appellate purposes with the Michigan Appellate Assigned Counsel Administrator (Michigan Supreme Court Administrative Order 1989-3, In re the Appointment of Appellate Assigned Counsel). These standards are detailed with the standards relating to financial eligibility procedures and informing clients of right to counsel.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.1 Systematic Assignment

…

Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

NLADA Guidelines for Legal Defense Systems in the United States

2.14 Qualifications, Conditions of Employment, and Role of the Administrator

An assigned counsel program should be administered by a qualified attorney licensed to practice in the jurisdiction where the system operates. In addition, the qualifications of the administrator should include, but not be limited to, the following: extensive experience in the field of criminal defense; experience in administration; ability to work cooperatively with other elements of the criminal justice system while retaining an independence of attitude to promote and protect the proper rendering of defense services; ability to maintain proper relations with the private bar; and, where the assigned counsel program co-exists with a defender system which has a separate administrator, the ability to maintain a cooperative working relationship with the defender system.

The functions of the administrator should include, but not be limited to, the following: developing and executing operational policy and control of the system; assisting the governing body in discharging its responsibilities; further assisting the governing body in the development of the budget, and in planning and establishing fee schedules and fiscal controls; acquiring such staff as is necessary to carry out the mission of the system; designing the internal operational and administrative controls necessary for the orderly disposition of cases; designing and implementing orientation and training programs for assigned counsel; and developing access to supporting services.

The administrator should have the authority to select the attorneys who will comprise the assigned counsel panel; to suspend or dismiss panel members for cause, subject to the review of the governing body; to hire and discharge such staff as is necessary to operate

the system; to monitor the quality of the services being rendered and to take appropriate measures to maintain a competent level of services; to approve expenditures for the acquisition of supporting services; and to approve the payment of attorney fee vouchers. However, requests for fees exceeding the recommended maximum, or appeals from the administrator's action, should be received by a panel of attorneys appointed by the governing board.

The following terms of employment should apply to the assigned counsel administrator. The administrator's salary should be sufficient to attract a capable person and should be at least as high as that of the chief prosecutor in the area served. The administrator and staff should be allowed reasonable expenses to participate in continuing education programs and bar association and defender association functions. The administrator should serve for a definite term of years which should be no less than three nor greater than six years and should be eligible for reappointment for successive terms. The administrator should not be subject to removal from office in the course of a term without good cause being shown and should be afforded a hearing before the governing body.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.3.1 Position of Administrator

The Board shall appoint an Administrator who shall implement policy and manage the Assigned Counsel Program, except when the legal representation plan requires that the Director of the defender office also act as Administrator, and the plan provides for the independence of the Director/Administrator from the judiciary and funding source (Standard 2.2).

Standard 3.3.2 Qualifications of Administrator

a. The Administrator shall be an attorney lic ensed to practice in the jurisdiction or jurisdictions in which the Assigned Counsel Program operates. The experience of the Administrator shall include extensive work in the criminal defense field and in administration. He or she shall have a reputation for integrity and commitment to program principles.

b. The Administrator shall be appointed on merit alone and shall be dismissed only for good cause found upon a hearing before the Board.

Standard 3.3.3 Employment Status and Pay of Administrator

a. The office of Administrator shall be a full-time position whenever feasible ; a full-time Administrator shall not engage in the private practice of law.

b. The Administrator shall be appointed for a stated term of office and shall be compensated at a rate not less than the local presiding judge, chief prosecutor and, where applicable, the chief defender.

Standard 3.3.4 Functions of Administrator

The Administrator shall implement Program policy and manage Program operations.

Standard 3.4 Budget and Funding

a. The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.

b. The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.

c. The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

3. Attorney Panel Qualifications

Commentary. The first responsibility of the administrator is to establish a panel of private attorneys willing to accept criminal case assignments. The two national standards (ABA and NLADA) and three state standards (Georgia, Indiana, and Kansas) provide guidance for this task by suggesting that there be an application process that screens attorneys to ensure that they have sufficient experience and training for the job. The NLADA and ABA standards also stress the necessity of adopting performance standards. See also, Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G 10.1 *et seq*., "Panel Attorneys."

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.2. Eligibility to Serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards. Counsel should not seek to avoid appointment by a tribunal to represent a person except for good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.15 Establishing the Assigned Counsel Panel

In establishing the assigned counsel panel, the administrator should solicit all members of the practicing bar in the area to be served by the system. The administrator should appoint all of those attorneys who display a willingness to participate in the program and manifest the ability to perform criminal defense work at a competent level. Provision should also be made for attorneys who are willing to learn criminal defense work, or to become more proficient in such work, to be inducted into the program upon completion of an appropriate training regime.

Standards of performance and conduct should be developed and disseminated among all panel members and potential panel members. In the event that those standards are disregarded or breached, it should be cause for either admonishment, suspension or removal from the panel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.9 Standards for Performance of Counsel

a. The Assigned Counsel Program shall identify, and enforce adherence to, minimum standards for the performance of counsel and shall assist counsel in meeting, and striving to exceed, those standards.

b. Assigned counsel shall meet, and strive to exceed, minimum standards for the performance of counsel.

Standard 4.1 Establishment and General Operation of Assigned Counsel Roster

…

b. The Board, or at its direction the Administrator, shall establish standards detailing the qualifications attorneys must have before being assigned cases at each level under paragraph (a), as described in Standard 4.1.1.

Standard 4.1.1 Qualifications of Attorneys

a. The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.

b. The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.

c. An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

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

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

…

(c) More difficult or complex cases shall be assigned to attorneys with sufficient levels of experience and competence to afford adequate representation ;

(d) Less experienced attorneys should be assigned cases which are within their capabilities, but should be given the opportunity to expand their experience under supervision; …

Guideline 2.5 Selection and Conduct of Panel Attorneys

The local committee shall select the attorneys who will serve on the panel of attorneys to receive appointments of indigent cases.

Standards of performance and conduct shall be developed and disseminated by the local committee among all panel members and potential panel members. In the event that those standards are disregarded or breached, it would be cause for either admonishment, suspension or removal of the attorney from the panel.

These standards of performance and conduct shall include, but not be limited to the following:

(a) A panel member should make contact w ith the defendant as soon as possible after the assignment;

(b) A panel member should actively represent his/her client at every stage of the criminal proceeding;

(c) A panel member should represent his/her client vigorously within the bounds of the law and ethical conduct;

(d) A panel member should at all times perform his/her role as counsel independently; and

(e) A panel member should responsibly manage and account for his/her time in rendering services under the program.

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

E. Appointment of Counsel

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

…

2. *Class A or B Felony*. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class A or B felony, an attorney shall ;

   a. be an experienced and active trial practitioner with at least two(2) years of criminal litigation experience; and

   b. have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion.

3. *Class C Felony*. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class C felony, an attorney shall:

   a. Be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or

   b. Have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.

…

5. *Other criminal cases*. To be eligible to serve as lead counsel in other criminal cases, an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-2. Eligibility to Serve

(a) Each licensed attorney engaged in private practice of law shall be eligible to serve on the panel if the following criteria are met.

   (1) Each attorney on the voluntary panel representing an indigent defendant shall have completed 12 hours of continuing legal education in the area of criminal law within three years of appointment or have graduated from an accredited law school during the three years immediately before appointment.

   (2) Each attorney assigned to the defense of any felony classified as a non-drug grid offense with a severity level of 3 or 4, or any felony classified as a drug grid offense with a severity level of 1, 2, or 3, shall have tried to a verdict, either as defense counsel or prosecutor, five or more felony jury trials.

   (3) Each attorney assigned to the defense of any felony classified as an off-grid offense or a non-drug grid offense with a severity level of 1 or 2 shall have tried to a verdict, either as defense counsel or prosecutor, five or more jury trials involving the following:

      (A) non-drug offenses of severity levels 1 through 4 or drug grid offenses of severity levels 1 through 3; or

      (B) any off-grid offenses

   …

   (7) …

      (B) Except for appointment of an attorney to provide rep resentation for an indigent person accused of a capital felony or a homicide pursuant to K.S.A. 21-3401, 21-3402, or 21-3403, an indigent person who has been convicted of a capital murder and who is under a sentence of death in the direct review of the judgment or an indigent person who has been convicted of capital murder and

who is under a sentence of death in postconviction proceedings, the judge may waive any of the above conditions if the attorney selected by the judge has sufficient training, resources, and experience to undertake the case in question.

4. Rotation of Assignments

Commentary. A corollary standard to panel establishment is the rotation of assignments among panel members to ensure equity and avoid charges of favoritism. The ABA Defense Services Standards and the NLADA Guidelines for Legal Defense Systems both provide for exceptions to panel rotation when necessary. The Kansas Standards also provide for emergency appointment, when required, outside the normal rotation.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.3. Rotation of Assignments and Revision of Roster

(a) As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

NLADA Guidelines for Legal Defense Systems in the United States

2.16 Assignment of Cases to Panel Members

Although methods of assigning cases may vary with local procedures and conditions, the administrator, in designing the system and making assignments, should adhere to the following goals:

(a) The cases should be distributed in an equitable way among the panel members to ensure balanced workloads through a rotating system with allowances for variance when necessary;

(b) The more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to afford proper representation; and

(c) Apprentice members of the panel should only be assigned cases which are within their capabilities; however, they should be given the oppor tunity to expand their experience gradually under supervision.

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

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

…

(b) The cases shall be distributed among the attorneys to ensure balanced workloads through a rotation system;

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-1. Rotation of Appointments

All appointments shall be made in an orderly manner to avoid patronage, or the appearance of patronage, and to ensure fair distribution of appointments among all whose names appear on the panel. Names on the panel shall be in alphabetical order and appointments shall be made in sequence with the following exceptions:

(a) When the court determines there is a conflict of interest, the next listed attorney shall be appointed.

(b) When the court determines the attorney lacks sufficient experience in a serious felony case, the next qualified attorney shall be appointed.

(c) When the court determines an emergency appointment of counsel is required, the first available attorney may be appointed; or

(d) When the court determines the attorney is unavailable to promptly handle the case, the next listed attorney shall be appointed.

Any attorney who is passed over shall be first in sequence for the next appointment.

5. Attorney Compensation

Commentary. A critical responsibility of the assigned counsel system is to ensure that participating attorneys are promptly compensated at a fair and reasonable rate. If rates are too low or compensation delayed, a qualified attorney will leave the plan, thus defeating one of the implicit purposes of an assigned counsel system—to insure broad bar support for indigent defense services.

The ABA standards and Model Act approach the question of compensation very generally by requiring "reasonable" and "adequate" compensation. The NLADA and Washington standards go further to peg compensation rates to prevailing rates among the private bar or among other governmental attorneys (e.g., prosecutors). The two state standards (Georgia and Indiana) set specific rate minimum rates, while the Kansas and North Dakota standards set a specific statewide compensation rate. The North Dakota standards also provide detailed requirements for judicial service of attorney requests for payment. Recent case law has defined reasonable rates as covering the lawyer's overhead with an additional amount over that. See, e.g., State *ex ref*. *Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.4. Compensation and Expenses

Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.

NLADA Guidelines for Legal Defense Systems in the United States

3.1 Assigned Counsel Fees and Supporting Services

Assigned counsel should be adequately compensated for services rendered. Fees should be related to the prevailing rates among the private bar for simi lar services. These rates should be reviewed periodically and adjusted accordingly.

…

In developing a fee schedule, the effect of the fee schedule upon the quality of representation should be considered. Fee structures should be designed to compensate attorneys for effort, skill and time actually, properly and necessarily expended in assigned cases.

Fee schedules, whether provided by statute or policy, should be designed to allow hourly in-court and out-of-court rates up to a stated maximum for various classes of cases, with provision for compensation in excess of the scheduled maxima in extraordinary cases.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.7.1 Assigned Counsel Fees

Reasonable compensation shall be provided to assigned counsel, at a rate commensurate with that paid for other contracted government legal work (e.g., work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.

Standard 4.7.2 Method of Compensation

a. Attorneys shall be compensated at an hourly rate, wit h no distinction between rates for services performed in and outside of court.

b. The amount of compensation sought shall be reviewed by the Administrator and approved unless there is cause to believe the amount is unwarranted.

c. Maximum fee limits shall not be established. Where they exist, they shall be subject to exception, upon approval by the Administrator acting within guidelines established by the Board.

d. Periodic billing and payment during the course of counsel's representation shall be provided for, at least in lengthy cases.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 13. Court Assigned Attorneys

If a court assigns an attorney under section 3 (d) or 6, it shall prescribe a reasonable rate of compensation for his services based on the complexity of the issues, the time involved, and other relevant considerations, and shall determine the direct expenses, necessary to representation, for which he should be reimbursed. Payment or reimbursement shall be made out of the [appropriate fund] of the state.

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

Guideline 2.6 Fees Paid to Lawyers Under a Panel Program

The local committee shall determine the method of compensation to be paid under a panel program within the following guidelines:

No program shall have a fee schedule which compensates attorneys at a rate of less than $45.00 per hour for out-of-court work and less than $60.00 per hour for in-court work.

In approving fees, the local committee shall take into consideration the complexity of the case and the corresponding fee that is presently being obtained by competent members of the bar for similar representation where privately retained. While the fee paid under the

panel program need not equate to that of a corresponding fee obtained by a private practitioner, there should be a reasonable relationship.

The Council discourages the setting of maximum fees which appointed attorneys may receive; however, if a committee chooses to set maximum fees the maximums set for trials or similar situations must be at least as follows:

$1000.00	for misdemeanors.
$2500.00	for non-capital felonies.
$5000.00	for capital felonies where the death penalty is not sough t.

No maximum fee shall be set for capital felonies in which the death penalty is sought. An appointed attorney shall be permitted to petition the court for a fee in excess of the maximum set for a particular category of case. It shall be within the sole discretion of the court after consideration of the petition whether or not to award a fee in excess of the maximum fee established by the local governing committee.

The Council recommends that fee requests of appointed attorneys be submitted to the Administrator of the Indigent Defense program or the local governing committee for approval. An appointed attorney may petition the court if the fee requested has been denied or reduced. It shall be within the sole discretion of the court after consideration of the petition whether or not to award the fee requested.

Capital felonies in which the death penalty is sought should be compensated based on hourly rates and the time spent as documented in records submitted by the attorneys.

Compensation for a capital felony case in which the death penalty is sought shall be at least the same hourly rate as other cases, but each case should be examined by the court and the fee total should be based on a complete examination of the individual case. Special attention shall be given to continuing counsel obligations in death penalty cases when conviction and imposition of the death penalty occur.

The monetary standards contained in this paragraph may be waived by the Council, on a year-to-year basis, upon a showing that compliance with them would work a demonstrable financial hardship upon a local governing authority, and would result in a diminution of ability to provide indigent defense services.

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

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

1. Hourly Rate. Counsel shall be compensated for time actually expended at the hourly rate of not less than sixty dollars ($60.00).
2. Incidental Expenses. Counsel shall be reimbursed for reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

3. Periodic Payments. Periodic payment during the course of counsel's representation shall be made monthly upon request of appointed counsel.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-5-2. Rates of compensation

(a) Each assigned counsel shall be compensated at the rate of $50 per hour.

…

(c) Contract counsel shall be compensated at the rate or rates established and set forth in the contract between the board and the assigned counsel.

105-5-4. Multiple attorneys

No more than one attorney shall be compensated for services rendered at the same stage of proceedings, unless the judge determines that co-counsel is required due to the extreme seriousness of the case.

105-5-5. Overpayments

If it is determined by the director that an attorney has been paid an amount in excess of what is allowable according to the current regulations regarding compensation, the director shall notify the attorney to immediately reimburse the board for a like amount. If not paid on demand, the director may recoup that amount from a subsequently approved claim from that attorney.

105-5-6. Reasonable compensation; non-tried cases

(a) Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants and other indigent persons at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-89, reasonable compensation shall not exceed $1,000 in the following cases:

   (1) Those felony cases in the trial court that are cla ssified as non-drug offenses of severity level 1 through 5 that are not submitted to a judge or jury, including services at a preliminary hearing sentencing, if applicable; and

   (2) Those felony cases in the trial court that are classified as drug offenses, that have not been submitted to a judge or jury, and in which there have been six hours or more spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.

(b) Except as provided in K.S.R. 105-5-8 and K.A.R. 105-6(a), reasonable compensation shall not exceed $750 in the following cases:

   (1) Those felony cases in the trial court that are not submitted to a judge or jury, including services at a preliminary hearing and sentencing, if applicable, and that are classified as severity level 6 through 10 non-drug offenses; and

(2) Those felony cases in the trial court that are not submitted to a judge or jury, that are classified as drug offenses, and in which there have been fewer than six hours spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.

(c) Except as provided in K.A.R. 105-5-8, K.A.R. 105-5-6(a), and K.A.R. 105-5-6(b), reasonable compensation shall not exceed $410 in the following types of cases:

(1) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 22-4503 and K.S.A. 1997 Supp. 22-4506;

(2) Cases filed pursuant to K.S.A. 60-1507 and K.S.A. 1997 Supp.22-4506 ;

(3) Habeas corpus cases as authorized by K.S.A. 22 -2710;

(4) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 22-3428 and L/S/A/ 22-3428a; and

(5) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 59-2965.

(d) Except as provided in K.A.R. 105-5-8, reasonable compensation shall not exceed $200 in the following types of cases:

(1) Representation of grand jury witnesses determined to be indigent and called to testify pursuant to K.S.A. 22-3009 ;

(2) Representation of indigent persons committed to custody as material witnesses pursuant to K.S.A. 1997 Supp. 22-2805 ;

(3) Probation revocation hearings; and

(4) Motions to modify sentence.

105-5-7. Reasonable compensation; tried cases

Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-8, reasonable compensation for felony cases tried on pleas of not guilty and submitted to a judge or jury for adjudication, including compensation for services at the preliminary hearing, sentencing and motions to modify the sentence, shall not exceed the following:

(a) $1,500 for felonies classified as non-drug offenses of severity levels 5 through 10 ;

(b) $2,000 for felonies classified as non-drug offenses of severity level 4 and f elonies classified as drug offenses of severity levels 2 through 4; and

(c) $5,000 for felonies classified as non-drug offenses of severity levels 1 through 3, off-grid felonies, and felonies classified as drug offenses of severity level 1.

105-5-8. Compensation; exceptional cases

(a) Any compensation for attorneys' services in excess of the amounts set out in K.A.R. 105-5-6 and K.A.R. 105-5-7 may be approved only in exceptional cases. A finding by the court that a case is exceptional shall be subject to final approval by the board. An exceptional case means any of the following:

(1) Any case involving a felony chare in the trial court which does not appear on the sentencing range grid;

(2) any felony case tried on a not guilty plea in which there have been 25 or more hours spent in court in defense of the indigent defendant;

(3) any felony case not submitted to a judge or jury in which there have been 10 hours or more of in-court time spent in defense of the indigent defendant; or

(4) any case that has been declared an exceptional case by the court due to its complexity or other significant characteristics.

(b) Each claim for compensation in an exceptional case shall be accompanied by a specific finding in a court order setting forth the basis for the declaration that the case is exceptional.

(c) Reasonable compensation for attorneys' services in exceptional cases shall not exceed $5,000 per case. However, additional compensation may be approved by the board if warranted by the extreme complexity of the case.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

2. Guidelines for Payment of Appointed Counsel Fees and Expenses for Indigent Defense Services

1. Appointed Counsel Fees:

   a. Appointed counsel shall be compensated at a rate of $75 per hour. Appointed counsel shall receive the same hourly rate of compensation for out-of-court services, including travel time, as for in-court services.

   b. If a lawyer anticipates a cumulative attorney fee in a particular case of more than $1,000, early prior written approval of the judge presiding in the case is required.

   c. If a lawyer anticipates a cumulative attorney fee in a particular case of more than $2,000, the early prior written approval of the judge presiding in the case is required. The judge shall notify the presiding judge of the judicial district and the State Court Administrator of each approval of an anticipated cumulative attorney fee in a particular case of more than $2,000.

   d. If multiple attorneys are required in a particular case, the early prior written approval of the judge presiding in the case is required.

   e. In exceptional cases in which total defense expenses may exceed $5,000, the judge presiding in the case will, at the earliest possible time, after consultation with the appointed attorneys, set a total fixed fee payment for total defense expenses, including counsel fees, witnesses, and investigatory expenses for that case. Notice of this order should be provided to the attorneys and the State Court Administrator.

Judges should avoid setting maximum reimbursable time limits in a case, beyond which the counsel is not compensated.

6. Procedures for Review of Trial Judge Decisions Regarding Counsel Fees for Indigent Defense Services

Section 1: Statement of Authority

Pursuant to the North Dakota Rule on Local Court Procedural Rules and Administrative Rules (NDLocalCtR) and after consultation with the Advisory Committee of the Judicial District (Section 8, NDLocalCtR) the following procedure for the resolution of counsel for indigent defendant fee disputes in this judicial district is adopted.

Section 2: Statement of Policy

This procedure is consistent with Rule 3(a)(9), North Dakota Legal Counsel for Indigents Rule (NDLCIR), that any person requesting review of a fee decision of a trial judge on counsel payment for state funded or county funded services shall exhaust administrative remedies established by the presiding judge of the judicial district. It is the policy in this judicial district to provide effective procedures for the prompt and fair resolution of fee disputes. Misunderstanding can be avoided by complete and detailed documentation of counsel fees submitted to the trial judge.

…

Section 4: Standing

An "interested party" may seek review of a fee decision by a trial judge.

Section 5: Commencement of Review Procedures

Whenever a trial judge changes a counsel fee from that submitted, the trial judge shall explain the reason for the change in a letter to the attorney and offer the attorney the opportunity to meet with the judge to discuss the decision.

An interested party may file a written petition requesting review of a counsel fee decision with the presiding judge of the judicial district. Use of the petition form supplied by the office of the presiding judge is encouraged but not required. Verbal requests for review will be received but shall be reduced to writing and signed by the petitioner before any action is taken by the presiding judge.

The petition for review must include the names and addresses of all interested parties, a description of the kind of case involved, and the procedural history of the case. The petition must include a copy of the following:

1. An itemized bill of the fees charged by the attorney; an d
2. The order of the trial judge relating to counsel payment.

Section 6: Time

Requests for review of counsel fee decisions must be filed within 30 days after notification of a fee decision either by a formal letter or receipt of partial payment,

whichever is earlier. The review procedure will be completed, whenever possible, within 60 days after a request is received.

Section 7: Acceptance of Partial Payment Not a Bar

Acceptance of partial payment is not a bar to the filing of a petition.

Section 8: Notice

Other interested parties will be notified by the presiding judge.

Section 9: Supplementary Materials

Each interested party will be provided an opportunity to submit written materials and explanations.

Alternate No. 1:

Section 10: Judge Review Panel

The petition will be reviewed by a panel of three judges appointed by the presiding judge. The judge whose fee decision is under review will not be appointed as a member of the panel.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own m otion.

Section 12: Findings and Recommendations

Written panel findings and recommendations will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19____.

Alternate No. 2

Section 10: Peer Review Panel

The petition will be reviewed by a panel of two attorneys appointed by the presiding judge and one attorney appointed by the attorney whose fee is under review.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own m otion.

Section 12: Findings and Recommendations

Written panel findings and recommendations of the panel will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19___.

Alternate No. 3

Section 10: Judge and Peer Review Panel

The petition will be reviewed by a panel of two judges and two attorneys appointed by the presiding judge, and one attorney appointed by the attorney whose fee is under review. The judge whose fee decision is under review will not be appointed as a member of the panel.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own m otion.

Section 12: Findings and Recommendations

Written panel findings and recommendations will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19___.

Alternate No. 4

Section 10: Reconsideration by the Trial Judge

The petition will be reviewed by the trial judge at the request of the presiding judge.

Section 11: Findings

The written findings of the trial judge will be sent to all interested parties.

Section 12: Effective Date

The effective date of this procedure is _____, 19___.

7. North Dakota Legal Counsel for Indigents Commission Procedures for Review of Counsel Fee Disputes

Section 1: Statement of Authority

Pursuant to Rule 3(a)(10), NDLCIR, the North Dakota Legal Counsel for Indigents Commission, adopts procedures relating to Commission review of counsel fee di sputes.

Section 2: Statement of Policy

Consistent with Rule 3(a)(5)(e) and Rule 3(a)(9), NDLCIR, it is the policy of the Commission to review disputed fee decisions by trial judges and to provide assistance to the parties in resolving counsel fee disputes. To this end, the Commission adopts procedures to aid in the resolution of counsel fee disputes.

Section 3: Definitions

The "trial judge" is the judge presiding in the case out of which the fee dispute arises.

An "interested party" is any aggrieved party including the affected attorney, trial judge, chair of any board of county commissioners, defendant, respondent and the state court administrator.

"Administrative Remedies" are remedies established by the presiding judge of each judicial district pursuant to Rule 3(a)(9), NDLCIR.

Section 4: Standing

An "interested party" may seek Commission review of a fee decision by a trial judge.

Section 5: Commencement of Commission Review

An interested party may file a written petition requesting Commission review of a counsel fee decision with the chair of the North Dakota Legal Counsel for Indigents Commission at the North Dakota Supreme Court. Use of the petition form supplied by the Commission is encouraged but not required. Verbal requests for review will be received but must be reduced to writing and signed by the petitioner before any action is taken by the Commission.

The petition for review shall include the names and address of all interested parties, a description of the kind of case involved, and the procedural history of the case. The petition should include a copy of the following:

1. An itemized bill of the fees charged by the attorney;
2. The order of the trial judge relating to counsel payment ;
3. Payment approval by the presiding judge of the judicial district in state expense cases;
4. Payment approval by the Board of County Commissioners in county expense cases; and
5. Certification of exhaustion of administrative remedies within the judicial district pursuant to Rule 3(a)(9), NDLCIR, and a copy of the written recommendations produced as a result of the administrative remedies.

Section 6: Time

Requests for Commission review of counsel fee decisions must be filed within 60 days after the exhaustion of counsel fee dispute administrative remedies established by the presiding judge of the judicial district.

Section 7: Acceptance of Partial Payment Not a Bar

Acceptance of partial payment is not a bar to the filing of a petition.

Section 8: Notice

Other interested parties will be notified by the Commission of the filing of the p etition.

Section 9: Supplementary Materials

Each interested party will be provided an opportunity to submit written materials and explanations which may be of assistance to the Commission.

Section 10: Oral Hearing

Any interested party may request an oral hearing before the Commission. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of the filing of the petition. The commission may set an oral hearing on its own motion.

Section 11: Findings and Recommendations of the Commission

Commission recommendations to the trial judge may be made by the full Commission or by a panel of three Commission members designated by the Chair of the Commission. Commission recommendations will be made within 60 days after the filing of the petition for review.

The written findings and recommendations of the Commission will be sent to all interested parties.

Section 12: Open Records, Meetings and Voting

All records and meetings of the Commission relating to counsel fees are open to the public. All Commission votes must be recorded.

Section 13: Liaison with the Judicial Conduct Commission and the Disciplinary Board

If circumstances warrant, the Commission may refer matters coming to its attention to the Judicial Conduct Commission or the Disciplinary Board for further action.

Section 14: Effective Date

The effective date of these procedures is October 1, 1981.

Section 15: Citation

These procedures may be cited as Review of Counsel Fee Procedures (RCFP).

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of

professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

6. Attorney Expenses

Commentary. Most assigned counsel plans do not include provision for paying expenses incurred by attorneys in the course of representing their clients, even though such expenses are routinely incurred. Implicit in the standards below is the proposition that expenses should not be taken out of the lawyer's basic fee; otherwise there is a potential for conflict of interest. Among those that do, the specificity of the standards ranges from the ABA's generalized principle for payment of expenses to the detailed statements of what is included by the Kansas regulations and the North Dakota guidelines.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.4. Compensation and Expenses

Assigned counsel should…be reimbursed for their reasonable out-of-pocket expenses.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.7.3 Payment of Expenses

a. The Board shall establish policies as to expenses which will be reimbursed (including reasonable and necessary travel and long-distance and client collect telephone calls) and those which will not.

b. Routine office expenses and out-of-pocket expenses shall be paid for by assigned counsel without reimbursement from the Program. The Administrator, with the guidance of the Board, shall approve reimbursement of extraordinary amounts which were reasonable, actual and necessary.

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

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

…

2. Incidental Expenses. Counsel shall be reimbursed for reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-6-2. Expenses allowed

Expense reimbursements shall include reimbursement for the following expenses:

(a) the cost of photocopying prepared briefs;

(b) the cost of binding appellate briefs for each case;

(c) in-state travel and subsistence by appointed attorneys, not to exceed the rate set by the secretary of the department of administration for state employees in accordance with K.S.A. 75-3201, *et seq*. and K.S.A. 75-4601 *et seq*.;

(d) expenses incurred by appointed attorneys in obtaining computerized legal research if the case presents a unique question of law to be researched. Such expenses shall not exceed $200;

(e) expenses incurred by appointed attorneys in taking depositions, if found to be authorized by statute and necessary in order to provide an adequate defense and when prior approval has been obtained from the court;

(f) costs of mailing briefs; and

(g) expenses incurred by appointed attorneys which would otherwise have been approved and paid by the board directly to a third party in accordance with statute or rule and regulation.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

2. Guidelines for Payment of Appointed Counsel

…

2. Attorney Travel Expenses:

   a. Mileage and travel expenses of the attorney will be reimbursed at rates not to exceed those provided in Sections 44-08-04 and 54-06-09, NDCC.

   b. If a lawyer anticipates cumulative travel expenses exceeding $500, the early prior written approval of the judge presiding in the case is r equired.

3. Other Investigatory and Defense Service Expenses:

   a. Witnesses will be compensated pursuant to Sections 31-01-16, 31-01-17, 31-01-18, and 31-01-19, NDCC, upon submission of itemized documentation including the dates attending court, travel and other expenses.

   b. The following expenses, up to $500, will be reimbursed without prior written approval of the judge presiding in the case:

1. Investigators;
2. Expert witnesses;
3. Out-of-state witnesses.

c. Interpreters for foreign languages and for the visually or hearing impaired will be provided as required by law (See Sections 28-33-02, 31-01-11, NDCC). Interpreter expenses shall be reimbursed; however, the level of compensation is determined by the judge presiding in the case.

d. The following expenses will be reimbursed without prior approval of the judge presiding in the case:
   1. Collect telephone charges from defendant;
   2. Long distance telephone charges;
   3. The first $40 in copying charges, including court records and medical records;
   4. The copying charges for briefs on appeal;
   5. Fees for service of subpoenas by private service of process agencies. Any costs for service of subpoenas by law enforcement agencies should be referred directly to the State Court Administrator for disposition.

e. If a lawyer anticipates individual investigatory or other defense expenses in a particular case of more than $500, early prior written approval of the judge presiding in the case is required.

f. Unless otherwise approved by the judge presiding in the case the following expenses will <u>not</u> be reimbursed:
   1. Transcripts from other proceedings (Access, use or copies of transcripts in the pending proceeding will be provided by the trial court without charge to defense counsel. Any costs in the preparation of transcripts will be referred directly to the State Court Administrator for disposition.);
   2. Local telephone charges;
   3. Office supplies;
   4. Incidental meals;
   5. Postage;
   6. Copying charges in excess of that allowed by 3(d)(3), including court records and medical records.

4. No advance funds payment authorization will be authorized for counsel. Counsel may submit expense vouchers for payment monthly.

5. When prior approval of Attorney Travel Expenses (Section 2) and Other Investigatory and Defense Services Expenses (Section 3) is required, the

standard for approval by the judge presiding in the case is whether the services are necessary to the preparation and presentation of an adequate defense.

6. Vouchers for all appointed attorney fees and expenses must be appropriately itemized.
7. Disputes regarding attorney fees or other defense service should be resolved pursuant to procedures established in each judicial district or by the Commission.

7. Related Provisions

Commentary: Two other assigned counsel-related provisions are these:
- Requirement for a complete and sufficient budget
- Provision for suitable office space

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.4 Budget and Funding

a. The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.

b. The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.

c. The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

Standard 3.6 Office Space, Equipment, Supplies

The Program shall be provided with suitable space, equipment and supplies at appropriate locations, or with the funds necessary to obtain them.

I. Contract Defense

Another method for providing defense services is for the jurisdiction to contract with a local firm. As with any other form of government contracting, defense services contracts are typically subject to competitive bidding.

The advantages of contract defense services can include reduced costs, predictable costs, streamlining of the counsel appointment process, and counsel expertise.

The potential disadvantages of contract counsel come from possible underbidding by the winning firm, resulting in inadequate services. These are referred to as "low bid systems." Inadequate service may, of course, result in a denial of the Sixth Amendment right to counsel (per *Gideon* and *Argersinger*), which can be the basis for appealing a conviction.

The standards in this section are intended to maximize the advantages in this system while protecting against the disadvantages.

The following topics are addressed in this section:

1. Authorization of contract services
2. Compensation
3. Contract termination and minimum term
4. Contracting procedures
5. Contract provisions
6. Prohibition on substitution of attorneys
7. Related provisions

1. Authorization of Contract Services

Commentary. Explicit provision for contract defense services is included in all but one of the national standards and in five state standards. (The New York City standards were written for contract providers.) The standards vary considerably in detail, ranging from the ABA's general approval of contract defense services to the North Dakota model contract.

One contradiction in the NLADA standards should be noted. The NLADA Guidelines for Legal Defense Systems would bar the letting of contracts through competitive bidding. However, the later-adopted NLADA Guidelines for Criminal Defense Contracts recognize that contract procurement is common and that standards are therefore necessary. These guidelines include a bar against awarding contracts on a low-cost basis only. The ABA, Kansas, and Washington standards also frown on awarding contracts exclusively to the lowest bidder. The Indiana standards imply competitive bid procedures, in contrast to the Georgia standards, which simply authorize such contracts. The Appellate Standards for Michigan specifically bar the use of contracts at the appellate level in favor of a statewide attorney roster. See also, Arkansas Public Defense Commission, Minimum Standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.1. Use of contracts for services

Contracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. The contracting authority should not award a contract primarily on the basis of cost.

NLADA Guidelines for Legal Defense Systems in the United States

2.6 Private Defender Organizations

Where a defender organization provides services pursuant to contract, in order to maintain continuity and attract qualified personnel to the position of Defender Director, provision should be made, either by law or by contract, for the continuation of the defender service beyond the contract period.

The scope of the services to be provided should be stated explicitly in the contract.

Contracts for defender services should not be let on the basis of competitive bidding.

The contract should specify the workload anticipated as it relates to the amount of funds being provided in order to provide a formula in the event that the anticipated workload is exceeded.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline IV-3 Awarding the Contract

The Policy Board and/or Contracting Authority should award contracts for representation for those unable to afford counsel only when Contractors have complied with these guidelines. Under no circumstances should a contract be awarded on the basis of cost alone. The Policy Board and/or Contracting Authority shall determine whether the proposed budget of a potential contractor will provide the capability of complying with these Guidelines.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office of Defender General

…

(d) Whenever appropriate, the Defender General may contract with private or public legal aid or other non-profit organizations that are equipped to provide the services to needy persons covered by this Act or to carry out any other function of the Office of Defender General. Each contract must provide (1) that the services performed shall meet the professional standards that this Act prescribes for services performed by the Office of the Defender General, and (2) that the services are subject to the Defender General's supervision and control.

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

Guideline 2.7 Contract Attorney Program

The local committee may elect to provide indigent defense services through a contract with an individual lawyer, or group of lawyers.

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

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services, in the event that such contracts are used. The plan shall provide that contracts not be awarded primarily on the basis of costs and shall otherwise ensure quality legal representation. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award. The contracting parties should

avoid provisions that create conflicts of interest between the contractor and clients. Contracts for services should include, but not be limited to, the following subjects:

1. the categories of cases in which the contractor is to provide services;
2. the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
3. the basis and method for determining eligibility of persons served by the contract;
4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
5. a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
6. supervision, evaluation, training and professional development;
7. provision of or access to an appropriate library;
8. a system of case management and reporting; and
9. the grounds for termination of the contract by the parties.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-10-5. Assigned Counsel Contracts

A public defender, the state appellate defender, and the designated conflicts office may, upon written authorization by the director, contract for services with qualified attorneys to undertake representation of indigent defendants to which each office has been appointed.

105-31-1. General Provisions

(a) The board may elect to contract with one or more private attorneys for the delivery of indigent defense services in any county, counties, or district when there is evidence that such contracting may be cost effective or that the assigned counsel panel lacks attorneys of sufficient expertise or number.

(b) The duration of the contract shall be set forth in the contract and shall be subject to availability of funds.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

4. Model Contract for Counsel Services for Indigent Defendants

This CONTRACT is made between the following law firms:

hereinafter referred to as FIRM; and the State of North Dakota through its authorized representative, the presiding judge of the _____ Judicial District, hereinafter referred to as STATE (and the County of _____ through its authorized representative _____, hereinafter referred to as COUNTY).

1. FIRMS AND ATTORNEYS:

The FIRM includes the firms listed above which include the following attorneys who will provide services under this contract:

as well as, subject to the prior approval of the presiding judge of the Judicial District, any other duly licensed attorney who may be hired by the FIRM while this agreement is in force.

5. Guidelines for Establishment of Ad Hoc Advisory Committees

Application of Guidelines

The North Dakota Legal Counsel for Indigents Commission recommends that each presiding district judge or municipal judge who is either developing or continuing a contract system of delivering indigent defense services appoint an ad hoc advisory committee pursuant to the following guidelines to assist the judge in the development or continuation of a contract indigent defense system within the judge's jurisdiction.

Purpose of Guidelines

The appointment of an advisory committee will insulate the judge from any criticism based on patronage in the awarding of the indigent defense contract and promote collective participation among the judiciary, bar, and funding entity in the establishment or continuation of a contract system of delivering indigent defense services.

Guidelines

1. Each presiding district judge or municipal judge should appoint an ad hoc advisory committee to assist the judge in the development or continuation of a contract indigent defense system.
    a. Where the funding entity is a city, the committee should consist of four members, including:
        1) a member of the city governing body who should serve as chair of the committee;
        2) a judge who presides over a similar court to that presided over by the appointing judge in an adjacent jurisdiction; and
        3) two licensed attorneys who will not be bidding on or have an interest in the indigent defense contract.

        If fewer than two attorneys from the city are available to serve on the committee, the appointing judge should seek the assistance of attorneys residing outside of the city or limit participation on the committee to one

licensed attorney.

b. Where the funding entity is the state, the committee should consist of four members, including:

1) a district court judge or the district court administrator who should serve as chair of the committee; and

2) three licensed attorneys who will not be bidding on or have an interest in the contract.

2. The duties of the committee should be to:

a. advise on and recommend to the judge the minimum requirements and terms of the contract for indigent defense services;

Washington Defender Association, Standards for Public Defense Services

Standard Five. Administrative Expenses

Contracts for public defense services should include the administrative costs associated with providing legal representation. These costs may include travel, telephones, law library, financial accounting, case management systems, the reporting requirements imposed by these standards, and other costs necessarily incurred in the day to day management of the contract.

Standard Eighteen. Guidelines For Awarding Defense Contracts

The county or city should award contracts for public defense services only after determining that the attorney or firm chosen can meet accepted professional standards. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Contracts should only be awarded to:

a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District courts, Superior Court or Juvenile court), or

b) to a firm where at least one attorney has one year's trial experience.

City attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.

2. Compensation

Commentary. Only two standards are directed at the compensation paid to the attorney working for the contractor. The NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services would pay contractor attorneys at a rate equal to attorneys who contract with other government agencies. The Indiana standards would compare salaries to those of the prosecuting attorney's office.

Washington state standards do not address attorney salaries, but instead direct attention to the problem of extraordinary cases.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

…

(b) attorneys at a minimum rate which reflects the following factors:

(1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;

(2) the time and labor required to be spent by the attorney;

(3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11 Special Case Compensation

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be determined in the contract.

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

G. Compensation of Salaried or Contractual Public Defenders

The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage and travel.

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

…

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

3. Contract Termination and Minimum Term

Commentary. Contract providers can be particularly vulnerable to political pressures. Conflict between aggressively defending the client and protecting the economic self-interest of the contractor is an especial danger. However, provisions can be put into the contract to reduce these pressures. Hence, standards are needed to ensure that jurisdictions do not void the conflict unless good cause is demonstrated and that a minimum term for the contract is provided for. Of the one national and three state standards here, the NLADA, Georgia, and Washington standards agree on requiring good cause for termination. The North Dakota standards provide only for 90 days' notice before termination without cause. The NLADA and Georgia standards provide for a minimum term for the contract, and the North Dakota standards speak to the question of what happens to cases previously assigned if the contract is terminated. See also standards relating to the independence of the defense function *supra*. Other related standards include Arkansas Public Defender Commission, Minimum Standards, recommending a minimum two-year contract period.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-4 Term of Contract

Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5 Definition of "Good Cause"

The Contract shall define "good cause" such as is required for removal of the Contractor (Guideline III-4) as: failure by the contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

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

Guideline 2.7 Contract Attorney Program

The local committee may elect to provide indigent defense services through a contract with an individual lawyer, or group of lawyers. Contracts for legal defense services should be awarded for at least a one year term. Removal of the Contractor short of the agreed term should be for good cause only.

The contract shall define "good cause" such as is required for removal of the Contractor as: failure by the Contractor to comply with the terms of the contract to an extent that the

delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interest of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Guideline 4. Model Contract

…

10. Contract Term:

The duration of this contract is from July l, _____ through June 30, _____ (preferably two years) and is renewable for an additional period of _____ at the option of both parties in writing on the following terms:

All necessary counsel services listed in Section 4 above for cases or proceedings for which appointments are made to the FIRM on or before June 30, _____ must be completed as part of this contract.

…

22. Termination of Contract:

Any party may terminate this CONTRACT immediately for cause at any time. Any party may terminate the CONTRACT without cause by 90 days written notice. All cases assigned and not completed within 90 days after expiration or notice of termination of the CONTRACT may be completed following consultation between the parties:

A. By the FIRM assigned to the case before expiration of the CONTRACT;

B. On an assigned counsel basis;

C. By inclusion of the uncompleted cases in any subsequent contract; or

D. Through any combination of A, B, or C.

Washington Defender Association, Standards for Public Defense Services

Standard Sixteen. Cause for Termination or Removal of Attorney

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney's contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney-client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

4. Contracting Procedures

Commentary. In order to minimize political involvement, some standards outline the procedures to be used for awarding contracts or require jurisdictions to determine and publish procedures for awarding contracts. In addition to the standards here, the North Dakota guidelines elsewhere in this volume detail contracting procedures. Indiana Standard L also calls for publishing the procedures for awarding of contracts, and Washington State Standard 18 prohibits certain classes of government officials from being involved in selecting the contractors.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.2. Contracting parties and procedures

(a) The contracting authority and each contractor should be identified in the contract. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.

(b) The contracting authority should ensure the professional independence of the contractor by means of a board of trustees, as provided in standard 5-1.3.

(c) The contracting parties should avoid provisions that create conflicts of inte rest between the contractor and clients.

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

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services under I.C. 33-9-10, in the event that such contracts are used. The plan shall provide that contracts not be awarded primarily on the basis of costs and shall otherwise ensure quality legal representation. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-31-1. Awarding the Contract

(a) The board shall not pursue a contract through the competitive b idding process but only through negotiation.

(b) Contracts to individual attorneys or firms shall be awarded on the basis of:

(1) the experience and qualifications of the attorney or firm;

(2) the willingness and ability of the attorney or firm to comply with the performance criteria and statistical reporting provisions of the contract; and

(3) the negotiated rate of compensation.

5. Contract Provisions

Commentary. The heart of defense services contracting is, of course, the contract elements. Several standards direct detailed attention to this topic. The most detailed is Part III of the NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. See also, Vermont DefenderGeneral, "Contract for Personal Services."

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.3. Elements of the Contract for Services

(a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the co ntractor.

(b) Contracts for services should include, but not be limited to, the following subjects:

(i) the categories of cases in which the contractor is to provide services;

(ii) the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;

(iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;

(iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

(v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;

(vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;

(vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;

(viii) limitations on the practice of law outside of the contract by the contractor;

(ix) reasonable compensation levels and a designated method of payment;

(x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;

(xi) supervision, evaluation, training and professional development;

(xii) provision of or access to an appropriate library;

(xiii) protection of client confidences, attorney-client information and work product related to contract cases;

(xiv) a system of case management and reporting;

(xv) the grounds for termination of the contract by the parties.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Part III: Elements of a Contract for Public Defense Services

Each of the following Guidelines should be included in a contract for public defense services. If contracts are to be awarded through some kind of bidding, RFP, or other competition, these should serve as the basis for the RFP or bidding document. Contracts should be awarded on the basis of the completeness and adequacy of a Contractor's consideration of these Guidelines.

Guideline III-1 Parties

The contract should identify the Contracting Authority, the Contractor, and any other public or private person, agencies or organizations which are party to the contract.

Guideline III-2 Scope of Contract

The contract should specify the categories of cases in which the Contractor is to provide services.

Guideline III-3 Determination of Eligibility

The Contract should specify the procedure by which client financial eligibility is to be determined and the person, officer or agency responsible for making the determination initially and at subsequent review proceedings. The contract should either incorporate eligibility standards by reference to those in accepted use or it should specify the eligibility standard applicable in all cases handled by the Contractor. The contract should provide that any information or statements of the defendant obtained in the process of determining eligibility shall be considered confidential and privileged.

Guideline III-4 Term of Contract

Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5 Definition of "Good Cause"

The Contract shall define "good cause" such as is required for removal of the Contractor (Guideline III-4) as: failure by the Contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone, shall not necessarily constitute "good cause" for removal.

Guideline III-6 Allowable Caseloads

The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time on handling a mix of cases should handle a proportional caseload.

Guideline III-7 Minimum Professional Qualifications

The Contract should specify minimum qualifications for staff lawyers. These qualifications should be developed by the Advisory Board which screens contract applications. If defense services are to be provided in more than one category of cases, the contract should specify different minimum-qualifications for each category of cases for which the Contractor will provide services.

Guideline III-8 Support Staff and Forensic Experts

The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important in ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

(a) Secretaries. The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.

(b) Social Service Personnel. The contract should provide an adequate number of social service personnel to assist…clients.

(c) Mental Health Professionals. The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.

(d) Forensic and Other Experts. The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9 Investigators

The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorneys' selection, supervision, or direction of investigators.

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

(a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction;

(b) attorneys at a minimum rate which reflects the following factors:

  (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;

  (2) the time and labor required to be spent by the attorney;

(3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11 Special Case Compensation

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be determined in the contract.

Guideline III-12 Case and Work-Overload

The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

(a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or

(b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or

(c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline III-12 Duration of Representation

The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms of the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act of the appeals court which is accepted as final on the merits by defense counsel and his or her client.

Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

Guideline III-13 Conflicts of Interest

The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

(a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and

(b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and

(c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Guideline III-14 Payment

The contract should provide that payments to the Contractor be made monthly or at times agreed to by the parties without regard to the number of cases closed in the period.

Guideline III-15 Financial Records

The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evalu ation or audit.

Guideline III-16 Supervision and Evaluation

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences. A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

Guideline III-17 Professional Development

The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training pr ogram.

Guideline III-18 Standards of Recommendation

The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

Guideline III-19 Confidentiality

The contract should prohibit the Contractor from releasing confidential attorney-client information or work product related to any case, except under a legal court order to do so, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent attorney on the case.

Guideline III-20 Insurance

The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys' representation of defendants.

Guideline III-21 Retention of Files

The contract shall provide that the Contractor provide for retention of client files in a manner that affords protection of the client's confidentiality interests (see Guideline III-17) for a specified period of time after the conclusion of the case at least equal to the period provided in rules governing all other lawyers' files in the jurisdiction but in no event less than five years.

Guideline III-22 Management System

The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information system shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, III-14, and III-16 partic ularly.

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

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services under I.C. 33-9-10, in the event that such contracts are used…. The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients. Contracts for services should include, but not be limited to, the following subjects:

1. the categories of cases in which the contractor is to provide services;
2. the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
3. the basis and method for determining eligibility of persons served by the contract;
4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
5. a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
6. supervision, evaluation, training and professional development;
7. provision of or access to an appropriate library;
8. a system of case management and reporting; and

9. the grounds for termination of the contract by the parties.

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

Standard IX. Compliance with Standards of Professional Responsibility

. . .

B. Evaluation Criteria

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

…

3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:

…

(c) no conflicts of interest exist between each lawyer's legal work unrelated to the contact and the interests of any client assigned to the defense organization?

4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations' clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?

5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?

6. Does the defense organization have adequate pr ocedures to ensure that its lawyers do not otherwise abuse the attorney–client relationship to create fee-generating opportunities?

…

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Guideline 4. Model Contract for Counsel Service for Indigent Defendants

…

2. Services Covered:

The FIRM shall provide legal services for indigent defendants in the following categories of case:

a. All cases in which a misdemeanor is charged;

b. All cases in which a felony is charged;

…

g. Extradition proceedings, pursuant to Chapter 29-30.3, NDCC;

h. Uniform Post Conviction Act proceedings, pursuant to Chapter 29-32.1, NDCC ;

…

k. Civil and criminal contempt proceedings;

l. Appeals to the North Dakota Supreme Court in all categ ories of cases listed above;

m. Retrials of all categories of cases listed above remanded by the North Dakota Supreme Court;

…

q. Three cases on appeal to the North Dakota Supreme Court which were not tried in the lower courts by the FIRM. [The availability of representation for an indigent appellant may be necessary for a variety of reasons, including the possibility that an indigent defendant may request different counsel to prosecute an appeal, originally assigned counsel may withdraw before the decision to prosecute an appeal is made, or a defendant may expend all personal funds securing representation in the lower court and as a result is indigent for purposes of prosecuting an appeal. In these situations, or others not anticipated, it is desirable to provide access to representation for an indigent appellant whose case was not tried in the lower court by the FIRM.]

3. Services Excluded:

The following services are excluded from this contract:

a. Any cases on appeal from a municipal court in the cou nty;

b. Any cases on appeal to the North Dakota Supreme Court which were not tried in the lower courts by the FIRM with the exception of three (3) cases addressed in paragraph 2(q) of this contract;

c. Appeals to the United States Supreme Court; and

d. Habeas corpus proceedings in state courts and in United States District Courts and Courts of Appeal.

4. Representation:

Representation will be made at all stages of the proceeding until completed. The FIRM shall include necessary representation of each indigent defendant in matters of investigation, trial preparation, preparation and filing of motions, arguments of motions, personal counsel and referral to other agencies when appropriate, referral to appropriate agencies, trial, post-trial motions, and motions, briefing and argument in the North Dakota Supreme Court and any retrials following an appeal. This includes preparation of all briefs, documents, letters, research and any and all things regarded as adequate representation of the indigent party.

13. Costs and Expenses:

The FIRM will pay for all costs, fees and expenses incurred in providing the contract services, except for the following expenses which will be paid by the STATE (and COUNTY):

a. Witness fees and expenses, including expert witnesses (court approval required for expenses over $500);

b. Investigative services (court approval required for expenses over $500) ;

c. Depositions;

d. Transcripts;

e. Service of process fees;

f. Collect telephone charges from defendant;

g. Long distance telephone charges;

h. The first $40 in copying charges, including court records and medical records;

i. Copying charges for briefs on appeal;

j. Costs of medical and psychiatric evaluations when ordered or approved by the court;

k. Interpreters for foreign languages and for the visually or hearing impaired;

l. Necessary travel, meals and lodging expenses incurred while investigating or trying cases or proceedings, including cases removed from the county covered in this contract and tried in any other county. (***Alternative.*** Necessary travel, meals and lodging expenses incurred while investigating or trying cases or proceedings, and necessary travel, meals and lodging expenses for cases removed from the county covered by this contract and tried in any other court.)

Mileage, meals and lodging expenses will be paid at the same rate as allowed by Section 54-06-09, NDCC, for state employees.

Costs and expenses in cases and proceedings which are prosecuted in district court will be paid by the STATE. Costs and expenses in cases and proceedings which are the responsibility of the county will be paid by the COUNTY.

14. Special Case Compensation:

The FIRM may apply to the Presiding Judge of the judicial district for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation. The Presiding Judge shall have complete discretion in determining the amount of additional compensation to be paid, if any. In no case will the Presiding Judge approve additional compensation where the number of hours expended on the case by the FIRM does not exceed _____ hours. Other factors that will be considered by the Presiding Judge in making its determination include the complexity of the legal issues and the intricacy of the factual situation involved in the case.

Applications must be in writing and submitted to the Presiding Judge at the completion of the representation of the case, unless the financial burden of the case is such that it may adversely affect the ability of the FIRM to provide adequate representation in the case. The application must include the individual case records maintained in the case under Section 17 of this contract and a statement by the FIRM of the justification for the application.

6. Prohibition on Substitution of Attorneys

Commentary. Both Indiana and Washington limit the use of counsel who are not named or otherwise included in the contract.

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

L. Contracts

…Contracts for services should include, but not be limited to, the following subjects:

4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

Washington Defender Association, Standards for Public Defense Services

Standard Twelve. Substitution of Attorneys or Assignment of Contracts

The attorney engaged by local government to provide public defense services should not sub-contract with another firm or attorney to provide representation and should remain directly involved in the provision of representation. If the contract is with a firm or office, the contracting authority should request the names and experience levels of those attorneys who will actually be providing the services, to ensure they meet minimum qualifications. The employment agreement shall address the procedures for continuing representation of clients upon the conclusion of the agreement.

7. Related Provisions

Commentary. Related standards address limits on private practice, nondiscrimination guarantees by the contractor, and exclusion of capital cases from the contract. The Washington nondiscrimination requirement is probably redundant in states with a generally applicable policy of requiring government contractors to act in a nondiscriminatory manner.

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

Guideline 2.7 Contract Attorney Program

Inclusion of capital felonies where the death penalty is sought as a portion of the contract is prohibited.

Washington Defender Association, Standards for Public Defense Services

Standard Thirteen. Limitations of Private Practice of Contract Attorneys

Contracts for public defense representation with private attorneys or firms shall set limits on the amount of privately retained work which can be accepted by the contracting attorney. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard Seventeen. Non-discrimination

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or handicap. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.

Appendix:
NLADA Defender Training and Development Standards

1. Defender Training Structure & Funding

Standard 1.1 Training Is Essential

The defender organization must provide training opportunities that insure the delivery of zealous and quality representation to clients.

Standard 1.2 Written Training Plan

Every defender organization must have a clear, written plan, which includes specific goals and objectives, for offering training opportunities to all employees.

Standard 1.3 Adequate Financial Resources

Defender organizations must have adequate governmental funding for the resources to provide high quality training opportunities consistent with these standards.

Standard 1.4 Training Director and Staff

The leadership of the organization must ensure that the training efforts are administered and overseen by a person or persons who have training as a specific job duty, and whose other work duties are adjusted to ensure that the training responsibilities can be competently directed. Such person(s) should be provided with resources and staff to accomplish these responsibilities.

Standard 1.5 Organizational Position of Training Director

The organization's leadership team should demonstrate a firm and consistent commitment to training as an integral part of the office's practice. The person who is responsible for training should be a member of the organization's leadership team or have a meaningful voice in its decisions with regard to the organization's practices.

Standard 1.6 Director and Staff Qualifications

All employees who have training responsibilities should have abilities, experience and attitudes commensurate with their training responsibilities and assignments.

2. Defender Training Needs Assessment

Standard 2.1 Regular Needs Assessments

Every defender organization should, on a regular basis, identify and analyze its organizational and employee training needs to ensure that training efforts are responsive to those needs.

Standard 2.2 Training Needs Assessment for Organization and for Employees

Training needs assessments for the defender organization should be the responsibility of the training director. The supervision and evaluation of employees should include an annual training needs assessment for each employee.

3. Learning Objectives and Curriculum

Standard 3.1 Organizational Curriculum

The defender organization should have an organizational curriculum on how to provide zealous and quality representation to clients, which includes appropriate learning objectives for all its employees from entry level staff through the most experienced staff. Based upon the needs assessment findings, the defender organization should create a comprehensive curriculum with clear learning objectives for each of its training and development efforts.

Standard 3.2 Ethics and Professional Responsibility

The defender organization should offer training and develop materials on ethics and professional responsibility, and should include discussion of ethics and professional responsibility issues as they relate to intended learning objectives in training all employees.

4. Learning Experience and Educational Methods

Standard 4.1 Selection of Methods

The intended learning objectives in training efforts should determine the selection of instructional methods and strategies, the choice of accompanying program materials, the use of any technological aids which may be appropriate, and the length and location of the training.

Standard 4.2 Training Staff and Qualifications

Defender organizations' trainers should be qualified by education, intellect, experience, teaching ability, and temperament to provide instruction which promotes the achievement of intended learning objectives. The defender organization should encourage employees to serve as trainers and should provide them with appropriate training.

Standard 4.3 Materials and Learning Technologies

Defender organizations' trainers should use current learning technologies and media devices to augment the learning experience and promote the achievement of intended learning objectives. The defender organization should distribute instructional and

comprehensive reference materials which promote the achievement of intended learning objectives.

Standard 4.4 Learning as an Ongoing Process

Defender organizations should encourage all employees to continue the learning process outside formal programs offered by the organization.

Standard 4.5 Ongoing Publications and Distribution of Training Materials

Defender organizations should develop and regularly publish independent training materials. These should include both permanent resources and continuing education on developments in the law. If resources are available, the defender organization should obtain and/or produce and distribute audio tapes, videotapes, and computer assisted instruction for its employees.

Standard 4.6 Maintenance of Training Resources

Defender organizations should maintain an accessible library of training materials developed by defenders within the organization as well as seek to collect training materials from outside resources which would be of benefit to its employees.

5. Learning Environment

Standard 5.1 Physical Setting

The physical environment and location for training should be conducive to learning and consistent with achieving intended learning objectives. Defender organizations should have adequate and well-trained staff at the training site to assist the training director with logistics and to facilitate the presentation of training activities.

Standard 5.2 Joint Training

Defender organizations should, when appropriate, pursue joint training opportunities with other members of the criminal justice system, the legal profession, and the community at large.

Standard 5.3 Limitations on Use of Defender Resources

Consistent with the duty owed to clients, the adversarial nature of the criminal justice system, and the promotion of full learning, some defender training programs and materials should not be available to non-defenders.

6. Evaluation of Learning; Accreditation

Standard 6.1 Systematic Evaluation of Programs and Materials

Defender organizations should conduct systematic and continuous evaluations of the effectiveness of its programs and materials to assess content, the achievement of intended learning objectives, program design, methods of instruction, quality of presenters, and impact on the participants' future performance. These regular internal evaluations to training activities should be conducted by the training director for purposes of planning and improving training activities. In addition, the defender organization should seek an

independent evaluation of the office's training efforts and the strategic training plan by a person experienced in training.

Standard 6.2 Defender CLE Accreditation

Defender organizations should strive to satisfy the continuing legal education requirements of its staff. Where appropriate, the defender organization should seek accreditation by the jurisdiction's continuing legal education authority as a continuing legal education provider.

7. Death Penalty Defense and Other Complex and Specialized Practice Areas

Standard 7.1 Death Penalty Defense

Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and post-conviction.

Standard 7.2 Complex and Specialized Practice Areas2

Defender organizations should provide special training to employees responsible for the representation of clients with complex or especially difficult cases, as well as for those employees handling specialized areas of practice.

8. Organizational Development

Standard 8.1 Management and Leadership Skills

The defender organization should provide all supervisors and leaders with training in management, supervisory and training skills, as well as in leadership principles.

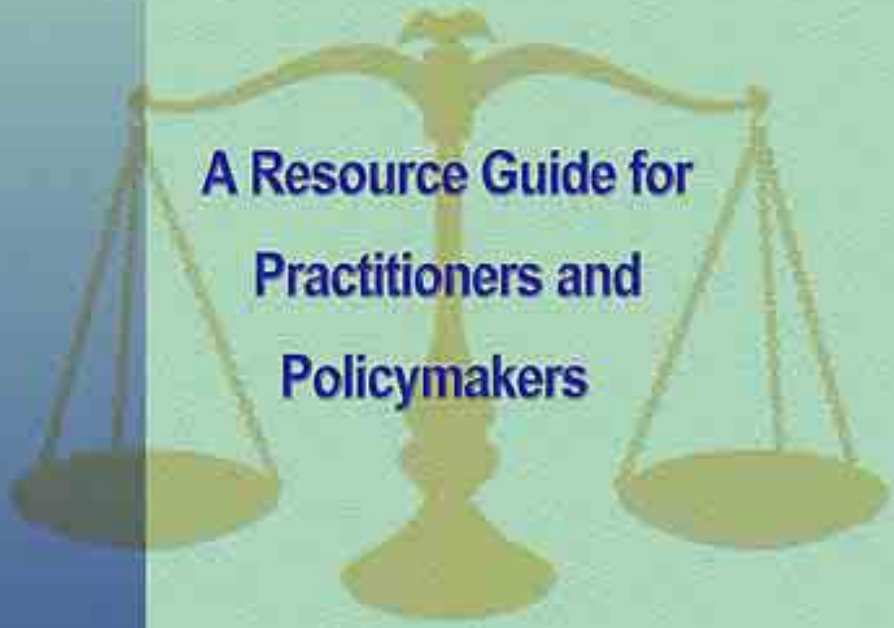
9. Quality Assurance

Standard 9.1 Quality Assurance

Defender organizations should develop and implement methods to insure zealous and quality representation for clients.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems



A Resource Guide for Practitioners and Policymakers

Volume II
Standards for
Attorney Performance

December 2000

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Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has said, "I believe this effort is essential if our nation is to fulfill our obligation under *Gideon v. Wainwright* to provide every criminal defendant charged with a serious crime with competent counsel." Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar "to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices." Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

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

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

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

Mary Lou Leary
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Acknowledgments

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7. Cooperation with Appellate Counsel
8. Related Issues

Introduction

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

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

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

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

Sponsorship and Development

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

Methodology

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

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

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

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

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

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

List of Standards and Table of Key Elements

Standards Included

National

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

National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation*, 1997

State and Local

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

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

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

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

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

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

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

Key Elements

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

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

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

A. Function of Standards

The standards in this section address the following topics:

1. Use of standards
2. Functions of defense counsel

1. Use of Standards

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.1 The Function of the Standards

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

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

IV. Performance Standards and Complaint Procedures

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

2. Functions of Defense Counsel

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2 The Function of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Pe nalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for rem edial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

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

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by lawyers. Lawyers should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.

(b) All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Such qualified lawyers should not assert or announce a general unwillingness to appear in criminal cases. Law firms should encourage partners and associates to become qualified and to appear in criminal cases.

(d) Such qualified lawyers should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law, representing the accused is likely to result in an unreasonable financial burden on the lawyer, or the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.1 Role of Defense Counsel

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

(a) All counsel should abide by the policies adopted by the Connecticut Public Defender Services commission and the Chief Public Defender in regard to the representation of a client.

(b) Counsel should zealously represent and advocate for each client and render effective assistance of counsel.

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

(d) Counsel should act with reasonable diligence and promptness in representing a cl ient.

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

1.1 Role of Defense Counsel

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

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

Guideline 1.1 Role of Defense Counsel

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

B. Attorney Qualifications

Included here are standards that require the following

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

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

1. Adequate Training and Experience

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.2 Education, Training and Experience of Defense Counsel

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

b. Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 2.1. Training

(a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.

(b) Counsel has a continuing obligation to stay abreast of changes and developments in criminal law and criminal procedure.

(c) Counsel has a continuing obligation to continue his/her legal training, professional development and education through the weekly review of the Connecticut Law Journal and regular attendance at public defender, regional or national training programs and seminars which are offered.

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

1.2 Education, Training and Experience of Defense Counsel

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

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

Guideline 1.2 Education, Training, and Experience of Defense Counsel

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

(b) When handling a criminal matter, counsel should have sufficient experience, training, and/or supervision to provide quality representation. The Department should afford sufficient training and supervision to enable lawyers to provide quality represent ation.

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

Principle 3

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

…

3. acquire and maintain appropriate experience, skills and training

Standard 1.1—Prerequisites for Representation

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

…

Implementation

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

Standard 2.1—Prerequisites for Representation

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

…

Implementation

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

…

3. Counsel should visit at least two correctional, juvenile or treatment facilities .

2. Adequate Time and Resources

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.3 Delays; Punctuality; Workload

…

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3 General Duties of Defense Counsel

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

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

1.2 General Duties of Defense Counsel

…

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

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

Guideline 1.3 General Duties of Defense Counsel

(a) When agreeing to act as counsel or accepting appointment, counsel has an obligation to work with the Department to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If counsel believes that counsel is unable to offer quality representation in a particular case, counsel shall immediately advise counsel's supervisor who shall review the situation to ensure that the client receives quality representation. If counsel withdraws due to a conflict, counsel shall immediately inform the client, and shall arrange for and cooperate with new counsel.

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

Principle 3

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

…

4. devote adequate time and resources to the case

Standard 1.1 Prerequisites for Representation

…

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

C. Attorney Overall Responsibilities

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

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

1. Acting Diligently and Promptly

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.3 Delays; Punctuality; Workload

(a) Defense counsel should act with reasonable di ligence and promptness in representing a client.

(b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

(c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

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

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

1.3 General Duties of Defense Counsel

…

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

2. Acting Ethically

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2 The Functions of the Defense Counsel

…

(c) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(d) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(e) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(f) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

Standard 4-1.3 Delays; Punctuality, and Workload

…

(c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

Standard 4-6.2 Plea Discussions

...

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

(d) Defense counsel should not seek concessions favorable to one client by an agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.1 Role of Defense Counsel

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 1.1. Role of Defense Counsel

…

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

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

XI. Compliance with Standards of Professional Responsibility

A. Performance Standard: Quality representation requires that defense organizations and the lawyers they employ adhere to all standards of professional r esponsibility.

B. Evaluation Criteria

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

   Specific Guideline:

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

2. Does the defense organization maintain adequate procedures for protecting attorney–client confidences and work product?

3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:

   (a) each lawyer's workload remains within the limitations established in Section V of these General Requirements, adjusted in proportion to the amount of legal work unrelated to the contract a particular lawyer a ccepts?

   (b) legal work performed outside the contract does not adversely affect the quality of representation provided to indigent defendants under the aegis of the defense organization?

   (c) no conflicts of interest exist between each lawyer's legal work unrelated to the contract and interests of any client assigned to the defense organization?

   Specific Guidelines:

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

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

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

4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations' clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?

5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?

6. Does the defense organization have adequate procedures to ensure that its lawyers do not otherwise abuse the attorney–client relationship to create fee-generating opportunities?

7. Does the defense organization have adequate procedures for receiving and responding to client complaints?

8. Does the defense organization maintain adequate procedures for identifying and resolving ethical issues?

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

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

Principle 3

…

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

Washington Defender Association, Standards for Public Defense Services

Standard Two: Duties and Responsibilities of Counsel

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

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

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.4 Public Statements

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

D. Lawyer–Client Relationship

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

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

1. Meeting with Client as Soon as Practicable

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.2 Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

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

1.3 General Duties of Defense Counsel

…

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

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

Guideline 1.3 General Duties of Defense Counsel

…

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

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

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

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

Implementation

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

Standard 1.4 Initial Client Interview

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

Implementation

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

2. Preparing for Initial Interview

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

a. *Preparation:*

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

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

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

Standard 1.4—Initial Client Interview

Implementation

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

3. Orienting Client and Explaining Role of Counsel

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.1 Establishment of Relationship

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

…

b. *The Interview*:

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

…

3. Information to be provided the client includes, but is not limited to:

A. an explanation of the procedures that will be followed in setting the conditions of pretrial release;

B. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

C. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

D. the charges and the potential penalties;

E. a general procedural overview of the progression of the case, where poss ible.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.2. Duty to Keep Client Informed

…

(c) Counsel should inform and explain to the client that he/she has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify and, to not be compelled to incriminate him/herself.

(d) Counsel should explain to the client the court procedures.

(e) Counsel should explain the attorney–client privilege t o the client and explain to the client that he/she is not required to speak to anyone regarding the case without counsel present.

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

Guideline 1.3

…

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

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

Standard 1.4 Initial Client Interview

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

Implementation

…

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

a. the facts surrounding the allegations against or affecting the client;

b. any possible witnesses who should be located;

c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;

d. any evidence that should be preserved; and

e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.

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

a. the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;

b. the role of counsel and the defense function;

c. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

d. a general procedural overview of the likely progression of the case;

e. the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;

f. an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;

g. how and when counsel can be reached;

h. when counsel will see the client next;

i. realistic answers, where possible, to the client's most urgent questions; and

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

4. Obtaining All Facts from Client

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.2 Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

a. *The Interview:*

…

3. Information to be provided the client includes, but is not limited to:

   A. an explanation of the procedures that will be followed in setting the conditions of pretrial release;

   B. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

   C. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

   D. the charges and the potential penalties;

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

…

c. *Supplemental Information*

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

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.1. Disposition of the Case

(a) Counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Counsel should not intentionally unde rstate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his/her pleas.

(c) Counsel should caution the client to avoid communication about the case with witnesses or other individuals, except with the approval of counsel.

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

2.2. Initial Interview and Preparation for Bail Hearing

…

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

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

Guideline 2.2 Initial Interview

(a) *Preparation:*

Prior to conducting the initial interview the attorney, should, w here possible:

(1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;

(2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by pretrial service agencies concerning pretrial release, and law enforcement reports that might be available;

(3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

(5) be familiar with any procedures available for reviewing the judge's setting of bail.

(b) *The Interview:*

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

(2) Information that may be acquired includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

(B) the client's physical and mental health, educational, and armed services records;

(C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;

(E) the ability of the client to meet any financial conditions of release;

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals.

(3) Information that may be provided to the client includes, b ut is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and the potential penalties;

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

(c) *Additional Information:*

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

(1) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved;

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

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

Standard 1.3 Role of Counsel

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

Implementation

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

Standard 1.4 Initial Client Interview

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

Implementation

…

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

5. Advising Client about Case and His or Her Actions

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4.3-7 Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in o r knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except the defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

Standard 4-5.1 Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

6. Overcoming Language and Other Barriers to Communication

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.2 Initial Interview

…

b. *The Interview:*

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

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

1.3 General Duties of Defense Counsel

…

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

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

Principle 3

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

…

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

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

…

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

7. Protecting Confidentiality of Communication

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.1 Establishment of Relationship

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

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.3. Protecting Confidentiality

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

8. Keeping Client Informed of Case Progress

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.8 Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3 General Duties of Defense Counsel

…

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 3.2. Duty to Keep Client Informed

(a) Counsel should keep the client informed of any developments in the case and the progress of the preparation of the defense, and provide sufficient information to permit intelligent participation in decision making by the client.

(b) Counsel should comply with reasonable requests for information from the client and reply to client correspondence and telephone calls.

(c) Counsel should inform and explain to the client that he/she has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify; and to not be compelled to incriminate him/herself.

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

Principle 3

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

…

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

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

…

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

9. Specifying Client Versus Attorney Decisions

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and other are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

(iv) whether to testify in his or her own behalf; and

(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

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

b. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.

c. Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.

d. Counsel should not accept any plea agreement without the client's express authorization.

e. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

Guideline 6.3 The Decision to Enter a Plea of Guilty

…

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

Guideline 7.5 Presenting the Defense Case

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

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.2. Control and Direction of the Case

(a) Counsel should advise the client of those decisions which are ultimately for the accused, which are:

(i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive a jury trial;

(iv) whether to testify in his/her own behalf;

(v) whether to appeal;

(vi) whether to apply for sentence review.

(b) Counsel should also advise the client of th e client's right to assert certain defenses which include extreme emotional disturbance or insanity, when applicable.

(c) Counsel should advise the client of the existence of any lesser included offense.

(d) Counsel should advise the client that strategic and tactical decisions will be made by counsel.

(e) Counsel should discuss a client's decision whether to testify at trial.

Guideline 5.3. Plea Negotiations

…

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

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

1.3. General Duties of Defense Counsel

…

(f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.

(g) The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.

5.1 Plea Negotiations

…

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

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

5.2 Client Decisions

(a) Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client that he/she will defend the client vigorously.

(b) Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial.

(c) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were to proceed to trial on the merits.

6.3 Bench Trial or Jury Trial

(a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.

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

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

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

(a) Defense counsel should consider the client's competence to stand trial or to enter a plea whenever defense counsel has a good faith doubt as to the client's competence to proceed in the criminal case. Counsel may move for evaluation over the client's objection, and if necessary, counsel may make known to the court those facts which raise the good faith doubt of competence to proceed in the criminal case.

(b) Where competency is at issue, counsel has a continuing duty to review and prepare the case for all court proceedings. Counsel should develop information relevant to the issue of dangerousness.

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

Standard 1.3 Role of Counsel

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

Standard 2.3 Role of Counsel

…

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

10. Identifying and Resolving Conflicts of Interest

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.5 Conflicts of Interest

a Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

b. Defense counsel should disclose to the defendant at the earliest feasi ble opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

c. Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants repr esented and, in either case, that :

   (i) the several defendants give an informed consent to such multiple representation; and

   (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple cl ients.

d. Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

e. In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

   (i) the accused consents after disclosure;

   (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and

   (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of conf identiality.

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

f. Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

g. Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

h. Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

i. Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.

j. Defense counsel should not act a s surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

k. Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 1.3

…

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 4.1. Conflicts

(a) Counsel should adhere to the Rules of Professional Conduct regarding conflicts of interest

(b) Counsel should be cognizant of the existence of any potential and actual conflicts of interest which would impair counsel's ability to represent a client, such as if…one client's interests are materially adverse to those of a current or former client.

(c) Except for preliminary matters such as arraignment or an initial hearing, counsel should not represent a client when a conflict of interest exists between co-defendants or multiple defendants such that the representation of one client *will be directly adverse* to the other client.

(d) Counsel should not represent a client if the representation of that client may materially limited by the lawyer's responsibilities to another current or former client or to a third person, or by the lawyer's own interests, unless:

  (i) The lawyer reasonably believes the representation will not be adversely affected; and

  (ii) The client consents after consultation, which consent should be documented by counsel in counsel's file. When the representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.

(e) Counsel who has formerly represented a client should not thereafter use information relating to the former representation to the disadvantage of a former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(f) Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case, unless required by the Rules of Professional Conduct.

(g) The filing or existence of a habeas corpus petition or grievance against counsel in regard to his/her quality of representation shall not create a conflict of interest per se. Withdrawal by counsel from the representation of a client under such circumstances should occur if ordered by the court upon motion by the client or if counsel is of the opinion that the filing or existence of the habeas corpus petition or grievance will interfere with counsel's ability to adequately represent the client.

(h) Counsel should withdraw upon the filing of a civil lawsuit against counsel by a client alleging malpractice, a finding of probable cause in connection with a grievance complaint, or if counsel has been scheduled to testify at a habeas corpus trial in which (a) counsel is the subject of the claim of ineffective assistance of counsel which has been raised in the petition; and, (2) the pleadings have been closed.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-21-3. Withdrawing from cases

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

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

1.3. General Duties of Defense Counsel

…

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

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

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

…

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

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

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

Implementation

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

E. Initial Case Actions

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

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

1. Pretrial Release and Other Prompt Actions

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-3.6 Prompt Action to Protect the Accused

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.1

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

Guideline 2.3 Pretrial Release Proceedings

a. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

b. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

c. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

d. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client

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

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

2.1 Arraignment

(a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, and should review the client's probation record paying particular attention to any alleged defaults.

(b) Counsel should be familiar with the law regarding pre-trial detention on the grounds of "dangerousness." If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summonsing witnesses, including the complainant.

2.2 Initial Interview and Preparation for Bail Hearing

(a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs.

(b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.

(c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of pretrial conditions of release. Such information should generally include:

(1) client's residence and length of time at that residence;

(2) family (names, addresses and phone numbers);

(3) health (mental and physical) and employment background;

(4) explanation of any court defaults and any other information on the record;

(5) probation/parole status;

(6) possible sources of bail money;

(7) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred.

(d) Such information should be verified whenever possible.

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

2.3 Bail or Detention Hearing

(a) Counsel has an obligation to vigorously attempt to secure the pre trial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.

(b) Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing.

(c) Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings, and, where appropriate and possible, be ready to present "proffers" that address those issues.

(d) Counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pre-trial probation, such as electronic monitoring, "stay rders, curfews, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties.

(e) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing.

(f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and the sheriff to any special needs of the client, e.g., medical problems, and request the court to order appropriate measures.

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

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

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

Guideline 2.3 Pretrial Release Proceedings

(a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(b) Counsel should adequately inform the defendant of his/her conditions of release after such conditions have been set.

(c) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(d) If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post su ch assets.

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

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

Standard 2.4 Obligations Of Counsel Regarding Pretrial Release

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

Implementation

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

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

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

2. Other Client Needs

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 2.3 Pretrial Release Proceedings

…

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

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

Standard 1.4—Initial Client Interview

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

   …

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

Standard 2.4—Obligations Of Counsel Regarding Pretrial Release

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

3. Non-Testimonial Evidence

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.3 Prosecution Requests for Non-Testimonial Evidence

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

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

Guideline 3.3 Non-Testimonial Evidence

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

F. Investigation and Preparation

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

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

1. Duty to Investigate; Scope

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.1 Duty to Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

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

b. Sources of investigative information may include the following:

1. *Charging documents*

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

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

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

C. any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

2. *The accused*

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

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

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

   C. collect information relevant to sentencing.

3. *Potential witnesses*

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

(a) Counsel should conduct a thorough independent investigation prior to trial, including investigation of potential witnesses, physical evidence and the scene of the alleged crime.

(b) To the extent possible, counsel should obtain expert reports, witness statements, police and law enforcement reports and any other potential information relating to the offense.

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

4.1 Investigation

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

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

Guideline 4.1 Case Review and Preparation

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

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

(1) charging documents

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

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

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

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

(2) the accused

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

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

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

(C) collect information relevant to sentencing.

(3) potential witnesses

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

(4) the police and prosecution

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

(5) the courts

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

(6) physical evidence

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

(7) the scene

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

(8) expert assistance

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

(A) prepare a defense;

(B) understand the prosecution's case;

(C) rebut the prosecution's case;

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

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

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

Standard 2.6—Independent Investigation

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

Implementation

Counsel should:

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

j. reports or notes of searches or seizures and the circumstances of any searches or seizures.

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

2. Methods of and Limits on Interviewing Witnesses

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.2 Illegal Investigation

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

Standard 4-4.3 Relations with Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

…

b. Sources of investigative information may include the following:

. . .

3. *Potential witnesses*

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

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

Standard 2.6—Independent Investigation

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

Implementation

Counsel should:

…

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

3. Use of Experts

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.4 Relation with Expert Witnesses

(a) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) Defense counsel should not pay an excessive fee for the purpose of influencing an expert's testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

…

b. Sources of investigative information may include the following:

…

7. *Expert assistance*

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

A. the preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebut the prosecution's case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

…

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

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

Standard 2.6—Independent Investigation

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

4. Preparation and Submission of Discovery Requests

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.1 Investigation

…

b. Sources of investigative information may include the following:

…

4. *The police and prosecution*

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

Guideline 4.2 Formal and Informal Discovery

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

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

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

…

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

(d) Counsel should consider seeking discovery of the following items:

(i) potential exculpatory information;

(ii) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

(iii) All oral and/or written statements by the accused, and the details of the circumstances under which the statements were made.

(iv) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

(v) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

(vi) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

(vii) statements of co-defendants.

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

4.5 Discovery Motions

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

(a) details of all identification procedures, including examination of any photographs shown and selected;

(b) written and oral statements of defendant/co-defendant(s);

(c) copies of statements by potential witnesses;

(d) copies of all official reports, e.g., police, arson, hospital, results of any sc ientific test;

(e) inspection of physical evidence;

(f) list of potential witnesses and addresses;

(g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;

(h) probation records of all potential witnesses;

(i) copies of Grand Jury minutes;

(j) exculpatory evidence, identified as specifically as possible, and including promises, rewards, inducements made to witnesses;

(k) any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking scenes, etc.).

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

Guideline 4.2 Formal and Informal Discovery

(a) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the applicable rules of criminal procedure and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Counsel should seek discovery of the following items:

  (1) potential exculpatory information;

  (2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

  (3) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;

  (4) the prior criminal record of the accused and any evidence of other misconduct that the state may intend to use against the accused;

  (5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

  (6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

  (7) statements of co-defendants.

(c) Counsel should comply with the mandatory disclosure rules for District, Magistrate, and Metropolitan Courts.

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

Standard 2.6—Independent Investigation

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

Implementation

Counsel should:

…

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

…

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

5. Compliance with Proper Discovery Requests

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.5 Compliance with Discovery Procedure

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.2 Formal and Informal Discovery

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

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

4.5 Reciprocal Discovery

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

4.10 Discovery Compliance

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

6. Duties Regarding Physical Evidence

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-4.6 Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable pe riod of time during which defense counsel: (a) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

Guideline 4.1 Investigation

a. Sources of investigative information may include the following:

…

5. *Physical evidence*

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

7. Development of a Theory of the Case

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 4.3 Theory of the Case

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

…

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

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

Guideline 4.3 Theory and Theme(s) of the Case

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

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

Standard 1.5—Theory of the Case

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

Implementation

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

8. Pretrial Motions

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 5.1 The Decision to File Pretrial Motions

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

b. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

   1. the pretrial custody of the accused;
   2. the constitutionality of the implicated statute or statutes;
   3. the potential defects in the charging process;
   4. the sufficiency of the charging document;
   5. the propriety and prejudice of any joinder of charges or defendants in the charging document;
   6. the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
   7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including;
      A. the fruits of illegal searches or seizures;
      B. involuntary statements or confessions;
      C. statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
      D. unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
   8. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

9. access to resources which or experts who may be denied to an accused because of his or her indigence;
10. the defendant's right to a speedy trial;
11. the defendant's right to a continuance in order to adequately prepare his or her case;
12. matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
13. matters of trial or courtroom procedure.

c. Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
    1. the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
    2. changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
    3. later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

a. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

b. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
    1. investigation, discovery and research relevant to the claim a dvanced;
    2. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
    3. full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

Guideline 5.3 Subsequent Filing of Pretrial Motions

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

…

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

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

4.3 Pretrial Motions and Affidavits

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

4.7 Substantive Pretrial Motions

Among the motions that counsel should consider filing are:

(a) nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;

(b) dismissal for unconstitutionality of the statute;

(c) dismissal for insufficiency of the complaint or indictment;

(d) dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the i ntegrity of the grand jury;

(e) request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;

(f) severance or joinder of defendants or charges;

(g) suppression of evidence obtained in violation of federal and Massachusetts law, i.e., (1) illegally seized evidence, (2) "un-Mirandized" or involuntary statements, (3) identifications procured by impermissibly suggestive proc edures;

(h) funds for experts, investigators, interpreters, etc. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses ;

(i) any other issues that are appropriate.

4.8 Trial Motions

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

4.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should i nclude:

(a) investigation and discovery necessary to advance the claim;

(b) careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rule of Criminal Procedure;

(c) subpoenas for pertinent evidence and witnesses;

(d) full understanding of the burdens of proof and evidentiary rules;

(e) careful consideration of the benefits/costs of having the client testify;

(f) careful preparation of any witnesses who are called, especially the defendant;

(g) submission of a memorandum of law may be required, and in most cases is a dvisable.

4.11 Interlocutory Relief

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

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

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider fil ing 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 inve stigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

(1) the pretrial custody of the accused and the filing of a motion to review conditions of release;

(2) the constitutionality of the implicated statute or statutes;

(3) the potential defects in the charging process;

(4) the sufficiency of the charging documents;

(5) the propriety and prejudice of any joinder of charges or defendants in the charging document;

(6) the discovery obligations of the prosecution;

(7) the suppression of evidence gathered as the result of violations of the New Mexico State Constitution and Fourth, Fifth or Sixth Amendments to the United States Constitution, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;

(D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

(8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

(9) the change of venue;

(10) the defendant's right to a speedy trial;

(11) the defendant's right to a continuance in order to adequately prepare his or her case;

(12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

(13) matters of trial or courtroom procedure.

(c) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

(1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

(2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;

(3) later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of state and local court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery and research relevant to the claim advanced;

(2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify;

(4) the assistance of an expert witness where appropriate and necessary;

(5) where appropriate and tactically advisable, obtaining a stipulation of facts by and between counsel.

Guideline 5.3 Subsequent Filing of Pretrial Motions

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

(1) If new supporting information is later disclosed or made available, counsel should consider renewing pretrial motions or filing additional motions at any subsequent stage of the proceedings.

(2) Where appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.

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

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

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

Implementation

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

b. If the client agrees, counsel should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, counsel may stipulate that the client is unable to aid and assist counsel in the proceedings.

c. At the hearing to determine whether the client is able to aid and assist, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences and secrets. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the client's confidences and secrets.

e. If an adult client is found to be unable to aid and assist, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment.

f. If the client is found able to aid and assist, counsel should recognize a continuing obligation during the course of the proceedings to raise good faith concerns about the client's ability to aid and assist.

G. Preliminary Hearings

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

1. Arraignment duties
2. Preliminary hearing duties

1. Arraignment Duties

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.1 Presentment and Arraignment

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

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

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

1.5 Special Concerns

(a) Particularly if the client is detained, counsel should consider a p rompt motion to dismiss any charge or aggravating element that is not supported by probable cause.

(b) Where appropriate, counsel should consider advantages and disadvantages of seeking cross-complaints.

2.1 Arraignment

…

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

(1) A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record, such as diversion, drug evaluation, mediation, or a continuance without a finding.

(2) Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or probable cause hearing as soon as practicable within thirty days.

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

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

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

Guideline 3.1 Presentment and Arraignment

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

(1) entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;

(2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;

(3) seeking a determination of whether there is probable cause to support the charges alleged and, requesting that the court dismiss the charge or charges if probable cause fails or other grounds exist for dismissal;

(4) requesting a timely preliminary hearing if it is provided for under the rules of the court unless there is a sound tactical reason not to do so.

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

Standard 2.5—Initial Court Appearances

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

Implementation

Counsel should:

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

2. Preliminary Hearing Duties

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 3.2 Preliminary Hearing

a. Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

b. In preparing for the preliminary hearing, the attorney should become familiar with:

   1. the elements of each of the offenses alleged
   2. the law of the jurisdiction for establishing probable cause
   3. factual information which is available concerning probable cause.

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

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

(a) Counsel should always seek to obtain a probable cause hearing and avoid a direct indictment unless good reasons exist for a different strategy.

(b) Where the client is entitled to a hearing, the attorney should insure that it is scheduled within thirty days, unless more time is needed to prepare, and delay will not increase the likelihood of direct indictment. Counsel should not waive this right without good reason.

(c) In order to prepare for the hearing, counsel must know the elements of all charges against the client and must investigate as fully as possible the facts underlying the charges.

(d) The probable cause hearing has a twofold purpose: to test the adequacy of the prosecution's case for binding over and to discover its strengths and wea knesses.

(e) Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each essential or aggravating element. Counsel should take advantage of the potential for discovery offered by a hearing by filing appropriate motions, using

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

(f) Where appropriate, counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.

(g) As soon as practicable after the hearing, counsel should request a copy of the tape recording of the proceedings for possible use as impeachment at the trial and for trial preparation. It is counsel's responsibility to arrange for transcri ption of the tape.

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

Guideline 3.2 Preliminary Hearing

(a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

(b) In preparing for the preliminary hearing, the attorney should consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) the factual information which is available concerning probable cause;

(4) the tactics of calling the defendant as a witness;

(5) the tactical need to subpoena defense witnesses;

(6) the tactics of proceeding with or without discovery materials;

(7) the tactics of full or partial cross-examination.

(c) The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such waiver.

Guideline 3.4 Grand Jury Representation

(a) Where an attorney and/or defense team member becomes aware of a notice of target status, the attorney should consider consultation with the client to discuss the adjudicatory process, including ramifications of the client's testifying before the grand jury. Consultation and discussion should include but is not limited to the following:

(1) client does not have to testify because there is a Fifth Amendment right to remain silent and not to be used as a witness against oneself;

(2) client will be under oath when testifying and such grand jury testimony may be used against the client in future proceedings;

(3) attorney may be present only during client's testimony and may advise the client, but the attorney may not speak or be heard by the grand jury;

(4) attorney should ask the client about exculpatory witness(es) and/or evidence so that the attorney may assess the need to present exculpatory witness(es) and/or evidence at the grand jury; and,

(5) if the client decides to testify, the attorney should review the allegations against the client, review the client's proposed grand jury testimony, and prepare the client to testify.

(b) Upon return of the indictment, the attorney should determine if client received proper notice of target status and should listen to the grand jury tape to determine if the grand jury proceedings were conducted properly.

(1) the attorney should be familiar with the grand jury statute 31-6-1 to 31-6-15, NMSA 1978 (1996 Cum. Supp.); and,

(2) where appropriate, the attorney should file motions to quash the indictment(s), and should consider the following grounds:

(A) improper prosecutorial conduct including but not limited to knowingly withholding exculpatory evidence, bullying jurors, and misstatements of law;

(B) procedural irregularities including but not limited to reconvening a Grand Jury at a later date with different people other than those who heard the initial evidence and improper juror qualifications.

(C) failure to give correct and adequate notice to a target.

H. Disposition Without Trial

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

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

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

1. Investigating Plea Alternatives

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-6.1 Duty to Explore Disposition Without Trial

…

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

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

5.1 Plea Negotiations

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

2. Informing Client of Plea Negotiations and Offers

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-6.2 Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

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

(b) Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.

(c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.

(d) Counsel should not accept any plea agreement without the client's express authorization.

Guideline 6.2 The Contents of the Negotiations

…

(b) In developing a negotiation strategy, counsel should be completely familiar with:

1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

   A. not to proceed to trial on the merits of the charges;

   B. to decline from asserting or litigating any particular pretrial motions;

   C. an agreement to fulfill specified restitution conditions and/or participation in

community work or service programs, or in rehabilitation or other programs.

D. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

A. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

B. that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;

C. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

D. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

E. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

F. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;

G. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official presentence report, certain information;

H. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.

Guideline 6.3 The Decision to Enter a Plea of Guilty

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.3. Plea Negotiations

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

(b) Counsel should discuss with the client the advantages and disadvantages of accepting a plea agreement.

(c) Counsel should discuss with the client any rights which are waived by acceptance of a plea agreement.

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

(e) Counsel should discuss with the client the nature of the charge to which he/ she would be entering a plea, the possible maximum and/or mandatory sentences which the client is exposed to as a result of the plea and any other questions that the court may raise during the canvass.

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

5.1. Plea Negotiations

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

(b) Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.

(c) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based *solely* on the client's acknowledgement of guilt or *solely* on a favorable disposition offer.

(d) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The attorney shall keep the client informed of the status of the plea negotiations.

5.5 Necessity of Admission of Guilt

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

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

5.6 Disposition Argument

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

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

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

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

(b) Where appropriate under state or local rules or necessary for client control, counsel should consider obtaining the consent of the client before entering into any plea negotiations.

(c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the client any offers made by the prosecution for a negotiated settlement.

(d) Counsel should not accept any plea agreement without the client's express authorization.

(e) Even though plea negotiations are ongoing, counsel should move forward with case preparation and take the necessary steps to preserve a defense. Counsel should consult with an immediate supervisor or experienced colleague to determine the steps necessary to preserve a defense.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting attorney(s) which may impact the content and likely results of negotiated plea bargains.

(b) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:

(1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;

(2) the possibility of forfeiture of assets;

(3) the other potential effects of conviction upon immigration status, motor vehicle licensing, right to carry arms, parental rights, and other civil rights;

(4) any registration requirements including sex offender registration and job specific notification requirements;

(5) any possible and likely sentence enhancements in the present and in future cases or parole consequences;

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

(7) the effects of good-time or earned-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds;

(8) the effect on appellate rights.

(c) In developing a negotiation strategy, counsel should be completely fa miliar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to trial;

(B) declining to assert or litigate any particular pretrial motions;

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) admitting identity and waiving challenges to proof or validity of prior conviction record.

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the defendant may enter a conditional plea to reserve the right to litigate and contest certain issues affecting the validity of a conviction;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of the official presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed by the court.

(G) that at the time of sentencing and/or in communications with the preparer of the official presentence report, the prosecution will not present certain information;

(H) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, guilty but mentally ill, a plea of nolo contendere, a conditional plea of guilty, and the right to a plea in which the client is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case;

(3) whether the plea agreement is binding on the court and jail/prison and parole authorities;

(4) any recent changes in the applicable statutes or court rules and the effective dates of these changes.

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

Standard 2.8—Pretrial Negotiations and Admission Agreements

Counsel should:

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

Implementation

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

b. conditions and limits of the agreement;

c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;

d. deferred sentences, conditional discharges and diversion agreements;

e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;

f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;

g. available drug rehabilitation programs, psychiatric treatment, and health care;

h. incarceration including any mandatory minimum requirements and maximum terms;

i. the possible and likely place and manner of confinement;

j. credit for pretrial detention;

k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

l. self-surrender to place of custody;

m. eligibility for correctional programs, work release and conditional leaves;

n. probation or suspension of sentence and permissible conditions of probation;

o. restitution, fines, assessments and court costs;

p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;

q. asset forfeiture;

r. collateral consequences of conviction, e.g., deportation, civil disabilities, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and

t. possibility of later expungement and sealing of records.

2. In conducting negotiations, counsel should be familiar with the various types of admissions or pretrial dispositions that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and an admission to juvenile court jurisdiction.

3. The decision to enter an admission rests solely with the client and the client's decision must be knowing, voluntary and intelligent.

4. When the client enters an admission, counsel should make sure the full content and conditions of the admission agreement are placed on the record before the court.

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

3. Preparing Client for Entry of Plea

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 6.4 Entry of the Plea Before the Court

a. Prior to the entry of the plea, counsel should:

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.3. Plea Negotiations

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

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

5.2 Preparation

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

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

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

5.3 Consequences of Conviction

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

(a) the maximum possible sentence of all offenses;

(b) mandatory minimum sentences where applicable;

(c) different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;

(d) potential liability for enhanced punishment after subsequent arrest;

(e) possible federal charges or penalty enhancements;

(f) conviction consequences for non-citizens (G.L., c.278, §29D);

(g) Sex Offender Registration Act (G.L., c.6, §§178C *et seq.*) and DNA Seizure and Dissemination Act (G.L., c.22E) requirements;

(h) parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);

(i) potential civil liabilities;

(j) possible loss or suspension of driver's license.

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

Guideline 6.3 The Decision to Enter a Plea of Guilty

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

(b) The decision to enter a plea of g uilty rests solely with the client, and counsel should not attempt to unduly influence that decision. Where counsel reasonably believes that

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

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

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of the plea, counsel should:

(1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

(2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the accused will be exposed to by entering a plea;

(3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should make sure that the full conte nt and conditions of the plea agreement are placed on the record by the court.

(c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing.

(d) Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

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

Standard 2.8—Pretrial Negotiations and Admission Agreements

Counsel should:

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

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

Implementation

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

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and

t. possibility of later expungement and sealing of records.

I. Trial

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

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

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

1. Trial Preparation Duties

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.1 General Trial Preparation

a. The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

b. Where appropriate, counsel should have the following materials available at the time of trial:

   1. copies of all relevant documents filed in the case;
   2. relevant documents prepared by investigators;
   3. voir dire questions;
   4. outline or draft of opening statement;
   5. cross-examination plans for all possible prosecution witnesses;
   6. direct examination plans for all prospective defense witnesses;
   7. copies of defense subpoenas;
   8. prior statements of all prosecution witnesses (e.g., transcripts, p olice reports);
   9. prior statements of all defense witnesses;
   10. reports from defense experts;
   11. a list of all defense exhibits, and the witnesses through whom they will be introduced;
   12. originals and copies of all documentary exhibits;
   13. proposed jury instructions with supporting case citations;
   14. copies of all relevant statutes and cases;
   15. outline or draft of closing argument.

c. Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

d. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where

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

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

f. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.

g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

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

6.1 General Trial Preparation

(a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

(1) summonsing all potentially helpful witnesses, utilizing ex parte procedures if advisable;

(2) summonsing all potentially helpful physical or documentary ev idence;

(3) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;

(4) obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;

(5) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case.

(b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:

(1) copies of all relevant documents in the case;

(2) relevant documents prepared by investigators;

(3) proposed voir dire questions;

(4) outline of opening statement;

(4) cross-examination plans for all possible prosecution witnesses;

(5) outline of argument for required findings of not guilty and authorities supporting it;

(6) direct examination plans for all prospective defense witnesses;

(7) copies of defense subpoenas;

(8) prior statements of all prosecution witnesses (e.g., Grand Jury minutes, transcripts, police reports);

(9) prior statements of all defense witnesses;

(10) reports from defense experts;

(11) a list of all defense exhibits, and the witnesses through whom each will be introduced;

(12) proposed jury instructions with supporting case citations;

(13) copies of all relevant statutes and cases, including any potential lesser-included offenses;

(14) outline or draft of closing argument.

(c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.

(d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior bad acts, reputation testimony, prejudicial evidence) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

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

Guideline 7.1 General Trial Preparation

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Where appropriate, counsel should have the following materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) reports, test results, and other materials subject to disclosure under SCRA 5-501 - 5-509;

(4) voir dire questions;

(5) outline or draft of opening statement;

(6) cross-examination plans for all possible prosecution witnesses;

(7) direct examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses;

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(13) originals and copies of all documentary exhibits;

(14) proposed jury instructions with supporting case citations;

(15) copies of all relevant statutes and cases;

(16) outline or draft of closing argument.

(c) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

(e) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request that all trial proceedings, including motions, bench conferences in chambers, and jury instructions, be recorded.

(f) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.

(g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a client transport order to have the client available for all required court appearances.

(h) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

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

Standard 2.9—Trial

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

Implementation

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

e. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence through objections and cross-examination of state's witnesses.

f. Counsel should advise the client and the client's witnesses as to suitable courtroom dress, decorum, and demeanor, and should counsel the client and witnesses concerning timeliness and sobriety issues. If the client or the client's witness is incarcerated, counsel should ensure that the client or witness does not appear before the jury in jail clothing.

g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of guilt or in a juvenile proceeding that the youth is within the jurisdiction of the court.

2. Preparation for Jury Selection

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.2 Selection of Jurors

(a) Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel should not intentionally use the voir dire to present factual matter which defense counsel knows will not be admissible at trial or to argue counsel's case to the jury.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.2 Voir Dire and Jury Selection

a. *Preparation*

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

4. Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
    A. to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
    B. to convey to the panel certain legal principles which are critical to the defense case;
    C. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
    D. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor;
    E. to establish a relationship with the jury, when the voir dire is conducted by an attorney.
5. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
7. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

b. *Examining the Prospective Jurors*

1. Counsel should consider seeking permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.
2. Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.
3. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the voir dire as to those sensitive questions.
4. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

c. *Challenges*

1. Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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

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

6.4 Voir Dire and Jury Selection

(a) Preparation

(1) Counsel should be familiar with the law governing the se lection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.

(3) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.

(4) Counsel should develop and file written voir dire questions tailored to the particular case in advance of trial.

(5) Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.

(6) Counsel should consider asking for extra peremptory challenges.

(b) Examining Prospective Jurors

(1) Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. interracial murder or sexual assault cases, sexual assault on children, "insanity" defenses.

(2) Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.

(3) When appropriate, counsel should consider requesting individual juror voir dire even when case law does not require it, particularly if the proposed voir dire questions may elicit sensitive information.

(c) Challenges

(1) Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.

(2) When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.

(3) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should make every effort to consult with the client in exercising challenges.

(5) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

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

Guideline 7.2 Voir Dire and Jury Selection

(a) *Preparation*

(1) Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list, and should develop a method for tracking juror seating and selection.

(4) Counsel must be familiar with the juror questionnaires and, where appropriate, should submit a supplemental questionnaire as a pretrial motion.

(5) Counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Voir dire questions should be designed to:

(A) elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

(B) convey to the panel certain legal principals which are critical to the defense case;

(C) preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

(D) present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

(E) establish a relationship with the jury, when the voir dire is conducted by an attorney.

(6) Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

(7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

(8) Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

(9) Counsel should consider seeking assistance from a colleague or a defense team member to record venir panel responses and to observe venir panel reactions. Counsel should also communicate with the client regarding the client's venir panel preferences.

(b) *Examining the Prospective Jurors*

(1) Counsel should personally voir dire the panel. If the court conducts voir dire, counsel should submit proposed questions to be incorporated into the court's voir dire.

(2) Counsel should take all steps necessary to protect the voir dire record for appeal, including filing a copy of the proposed voir dire questions or moving the admission of the proposed questions into evidence.

(3) If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors. Counsel should consider whether the court, rather than counsel, should conduct particularly sensitive voir dire.

(4) In a group voir dire, counsel should consider the impact of questions which may elicit responses which are likely to prejudice other prospective jurors, or to reveal information otherwise inadmissible.

(c) *Challenges*

(1) Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

(2) Counsel should object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

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

Standard 2.9—Trial

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

Implementation

…

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

3. Overall Defense Trial Strategy

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.5 Presenting the Defense Case

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

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

6.6 Presenting the Defense Case

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

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

Standard 2.9—Trial

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

Implementation

…

4. Proof

   …

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

4. Opening Statement

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.4 Opening Statement

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.3 Opening Statement

a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

b. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

c. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

d. Counsel's objective in making an opening statement may include the fo llowing:

   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 t he prosecutor makes to the jury during opening statement in the defense summation.

f. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

   1. the significance of the prosecutor's error;

   2. the possibility that an objection might enhance the significance of the information in the jury's mind;

   3. whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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

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

6.5 Opening Statement

(a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening and of deferring the opening statement until the beginning of the defense case.

(b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.

(c) Counsel's objectives in making an opening statement may include the following:

   (1) to provide an overview of the theory of the defense case;

   (2) to summarize the testimony of witnesses and the role of each in relationship to the entire case;

   (3) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(4) to identify the weaknesses of the prosecution's case;

(5) to remind the jury of the prosecution's burden of proof,

(6) to clarify the jurors' responsibilities;

(7) to personalize the client and counsel to the jury.

(d) Counsel should consider incorporating in the defense summation the pr omises of proof the prosecutor makes to the jury during his/her opening statement.

(e) Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

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

Guideline 7.3 Opening Statement

(a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

(b) Counsel should be familiar with the law and the individual trial judge's rules regarding the permissible content of an opening statement.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

(d) Counsel's opening statement should introduce the case theory(s) and theme(s) using storytelling techniques. Counsel's opening statement may also incorporate these objectives:

(1) to provide an overview of the defense case;

(2) to identify the weaknesses of the prosecution's case;

(3) to emphasize the prosecution's burden of proof;

(4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

(5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(6) to clarify the juror's responsibilities;

(7) to state the ultimate inferences which counsel wishes the jury to draw.

(8) to prepare the jury for the client's testimony or failure to testify.

(e) Counsel should consider incorporating the promises of proof that the prosecutor makes to the jury during opening statement into the defense summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions,

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

(1) the significance of the prosecutor's error;

(2) the possibility that an objection might emphasize the significance of the information in the jury's mind, or negatively impact the jury;

(3) whether there are any rules made by the judge against objecting during the other attorney's opening statement.

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

Standard 2.9—Trial

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

Implementation

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

5. Confronting the Prosecution's Case

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.6 Examination of Witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.

…

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.4 Confronting the Prosecution's Case

a. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

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c. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

d. In preparing for cross-examination, counsel should:

   1. consider the need to integrate cross-examination, the theory of the defense and closing argument;

   2. consider whether cross-examination of each individual witness is likely to generate helpful information;

   3. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;

4. consider a cross-examination plan for each of the anticipated witnesses;
5. be alert to inconsistencies in witnesses' testimony;
6. be alert to possible variations in witnesses' testimony;
7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
8. where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
9. be alert to issues relating to witness credibility, including bias and motive for testifying.

e. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

f. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

g. Where appropriate, at the close of the prosecution's case and out of the pre sence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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

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

6.6 Confronting the Prosecution's Case

(a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.

(b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.

(c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.

(d) In preparing for and carrying out cross-examination, counsel should also:

(1) develop a coherent and sensible theory of the case, along with the framework of the closing argument;

(2) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;

(3) integrate into cross-examination the theory of the defense and closing a rgument;

(4) consider whether cross-examination of each witness is necessary or likely to generate helpful information;

(5) review and organize all prior statements and testimony of each witness;

(6) be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;

(7) be alert to significant omissions or deficiencies in the testimony of any witness; e.g., investigative steps not taken, persons not interview by the police, failure to mention obvious physical characteristics, etc.;

(8) consider using certified copies of prior convictions or pending cases of witnesses;

(9) be alert to all issues relating to witness competency or credibility, including bias or motive for testifying.

(e) If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.

(f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.

(g) Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. Counsel should request,

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

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

Guideline 7.4 Confronting the Prosecution's Case

(a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.

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

(c) In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

(d) In preparing for cross-examination, counsel should:

(1) consider the need to integrate cross-examination, the theory and theme(s) of the defense and closing argument;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking unnecessary questions or questions which may hurt the defense case.

(3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;

(4) consider a cross-examination plan for each of the anticipated witnesses;

(5) be alert to inconsistencies in a witness's testimony;

(6) be alert to possible variations in witnesses' testimony;

(7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(8) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

(9) be alert to issues relating to witness credibility, including bias and motive for testifying.

(e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the law concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

(f) Prior to trial, counsel should ascertain whether the prosecution has provided copies of all prior statements of the witnesses it intends to call at trial as required by law. If disclosure is not timely made, counsel should prepare and argue (a) motion (s) to:

(1) dismiss the case;

(2) exclude the witness's testimony and all evidence affected by that testimony;

(3) grant a mistrial;

(4) continue the case; or

(5) give a cautionary instruction.

(g) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a directed verdict on each count charged, and, where there are colorable issues, be prepared with supporting case law. If necessary, counsel should request that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

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

Standard 2.9—Trial

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

Implementation

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4. Proof

   a. Counsel should anticipate weaknesses in the prosecution' s proof and consider researching and preparing corresponding motions for judgment of acquittal.

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

   c. In preparing for cross-examinati on, counsel should:

      i. be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;

      ii. consider the need to integrate cross-examination, the theory of the defense and closing argument;

      iii. consider whether cross-examination of each individual witness is likely to generate helpful information;

      iv. anticipate those witnesses the prosecution might call in its case-in-chief and in rebuttal;

v. consider a cross-examination plan for each of the anticipated witnesses;

vi. be alert to inconsistencies or variations in a witness's testimony;

vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

viii. review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

ix. be alert to issues relating to witness credibility, including but not limited to background, bias and motive for testifying.

d. Counsel should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.

e. Before beginning cross-examination, counsel should ascertain whether the prosecution has provided copies of all prior statements. If counsel does not receive prior statements of prosecution witnesses until the prosecution has completed direct examination, counsel should, at a minimum, request adequate time to review these documents before commencing cross-examination.

f. At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion in order that counsel may make an informed decision whether to present a defense.

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

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

i. Counsel should be aware of the elements of any affirmative defense and kno w whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

j. In preparing for presentation of a defense case, counsel should:

i. develop a plan for direct examination of each potential defense witness;

ii. determine the order of witnesses;

iii. consider the possible use of character witnesses; and

iv. consider the need for expert witnesses.

k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.

l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.

m. Counsel should conduct redirect examination as appropr iate.

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

6. Stipulations

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.4 Confronting the Prosecution's Case

(b) Counsel should consider the advantages and disadvantag es of entering into stipulations concerning the prosecution's case.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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

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

6.6 Confronting the Prosecution's Case

(a) Counsel should carefully consider the advantages and disadvantag es before entering into stipulations concerning the prosecution's case.

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

Standard 2.9—Trial

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

Implementation

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4. Proof

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

7. Presentation of the Defense Case

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.5 Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

(b) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 4-7.6 Examination of Witnesses

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.5 Presenting the Defense Case

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b. Counsel should discuss with the client all of the considerations re levant 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 appropr iate:

   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 a ll 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 cas e, counsel should renew the motion for judgment of acquittal on each charged count.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4

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

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

6.7 Presenting the Defense Case

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

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).

(c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropr iate:

(1) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;

(2) after discussion with the client, make the decision whether to call any wi tnesses;

(3) develop a plan for direct examination of each potential defense witness;

(4) determine the implications that the order of witnesses may have on the defense case;

(5) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;

(6) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;

(7) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;

(8) attempt to obtain the prior records of all defense witnesses.

(e) In developing and presenting the defense case, c ounsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.

(g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

(h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.

(i) If an objection is sustained, counsel should make appropriate ef forts to re-phrase the question(s) and/or make an offer of proof.

(j) Counsel should guard against improper cross-examination by the prosecutor.

(k) Counsel should conduct redirect examination as appropriate.

(l) At the close of the defense case, counsel s hould renew any previously filed motions for a required finding of not guilty on each count charged and/or aggravating element.

(m) Counsel should keep a record of all exhibits identified or admitted.

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

Guideline 7.5 Presenting the Defense Case

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

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

(c) Counsel should be aware of the elements of any affirmative defense, the time frames for disclosure, and whether the client bears a burden of persuasion or a burden of production. Defense presentations with a time notice requirement include the following: alibi, insanity, inability to form specific intent, entrapment, and polygraph evidence.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the order of exhibit presentation.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses, including expert(s), for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the client of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examinations as appropriate.

(h) At the close of the defense case, counsel should renew the motion for a directed verdict on each charged count.

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

Standard 2.9—Trial

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

Implementation

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4. Proof

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   h. Counsel should discuss with the client all of the considerations relevant to t he client's decision to testify.

   i. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

   j. In preparing for presentation of a defense case, counsel should:

      i. develop a plan for direct examination of each potential defense witness;

      ii. determine the order of witnesses;

      iii. consider the possible use of character witnesses; and

      iv. consider the need for expert witnesses.

   k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.

   l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.

   m. Counsel should conduct redirect examination as appropriate.

8. Closing Argument

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.7 Argument to the Jury

(a) In closing argument to the jury, defense counsel may argue all reasona ble inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

(c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.

(d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.6 Closing Argument

a. Counsel should be familiar with the substantive limits on both prosecution and defense summation.

b. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

c. In developing closing argument, coun sel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

   1. highlighting weaknesses in the prosecution's case;

   2. describing favorable inferences to be drawn from the evidence;

   3. incorporating into the argument:

      A. helpful testimony from direct and cross-examinations;

B. verbatim instructions drawn from the jury charge;

C. responses to anticipated prosecution arguments;

4. the effects of the defense argument on the prosecutor's rebuttal argument.

d. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

1. whether counsel believes that the case will result in a favorable verdict for the client;

2. the need to preserve the objection for a double jeopardy motion;

3. the possibility that an objection might enhance the significance of the information in the jury's mind.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

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

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

6.6 Closing Argument

(a) Before an argument, counsel must file and should seek to obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the Court's rulings.

(b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing argument.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:

(1) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;

(2) favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(a) helpful testimony from direct and cross-examinations;

(b) verbatim instructions drawn from the expected jury charge;

(c) responses to anticipated prosecution arguments;

(4) the effects of the defense argument on the prosecutor's possible rebuttal argument.

(d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at the conclusion of the argument), requesting a mistrial, or seeking cautionary instructions.

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

Guideline 7.6 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.

(b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;

(2) describing favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(A) the theory and theme(s) of the case;

(B) helpful testimony from direct and cross-examinations;

(C) verbatim instructions drawn from the jury charge;

(D) responses to anticipated prosecution arguments;

(E) visual aids and exhibits.

(4) the effects of the defense argument on the prosecution's rebuttal argument.

(d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) whether counsel believes that the case will result in a favorable verdict for the client;

(2) the need to preserve the objection for a double jeopardy motion;

(3) the possibility that an objection might enhance the significance of the information in the jury's mind.

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

Standard 2.9—Trial

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

Implementation

…

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

f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

9. Jury Instruction

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.7 Jury Instructions

a. Counsel should be familiar with the local rules and the individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

b. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions.

c. Where appropriate, counsel should object to and argue against improper instructi ons proposed by the prosecution.

d. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.

e. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

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

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

6.6 Jury Instructions

(a) Counsel must file proposed or requested jury instructions before closing arg ument.

(b) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

(c) Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.

(d) Where appropriate, counsel should object and argue against instructions proposed by the prosecution.

(e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.

(f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and if necessary, request additional or curative instructions.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

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

Guideline 7.7 Jury Instructions

(a) Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

(b) Counsel should submit written modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Client approval is required for submission of a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions and should ensure that all jury instruction argument is on the record.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including filing a copy of the proposed jury instructions or moving them into evidence.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

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

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

Standard 2.9—Trial

…

5. Closing Argument

   …

   c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.

   d. Counsel should object to and argue against improper instructions proposed by the prosecution.

   e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.

   f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

   g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

10. Protection of Defendant's Post-Trial Rights

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.9 Posttrial Motions

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 7.1 General Trial Preparation

…

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.4. Trial

…

(r) Counsel should submit requests to charge to the court and take appropriate steps to preserve the record when necessary.

(s) Counsel should endeavor throughout the trial process to establish a proper record for appellate review and should request that all trial proceedings be recorded.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

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

(a) In order to protect a convicted defendant's right to appeal, it shall be the duty of each trial counsel to:

(1) file a motion for modification of sentence, when appropriate;

(2) file a motion for release on appeal bond, when appropriate;

(3) file a notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant;

(4) upon filing the notice of appeal, obtain a court order for the trial transcript, and a transcript of any pretrial or posttrial proceedings from which a claim of error may arise;

(5) upon filing the notice of appeal, obtain an order from the district court appointing the state appellate defender as counsel for the appeal and file the order of appointment with the clerk of the district court within five days of the filing of the notice of appeal; and

(6) submit a draft of the docketing statement and all documents necessary to docket the appeal required by Supreme Court Rule….

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

6.1 General Trial Preparation

(a) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practices regarding:

(1) preservation of each type of objection at every stage of the proceedings;

(2) offers of proof regarding evidence ruled inadmissible;

(3) recording of trial proceedings. Counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording.

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

Standard 2.11—Postdisposition Procedures

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

Implementation

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

11. Related Issues

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-7.1 Courtroom Professionalism

(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(c) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.

(d) Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.

(e) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

Standard 4-7.3 Relations with Jury

(a) Defense counsel should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during the trial. Defense counsel should avoid the reality or appearance of any such communications.

(b) Defense counsel should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such

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

J. After Conviction

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

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

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

1. Sentencing Duties

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.1 Sentencing

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is not presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

(d) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal.

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 8.1 Obligations of Counsel in Sentencing

a. Among counsel's obligations in the sentencing process are:

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

Guideline 8.2 Sentencing Options, Consequences and Procedures

a. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:

1. any sentencing guideline structure;
2. deferred sentence, judgment without a finding, and diversionary programs;
3. expungement and sealing of records;
4. probation or suspension of sentence and permissible conditions of probation;
5. restitution;
6. fines;
7. court costs;
8. imprisonment including any mandatory minimum requirements;
9. confinement in mental institution;
10. forfeiture.

b. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

1. credit for pre-trial detention;
2. parole eligibility and applicable parole release ranges;
3. effect of good-time credits on the client's release date and how those credits are earned and calculated;
4. place of confinement and level of security and classification;
5. self-surrender to place of custody;
6. eligibility for correctional programs and furloughs;
7. available drug rehabilitation programs, psychiatric treatment, and health care;
8. deportation;
9. use of the conviction for sentence enhancement in future proceedings;
10. loss of civil rights;
11. impact of a fine or restitution and any resulting civil liability;
12. restrictions on or loss of license.

c. Counsel should be familiar with the sentencing procedures, including:

1. the effect that plea negotiations may have upon the sentencing discretion of the court;
2. the procedural operation of any sentencing guideline system;
3. the effect of a judicial recommendation against deportation;
4. the practices of the officials who prepare the presentence report and the defendant's rights in that process;
5. the access to the presentence report by counsel and the defendant;
5. the prosecution's practice in preparing a memorandum on punishment;
7. the use of a sentencing memorandum by the defense;
8. the opportunity to challenge information presented to the court for sentencing purposes;
9. the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;
10. the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

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

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

Guideline 8.5 The Prosecution's Sentencing Position

a. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.

b. If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

c. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude

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

Guideline 8.7 The Sentencing Process

a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's inte rest.

b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

e. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation of the defendant.

f. Where appropriate, counsel should prepare the client to personally address the court.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 5.5. Sentencing

(a) Prior to sentencing, counsel should discuss with the client the maximum sentence that may be imposed, which may include any period of probation, any special conditions of probation which may include treatment or restitution, and any fine which may be imposed.

(b) Counsel should inform the client of the nature of the presentence investigation process and the client's right to waive the presentence investigation if appropriate.

(c) For the purposes set forth in Connecticut Practice Book, counsel or counsel's representative should be present during the Office of Probation's interview of the client in the presentence investigation process when requested by the client, or when, in counsel's opinion, counsel's presence is required to protect the interests of the client, or when otherwise appropriate.

(d) Counsel should review the presentence investigation report with the client and request that any necessary corrections be made to the presentence investigation report in writing and in accordance with Connecticut Practice Book.

(e) Counsel should request a copy of the corrected report for his/her file and for the parole board.

(f) With the client's consent, counsel should provide information and documents to the probation officer preparing the presentence report.

(g) Counsel should advocate the best possible disposition for sentencing on behalf of the client.

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

1.2 Sentencing

Counsel should begin gathering information relative to possible sentencing.

1.5 Dispositions

(a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.

(b) Counsel should request a reasonable time period for th e payment of any fines or restitution.

(c) Counsel should make sure that the client fully understands the foreseeable consequences of the sentence, including any conditions of probation.

(d) Counsel should insure that the sentence accurately reflects the r ights of the client for parole eligibility and jail credit.

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

7.1 Preparation

Defense counsel should be familiar with and consider:

(a) the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties;

(b) the official version of the client's prior record, if any;

(c) the position of the probation department with respect to the client;

(d) the sentencing recommendation and memorandum, if any, of the prosecutor;

(e) seeking the assistance of an expert—either through community resources or the Committee for Public Counsel Services;

(f) the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender registration, DNA Seizure;

(g) the sentencing practices of the judge, to the extent they may be determined;

(h) the sentencing guidelines, as they would apply to the case;

(i) referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing;

(j) any victim impact statement to be presented to the court;

(k) any other report to be presented to the court in aid of sentencing;

(l) seeking an evidentiary hearing, e.g., restitution amount;

(m) requesting a continuance for sentencing at a later date;

(n) any other information or proposals that may be helpful to the client.

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

Guideline 8.1 Obligations of Counsel in Sentencing

(a) Counsel has the following obligations for the sentencing process :

(1) to consider all sentencing, correctional, and financial implications;

(2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(3) to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;

(4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report;

(6) to consider the need for and availability of sentencing specialists, and/or mental health and/or mental retardation professionals, and to seek the assistance of such specialists whenever possible and warranted;

(7) to identify and preserve the legal and constitutional issues for appeal.

Guideline 8.2 Sentencing Options, Consequences and Procedures

(a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:

(1) habitual offender statutes, sentencing enhancements, mandatory sentence requirements, and all other applicable sentencing statutes or case law;

(2) deferred sentence, conditional discharge, and diversionary programs;

(3) expungement and sealing of records;

(4) probation or suspension of sentence and mandatory/permissible conditions of probation;

(5) restitution;

(6) mandatory registration programs: sex offender, DNA, and school systems/health care providers' background checks;

(7) fines;

(8) court costs;

(9) imprisonment including any mandatory minimum requirements;

(10) forfeiture;

(11) sixty (60) day diagnostics and forensic evaluations.

(b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:

(1) credit for pre-trial detention;

(2) parole eligibility and supervision;

(3) effect of earned time or good-time credits on the client's release date and how those credits are earned and calculated;

(4) place of confinement and level of security and classification;

(5) self-surrender to place of custody;

(6) eligibility for correctional/jail programs, and furloughs;

(7) available drug rehabilitation programs, psychiatric treatment, and health care;

(8) deportation/exclusion and other consequences under federal immigration law;

(9) use of the conviction for sentence enhancement in future proceedings;

(10) loss of civil rights, including right to bear arms, voting rights, and employment consequences;

(11) impact of a fine or restitution and any resulting civil liability;

(12) restrictions on or loss of license.

(c) Counsel should be familiar with and advise the client of the sentencing procedures, including:

(1) the effect that plea negotiations may have upon the sentencing discretion of the court;

(2) the procedural operation of the sentencing system, including concurrent and consecutive time calculations;

(3) the practices of the officials who prepare the presentence report and the defendant's rights in that process;

(4) the access to the presentence report by counsel and the defendant;

(5) the prosecution's practice in preparing a memorandum on punishment;

(6) the use of a sentencing memorandum by the defense;

(7) the opportunity to challenge information presented to the court for sentencing purposes;

(8) the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

(9) the participation that victims under the Victims' Rights Act and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparing for Sentencing

(a) In preparing for sentencing, counsel should consider the n eed to:

(1) inform the client of the applicable sentencing requirements, options, and alternatives, the sentencing judge's practices and procedures, and the likely and possible consequences of the sentencing alternatives;

(2) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(3) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical/mental health/counseling history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(4) ensure that the client has adequate time to review the contents and recommendations of the presentence report;

(5) inform the client of his or her right to speak at the sentencing proceedings and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;

(6) prepare the client to be interviewed by the official preparing the presentence report;

(7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

(8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;

(9) collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should also specifically request the opportunity to present tangible and testimonial evidence.

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

Standard 2.10—Sentencing or Disposition

Counsel should:

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

Implementation

1. Counsel should be fully aware, and make sure the client is fully aware of:
   a. sentencing guideline structure, if applicable, or the maximum, mandatory, minimum and likely sentence or disposition, including likely jail, detention or prison time, or training school commitment;

   …

   c. imprisonment or incarceration, including any mandatory minimum requirements and maximum terms;

   d. restitution, fines, unitary assessments and court costs;

   e. possible and likely sentence enhancements, and probation, parole, or post-prison supervision consequences;

   f. asset forfeiture;

g. deferred sentences, conditional discharges, informal disposition, or conditional postponement and diversion agreements;

h. probation or suspension of sentence and permissible conditions of probation;

i. possibility of later expungement and sealing of records;

j. the possible and likely place and manner of confinement;

k. credit for pretrial detention;

l. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

m. if applicable, parole or post-prison supervision eligibility and applicable release ranges;

n. self-surrender to place of custody;

o. likely post-prison or training school supervision conditions;

p. eligibility for correctional programs, work release and conditional leaves;

q. available drug rehabilitation programs, psychiatric treatment, and health care;

r. collateral consequences of conviction, e.g., deportation, civil disabilities, sex offender registration, DNA and AIDS testing, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;

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

…

2. Counsel should be familiar with the sentencing and dispositional hearing procedures, including:

a. effect that plea negotiations may have upon the sentencing discretion of the court;

b. procedural operation of any sentencing guideline system;

c. effect of a judicial recommendation against deportation;

d. access to the presentence or dispositional report by counsel, the client, and others;

e. availability of assessments such as psychiatric, psychological, educational or neurological evaluations to both the PSI investigator or juvenile court counselor and client's counsel in preparing sentencing or dispositional recommendations;

f. prosecution's practice in preparing sentencing or dispositional recommendations;

g. use of a sentencing or dispositional memorandum by counsel;

h. opportunity to challenge information presented to the court for sentencing or dispositional purposes;

i. availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

…

l. participation that victims and prosecution or client's witnesses may have in the sentencing or dispositional proceedings;

m. witnesses that may be called by counsel, such as family members, teachers, ministers or others who have worked with the client;

n. the admissibility of other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities.

3. Counsel should:

a. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences thereof;

b. maintain regular contact with the client prior to the sentencing hearing and keep the client informed of the steps being taken in preparation for sentencing;

c. obtain from the client information such as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and sources through which the information can be corroborated;

d. determine with the client whether to obtain an independent psychiatric, psychological, educational or neurological or other evaluation for sentencing or dispositional purposes;

e. if the client is being evaluated, whether by the state or at counsel's request, counsel should call or write the evaluator in advance to provide favorable background information for the evaluator's use and to request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;

f. ensure that the client who is being evaluated understands the process, is not frightened, and is encouraged to cooperate;

g. prepare the client to be interviewed for a presentence or dispositional report;

h. inform the client of the client's right to address the court at sentencing or disposition and inform the client of the possible consequences that admission of guilt may have upon an appeal, retrial or trial on other offenses;

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

j. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

k. collect documents and affidavits to support the client's position, prepare witnesses to testify at the sentencing or disposition and request the opportunity to present tangible and testimonial evidence.

4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:

   a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;

   b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

   c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.

5. Counsel should determine whether the prosecution will advocate that a particular type or length of sentence or disposition be imposed.

6. If a written sentencing or disposition memorandum is submitted by the prosecution, counsel should verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

7. When the court has found evidence sufficient to support jurisdiction in a delinquency case, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the youth or society.

8. Counsel should prepare and present to the court a sentencing or disposition memorandum where there is a strategic reason for doing so.

9. Counsel should be prepared at the sentencing or disposition proceeding to take the steps necessary to advocate fully for the requested sentencing or disposition and to protect the client's interest.

…

11. In the event facts will be disputed at sentencing or dispositio n, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

12. Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses.

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

2. Pre-Sentence Report/Sentencing Memo

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 8.4 The Official Presentence Report

a. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

   1. determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be pr epared;
   2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the o ffense;
   3. review the completed report;
   4. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
   5. take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:

      A. the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

      B. the prosecution fails to prove an allegation;

      C. the court finds an allegation not proved.

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

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

Guideline 8.6 The Defense Sentencing Memorandum

a. Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

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

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

7.2 Prosecution and Probation Recommendations

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

7.3 Pre-Sentence Reports

(a) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct these before prejudice occurs.

(b) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

7.4 Defense Recommendations

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

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

(b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.

(c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses; e.g., reports or testimony from employers, community representatives and family.

(d) Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

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

Guideline 8.4 The Official Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

(1) determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;

(2) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;

(3) review the completed report and discuss it with the client;

(4) take appropriate steps to ensure that erroneous or misleading information which may harm the client is challenged or deleted from the report;

(5) take appropriate steps to preserve and to protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:

(A) the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

(B) the prosecution fails to prove an allegation;

(C) the court finds an allegation not proved.

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

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

Guideline 8.5 The Prosecution's Sentencing Position

(a) Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for an aggravated sentence.

(b) If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

(c) If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to probation, parole and correctional officials.

Guideline 8.6 The Defense Sentencing Memorandum

(a) In the appropriate case, counsel should prepare and present to the court a defense sentencing memorandum. Among the topics counsel may wish to include in the memorandum are:

(1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;

(2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;

(3) information contrary to that before the court which is supported by affidavits, letters, and public records;

(4) information favorable to the defendant concerning such matters as the offense, mitigating factors (cultural background, mental health, retardation, etc.), relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;

(5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(7) presentation of a sentencing proposal.

Guideline 8.7 The Sentencing Process

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

(b) Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

(c) In the event there will be disputed facts before the court at sentencing, counsel sh ould consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

(d) Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

(e) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation/exclusion of the defendant.

(f) Where appropriate, counsel should prepare the c lient to personally address the court. In addition, counsel should prepare expert and sentencing advocate witnesses to address the court.

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

Standard 2.10—Sentencing or Disposition

Counsel should:

…

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

Implementation

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

   …

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

   …

3. Counsel should:

…

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

…

4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:

   a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;

   b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

   c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.

3. Motion for New Trial

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.1 Motion for a New Trial

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

b. When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

   1. the likelihood of success of the motion, given the nature of the error or errors that can be raised;

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

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

Guideline 9.1 Motion for a New Trial in District Court

(a) Counsel should be familiar with the procedures available under the Rules of Appellate Procedure, 12-201, to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

(b) When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

   (1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;

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

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

Standard 2.11—Postdisposition Procedures

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

Implementation

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

4. Motion for Bail Pending Appeal and Related Motions

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.3 Bail Pending Appeal

a. Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

b. Where an appeal is taken and the client requests bail pendi ng appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

Guideline 9.4 Self-Surrender

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

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

Guideline 9.3 Bail Pending Appeal

(a) Where a client indicates a desire to a ppeal from a conviction after trial or after a conditional plea, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

(b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel to pursue the request for bail.

Guideline 9.4 Self-Surrender

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

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

Standard 2.11—Postdisposition Procedures

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

Implementation

…

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

5. Explanation to Client of Right of Appeal

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

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.2 Appeal

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.2 Right to Appeal

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

b. Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.

Guideline 9.5 Sentence Reduction

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeal

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

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

Guideline 9.2 Right to Appeal from District Court Disposition

(a) Counsel should inform the client of his/her right to appeal a conviction after trial, after a conditional plea or after a guilty plea that was not entered in a knowing, intelligent and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision.

(b) If the client wishes to appeal, counsel should timely file a notice of appeal and a docketing statement or timely request extensions after advising the client of the need for an extension. If a client wishes to waive appeal from a conviction after trial or a conditional guilty plea, counsel should timely file a written waiver of appeal pursuant to Rule 5-702 (b).

(c) Where possible, counsel should request the audio-tape or stenographic transcript of the proceedings in order to prepare a complete and accurate docketing statement, and where possible, should preserve that transcript to provide to appellate counsel on request. In judicial districts where it is not possible to obtain the transcript of the trial to prepare the docketing statement, counsel should take careful, contemporaneous notes of all trial proceedings to ensure an accurate statement of the facts.

(d) Where appellate counsel was not trial counsel, trial counsel should timely respond to requests from appellate counsel for additional information about the case.

(e) If an appeal is subsequently assigned to the general calendar, trial counsel should provide the district court clerk with a list of all the hearing dates and court proceedings that are needed for the record on appeal. Trial counsel must also file a designation of the specific exhibits needed for appeal with the district court clerk pursuant to Rule 12-212.

(f) Counsel's advice to the client regarding the right to appeal should include an explanation of the limited nature of the relief available on direct appeal and, where appropriate, should advise the client of the right to file a pro se habeas corpus petition. Counsel should provide a pro se habeas corpus packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise a client of the relevant time frames for filing state and federal habeas corpus

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

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

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

Standard 2.11—Postdisposition Procedures

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

Implementation

…

2. Counsel should inform the client of his or her right to appeal the judgmen t and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.

6. Filing of Appeal

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeal

…

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

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

8.1 Appellate Rights

(a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence and should file such motion in a timely fashion if requested to do so by the client or, if appropriate, to insure an accurate and legal sentence.

(b) After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file in a timely fashion the appropriate notice and request either a tape or transcript of all prior court proceedings.

(c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

8.2 Continuing Duty to Represent

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

7. Cooperation with Appellate Counsel

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.2 Right to Appeal

…

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

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense

Guideline 6.2. Appeals

…

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

8. Related Issues

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

NLADA Performance Guidelines for Criminal Defense Representation

Guideline 9.6 Expungement or Sealing of Record

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

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

Guideline 9.6 Expungement or Sealing of Record

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

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

Standard 2.11—Postdisposition Procedures

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

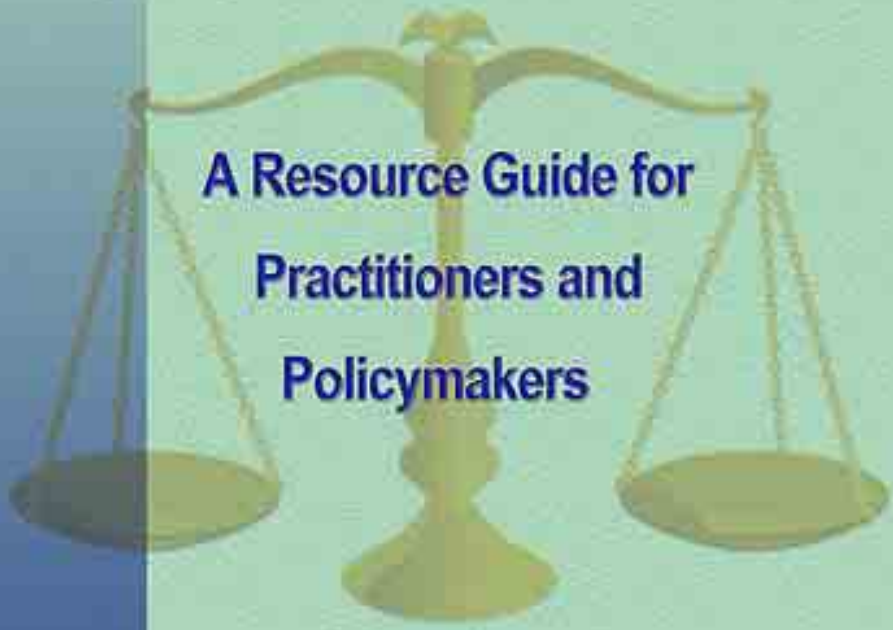
Implementation

…

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

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems



A Resource Guide for Practitioners and Policymakers

Volume III

Standards for

Capital Case Representation

December 2000

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Foreword

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

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

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

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

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

Mary Lou Leary
Acting Assistant Attorney General
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3. Insufficiency of Minimum Criminal Defense Standards

B. Counsel Appointment
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2. Trial Attorney Qualifications/Experience
3. Appeals Attorney Qualifications/Experience
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F. Attorney Performance: Pretrial
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9. Explanation of Plea Contents and Implications

G. Attorney Performance: Trial

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2. Preserving Objections to Error
3. Establishing a Plan to Avoid Death Sentence

H. Attorney Performance: Sentencing

1. Preparing for Sentencing
2. Conducting Sentencing Investigation
3. Considering Own Sentencing Report
4. Preparing for Prosecutor Arguments at Sentencing
5. Considering Full Scope of Defense Arguments

I. Attorney Performance: Postjudgment

1. Trial Counsel Duties
2. Appellate Counsel Duties
3. Postconviction Counsel Duties
4. Clemency Counsel Duties
5. Related Standards

Introduction

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

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

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

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

Sponsorship and Development

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

Methodology

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

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

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

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

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

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

State Legislation, Court Rules, and Standards Relating to Capital Case Representation Experience and Training

E = Experience requirement; T = Training requirement

State	Law	Rule	Standards/ Guidelines	State Capital Defender Agency	No Death Penalty
AL					
AK					Yes
AZ		Yes: E,T			
AR				Public Defender Commission. Yes: E, T	
CA		Yes: E Appeals/ Postconviction		State Public Defender handles appeals; Habeas Corpus Center handles post-conviction. Court rule applies to both.	
CO				Public Defender. Practice is to appoint experienced, competent attorneys for trial and appeal	
CN				Public Defender. Practice is E, T	
DE				Public Defender. Civil service rules require experience; practice is to appoint attorneys experienced in capital cases	
DC					Yes
FL	Yes: E	Yes soon E, T		Post-Conviction Center (3 regional). Uses proposed Supreme Court rule for hires	
GA		Yes: E, T	Yes: E, T	Multicounty Public Defender. Yes: E, T	
HA					Yes
ID		Yes: E, T Trial/Appeal		Appellate Public Defender. Court rule applies to office	
IL				Appellate Defender. Practice is for experience	
IN		Yes: E, T Trial/Appeal	Yes: E	Public Defender. (handles postconviction)	
IA					Yes
KS	Yes: E, T		Yes: E, T Trial/Appeal	Indigent Defense Services. No policy; practice is for experience	
KY				Department of Public Advocacy, special unit. Policy: goal is to meet ABA standard	
LA		Yes: E, T	Yes: E, T Trial/Appeal		

ME					Yes
MD				Public Defender, special unit. Uses list of experienced attorneys	
MA					Yes
MI					Yes
MN					Yes
MS				Public Defender Authorized	
MO		Yes: E, T		Public Defender System. Court rule applies to contract attorneys. Pay classification scheme requires experienced attorneys in special unit	
MT		Yes: E, T Trial/ Postconviction		Appellate Defense Commission. Court rule applies	
NE				Commission has own standards. Yes: E Trial/Appeal	
NV		Yes: E		Public Defender. Court rule applies	
NH				Public Defender. No policies	
NJ				Public Defender. No policies; practice is to require experience	
NM				Public Defender. Yes: Use ABA/NLADA for special unit and contract	
NY		Yes: E, T Trial/Appeal/ Postconviction		Capital Defender's Office. Policy requires training; court rule also applies	
NC		Yes: E		Appellate Defender. No policy. Indigent Defense Services Commission adopted policy for trial/appeal/postconviction experience	
ND					Yes
OH	Yes: E	Yes: E		Public Defender. Court rule applies	
OK-				Indigent Defense System. Special trial unit	
OR			Yes: E, T	Indigent Defense Services Division. Yes: E, T Trial/Appeal/Postconviction Public Defender (Appellate). Has special unit; staff chosen based on length of experience and subjective measures	

PA					
RI					Yes
SC	Postcon-viction:. E, T			Office of Appellate Defense. No policies; special unit	
SD					
TN		Yes: E, T Appeal/ Postconviction		Postconviction Defender. Court rule applies per commission policy to director only.	
TX					
UT		Yes: E, T			
VT					Yes
VA			Yes: E, T Trial/Appeal		
WA			Yes: E		
WV					Yes
WI					Yes
WY				Public Defender. No policies; special trial unit being established	

List of Standards and Table of Key Elements

Standards Included

National

Conference of Chief Justices, *Resolution XVII: Competence of Counsel in Capital Cases*, 1995

American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989

American Bar Association, *Standards for Criminal Justice: Providing Defense Services*, 1992

Federal Judicial Conference Committee on Defender Services, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, 1999

National Legal Aid and Defender Association, *Defender Training and Development Standards*, 1997

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, 1988

State and Local

Georgia Indigent Defense Council, *Guidelines for the Operation of Local Indigent Defense Programs*, 1989

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

Kansas Board of Indigents' Defense Services, *Permanent Administrative Regulations*, 1994

Louisiana Indigent Defender Board, *Standards on Indigent Defense*, 1995

Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases*, 1996

New York Court of Appeals, *Standards for Appellate Counsel in Capital Cases*, 1998

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

Ohio Public Defender, *Standards and Guidelines for Appointed Counsel Reimbursement (2d)*, 1996

Virginia Public Defender Commission, *Standards for the Qualifications of Appointed Counsel in Capital Cases*, 1999

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

Key Elements

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Conference**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
A. General															
	Need for standards	✓			✓										
	Need to ensure quality/ effective legal services		✓		✓				✓	✓					
	Insufficiency of minimum criminal def. standards		✓		✓					✓					
B. Counsel Appointment															
	Method of appointment		✓		✓			✓			✓				
	Trial attorney qualifications/ experience		✓	✓	✓	✓	✓	✓	✓	✓		✓		✓	✓
	Appeals atty. qualifications/ experience		✓	✓	✓		✓	✓	✓	✓	✓			✓	
	Postconviction atty. quals/ experience		✓	✓	✓			✓		✓	✓			✓	
	Monitoring of performance and removal from roster		✓		✓				✓		✓				
	Requirement for training[1]		✓	✓	✓				✓		✓				

[1] See also the NLADA *Defender Training and Development Standards*, Standard 7.1. Death Penalty Defense: Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal, and postconviction.

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
C. Plan Elements															
	Requirement for a formal plan		✓		✓										
	Provision for support services		✓	✓	✓				✓						
	Related standards					✓									
D. Financial															
	Client eligibility									✓					
	Attorney compensation rate		✓	✓	✓	✓							✓		
E. Workload															
	Requirement that workload not be excessive		✓						✓	✓					
	Specification of the number of attorneys per case		✓		✓				✓	✓				✓	

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
F. Attorney Performance: Pretrial															
	Requirement for performance stds		✓		✓										
	Prepare as if death penalty to be sought		✓		✓					✓					
	Formulate theory of case		✓		✓					✓					
	Conduct independent investigation		✓		✓					✓					
	Maintain close contact with client		✓		✓					✓					
	Consider filing pretrial motions		✓		✓					✓					
	Explore plea negotiations		✓		✓					✓					
	Inform client of plea options		✓		✓					✓					
	Fully explain plea contents and implications		✓		✓					✓					
G. Attorney Performance: Trial															
	Prepare for voir dire		✓		✓					✓					
	Preserve objections to error		✓		✓					✓					
	Establish plan for avoiding death sentence		✓		✓										

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
H. Attorney Performance: Sentencing															
	Prepare for sentencing		✓		✓					✓					
	Conduct sentencing investigation				✓					✓					
	Consider own sentencing report		✓		✓					✓					
	Prepare for prosecutor arguments at sentencing		✓		✓					✓					
	Consider full scope of defense arguments		✓		✓					✓					
I. Attorney Performance: Postjudgment															
	Trial counsel duties in post judgment		✓		✓					✓					
	Appellate counsel duties		✓		✓										
	Post-conviction counsel duties		✓		✓										
	Clemency counsel duties		✓		✓										
	Related standards		✓		✓										

A. General

The following topics are covered in this section:

1. Need for standards
2. Need to ensure quality/effective legal services
3. Insufficiency of minimum criminal defense standards

Also included is the Conference of Chief Justices resolution on competence of counsel in capital cases.

1. Need for Standards

Commentary. The need for standards may seem obvious to some, but it nonetheless needs explanation to many others. The Chief Justices' resolution and the NLADA Death Penalty Case Standards take very different paths to defining the need for standards. See also "Purpose of Standards" in the other volumes of this compendium.

Conference of Chief Justices, Resolution XVII: Competence of Counsel in Capital Cases

Whereas, the Conference of Chief Justices has long supported legislation that would place reasonable limits on federal habeas corpus review of state convictions, including capital cases; and

Whereas, Congress is presently considering changes in the federal habeas corpus procedures which would substantially limit review of state proceedings, including capital cases; and

Whereas, quality representation and competency of counsel has long been a major subject of federal habeas court litigation, particularly in capital cases; and

Whereas, providing quality representation to defendants facing loss of liberty or life is essential to fundamental due process and the speedy and final resolution of judicial proceedings; and

Whereas, the development, promulgation and implementation of standards and procedures for quality representation in state courts is a state responsibility; and

Whereas, it appears that the numbers of defendants facing potential death penalty sanctions are burgeoning and the energies and resources of the volunteer attorneys, public defenders and death penalty resource centers who have provided the bulk of representation for these defendants over the past decade have largely been exhausted;

Now, therefore, be it resolved that the Conference urges the judicial leadership of each state in which the death penalty is authorized by law to:

- Initiate a broad-based, interdisciplinary planning program to establish standards and a process that will assure the timely appointment of competent counsel, with adequate resources, to represent defendants in capital cases at each stage of such proceedings; and
- Cooperate with other states and the National Center for State Courts in developing a national clearinghouse for joint assistance in developing procedures for recruiting and compensating competent counsel in capital cases; and

Be it further resolved that the national Center shall report biannually to the Conference of Chief Justices and the Conference of State Court Administrators concerning activity that has occurred pursuant to this Resolution.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 3.1 Legal Representation Plan

a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt Standards and procedures for the appointment of counsel in capital cases consistent with these Standards, and perform all duties in connection with the appointment process as set forth in these Standards.

b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction;

   ii. have practiced law in the field of criminal defense for not less than five years;

   iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

   iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

   v. are dedicated to quality legal representation in capital cases.

The committee should adopt Standards and procedures for the appointment of counsel in capital cases, consistent with these Standards, and perform all duties in connection with the appointment process.

Standard 11.1 Establishment of Performance Standards

a. The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

b. The Standards of performance should include, but should not be limited to , the specific Standards set out in Standards 11.3 through 11.9.

c. The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

2. Need to Ensure Quality/Effective Legal Services

Commentary. Another way to define the need for standards is to focus on the purpose of counsel, especially on able counsel. The four sets of standards below discuss both quality legal representation and ensuring the right to counsel through use of standards.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 1.1 Objective

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 1.1 Objective

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Purpose and Scope of Standards. The following standards are designed to ensure that the constitutional right to the effective representation by counsel is provided to indigent persons accused of capital crimes. The certification process described herein is designed to provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar and providing for the largest possible pool of certified counsel.

These standards address principles of eligibility and certification of trial and appellate counsel involved in the defense of indigent clients accused of capital crimes, including educational requirements, workload standards, and support.

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

Standard I. Policy Statement: Objective of the Nebraska Commission on Public Advocacy

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

3. Insufficiency of Minimum Criminal Defense Standards

Commentary. As the Nebraska standards state, "Death is different." This difference requires the establishment of standards specifically drawn with death penalty cases in mind.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.2 Minimum Standards Not Sufficient

A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.2 Minimum Standards Not Sufficient

a. Minimum Standards that have been promulgated concerning representati on of defendants in criminal cases generally, and the level of adherence to such Standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

b. Counsel in death penalty cases should be required to perform at the l evel of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

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

III. Operating Policies and Procedures

E. Minimum Standards Required

"Death is different," and all rules established for the protection of the capital defendant should be strictly enforced. The defense of death penalty cases is an evolving practice

and counsel should refer to state and federal death penalty training and practice manuals for preparation and trial of death penalty cases. When the courts are not likely to provide the proper enforcement of the rules *sua sponte*, attorneys must seek to enforce the rules, or their clients will die. The minimal level of attorney competence that may be accepted as sufficient in some jurisdictions in non-capital cases can be fatally inadequate in death penalty cases. For example, attorney ignorance or oversight will not constitute cause for failure to meet the exhaustion requirements of federal habeas corpus, unless the attorney's failures have been so egregious as to meet the current standard of constitutionally ineffective assistance of counsel. Under this rule, otherwise reversible error will be ignored by the court; the capital client, rather than serving an improperly imposed but unreviewable prison term because of counsel's error, will die. To ensure that indigent defendants will not die for, and their attorneys will not have to live with, such error, the standards of performance established by the appointing authority under Guideline 11.1 should include requirements that all aspects of representation be intensified in a capital case.

VII. Performance Standards for Counsel in Capital Cases

Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, are not sufficient for death penalty cases. Counsel in death penalty cases must perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation. See ABA Guideline 11.2.

B. Counsel Appointment

Ensuring qualified counsel is the first purpose of capital case representation standards (see *supra*). This leads then to standards relating to how counsel are appointed, using what qualification standards.

The following topics are included in this section:

1. Method of appointment
2. Trial attorney qualifications/experience
3. Appeals attorney qualifications/experience
4. Postconviction attorney qualifications/experience
5. Monitoring of performance and removal from roster
6. Requirement for training

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services," especially the requirement that there be a system or plan. See also "Plan Elements" *infra* in this volume.

1. Method of Appointment

Commentary. How counsel is appointed determines, in part, who is appointed to represent defendants in capital cases. The several standards here include those for screening for qualifications, roster of attorneys, distributing assignments to all members of the roster, and locus of appointment authority (e.g., court).

Although many local jurisdictions have special qualifications for attorneys in capital cases, very few also have special appointment procedures. But see Cobb County (Georgia) Indigent Defense Program Guidelines, Article II, Section 1, "Method of Appointment in Murder Cases," requiring trial judge or chief judge approval of any defense counsel selected by the program administrator.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 4.1 Selection of Counsel

A. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

B. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in Guideline 5.1; the second roster should contain the names of attorneys eligible for appointment as assistant defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in the same Guideline.

C. The appointing authority should review applications from attorneys conc erning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorney's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Guideline 5.1 and the performance standards established pursuant to Guidelines 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

D. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

In jurisdictions where a defender office or other entity by law receives a specific portion of or all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflicts of interest or other reasons.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 4.1 Selection of Counsel

a. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

b. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in Standard 5.1; the second roster should contain the names of attorneys eligible for appointment as co-counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in the same Standard.

c. The appointing authority should review applications from attorneys concerning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorney's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Standard 5.1 and the performance Standards established pursuant to Standards 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

d. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

e. In jurisdictions where a defender office or other entity by law receives a specific portion of all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflict of interest or other reasons.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105.3.12 Appointments in Capital Cases

(a) In each case in which the death penalty may be imposed and the defendant is unable to afford counsel, the court shall appoint the capital defender to represent the defendant.

(1) Subject to [Kansas law], the court may appoint co-counsel from the capital appointments panel list to represent the defendant in accordance with the system established by these regulations for providing legal defense services for indigent persons charged with capital felonies. The court, however, shall not appoint any attorney as co-counsel without prior notice to the chief capital defender and the board.

(2) The court shall not appoint any attorney to provide representation in a capital felony without prior notice to the chief capital defender.

(3) Eligibility to serve on the capital appointments panel shall be limited to attorneys who have been screened pursuant to [Kansas law].

(b) The court shall appoint counsel for any indigent person accused of homicide from panel lists approved by the board. The court shall not appoint any attorney to provide representation to an indigent person accused of a felony without prior notice to the chief capital defender.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standard 3. Creation of Court of Appeals Roster

(a) Delivery to Screening Panel. The Capital Defender Office shall review each application to determine that it is complete. The Capital Defender Office shall deliver all completed applications, within 30 days of receipt, to the appropriate Screening Panel, together with a statement setting forth the status of the attorney's completion of the training required by section 5, below, and its recommendations to the Screening Panel with respect to whether the attorney is qualified for appointment as appellate counsel in a capital case. The appropriate Screening Panel shall be the panel in the judicial department in which the attorney has his or her principal office for the practice of law.

(b) Designation by Screening Panel. Within 30 days of receipt of the application, each Screening Panel shall designate those attorneys deemed qualified for appointment as appellate counsel in a capital case, and shall report those designations to the Court of Appeals.

(c) Waiver or Deferral of Required Submissions. If an attorney cannot provide each of the above items, the Screening Panel, upon demonstration that the attorney is capable of providing effective representation as appellate counsel in a capital case, and after consideration of the recommendation of the Capital Defender Office, may:

(1) defer submission of any item(s) for a reasonable time, and in the interim designate the attorney as a qualified appellate counsel; or

(2) waive such submission.

(d) Establishment of the Roster. The Court of Appeals shall incorporate the names of each attorney found qualified by a Screening Panel into a single roster of attorneys qualified for appointment as appellate counsel in a capital case.

Standard 4. Additions to Court of Appeals Roster

(a) Requests for Reconsideration. Any attorney whose application for designation as qualified appellate counsel is rejected by a Screening Panel may apply to the Court of Appeals for reconsideration of his or her application pursuant to such procedures as may be prescribed by the Court of Appeals.

(b) Determination by the Court of Appeals. The Court of Appeals shall review each such application pursuant to the criteria set forth in these standards, including consideration of the recommendations of the Capital Defender Office and of the Screening Panel, and may add that attorney to the roster of qualified appellate counsel if the Court deems the attorney qualified to serve as a ppellate counsel in a capital case.

2. Trial Attorney Qualifications/Experience

Commentary. Capital cases require experienced counsel. The standards set forth here call for minimal experiential qualifications only. The ABA and NLADA standards for attorney qualification in death penalty cases are virtually identical.

Georgia and Kansas standards explicitly refer to the ABA standards, while the Louisiana, Nebraska, and Washington standards closely emulate them. The New York City standards add a new requirement that an attorney with capital case experience supervise and add higher experience requirements generally. The Vermont standards follow the ABA requirement in form but do not set experience requirements as high as the ABA does.

In addition to the standards displayed here, many local standards also include attorney eligibility criteria. See, for example, Second Judicial Circuit of Florida, *Conflict Attorney Policies* (October 1992) Standard I(B) "Basic Qualifications: Capital Cases"; Alameda County Bar Association, *Court Appointed Attorneys' Program, Rules and Regulations* (1988), Rule F(1) "Experience Requirements for Capital Cases"; Circuit Conflict Committee, Eleventh Judicial Circuit of Florida, *Policies and Procedures* (1992) "Attorney Qualifications: Category IV Cases"; Montgomery County (Alabama), *Capital Murder Appointment Procedures*; Philadelphia General Court, Regulation 89-3, Rule 406, "Standards for Appointment of Counsel," Rule 406-1, ppointment in Homicide Cases"; Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part X Attorneys Guideline 10.1(A) "Qualification of Panel Attorneys in Felony-Life/Death Cases"; and Cobb County (Georgia) Indigent Defense Program Guidelines, Article 1, Section 4, "Murder," Section 5, "Capital itional state-level standards include these: *Nevada Supreme Court Rules*, Rule 250 "Procedures in Capital Cases," Subsection (IV), "Qualification of Defense Counsel"; North Carolina State Bar, *Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases*, Art. VII §7.3 (1995); *Indiana Rules of Criminal Procedure*, Criminal Rule 24: Capital Cases, §(B) "Appointment of Qualified Trial Counsel"; *Utah Rules of Criminal Procedure*, Rule 8, "Appointment of Counsel," §(b)(c); and Arkansas Public Defender Commission, *Minimum Standards*, "Attorney Qualifications: Certification Criteria, Attorney Eligibility:

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 5.1 Attorney Eligibility

1. TRIAL

A. Lead trial counsel assignments sh ould be distributed to attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. who qualify as lead counsel under paragraph (A) of this Guideline or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil

litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or postconviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or postconviction review that, in combination with co-counsel, will assure high quality representation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1(1)

The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

1. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

(i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

(ii) are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

(iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

(iv) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(v) are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(vi) have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

(vi) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

(i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

(ii) who qualify as lead counsel under paragraph A of this Standard or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

(i) Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

(ii) Specialized postgraduate training in the defense of persons accused of capital crimes;

(iii) The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

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

Guideline 2.4 Panel Attorney Programs

…

(e) Cases in which the death penalty is sought shall be assigned only to attorneys of sufficient experience, skill and competence to render effective assistance of counsel to defendants in such cases. The American Bar Association "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" may be referred to as a suggestion for the determination of the experience, skill and competence of the attorneys.

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

Standard E. Appointment of Counsel

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

1. *Murder*. To be eligible to serve as appointed counsel in a case where the accused is charged with murder, an attorney shall:

   a. be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience; and

b. have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials that were Class C felonies or higher which were tried to completion.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(4) Each attorney assigned or appointed to the defense of any indigent person accused of a capital felony shall be a prequalified death penalty attorney. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person accused of a capital felony, pursuant to these regulations and "Guideline 5.4(1), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments panel shall be certified by the board.

(5) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(1), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments appellate panel shall be certified by the board.

(6) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(III), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments postconviction panel shall be certified by the board.

(7) To ensure compliance with these regulations in capital felony or homicide cases, each attorney assigned or appointed to the defense of any indigent person accused of a capital felony or a homicide shall be appointed from panel lists screened pursuant to these regulations and approved by the board.

…

(b) Except for appointment of an attorney to provide representation for an indigent person accused of a capital felony or a homicide, an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment or an indigent person who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings, the judge may waive any of the above conditions if the attorney selected by the judge has sufficient training, resources, and experience to undertake the case in question.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part I. General Principles of Certification Eligibility. The following standards shall be applied to attorney certification under any part of this chapter:

Standard 7-1.1. Eligibility. The attorney shall be familiar with the practice and procedure of the criminal courts of Louisiana and shall be a member in good standing of the Louisiana Bar or admitted to practice *pro hac vice*.

Standard 7-1.2. Evidentiary Matters. The attorney shall be familiar with the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence.

Standard 7-1.3. Initial Training. Within one year of an initial application for certification under the standards of this Chapter, the attorney shall complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-1.4. Continuing Training. To maintain certification, counsel shall, every two years from the date of certification, successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Part II. Trial Lead Counsel. To be certified to serve as trial lead counsel, an attorney shall also satisfy the following minimum standards.

Standard 7-2.1. Eligibility Criteria. Trial lead counsel shall:

(A) Be an experienced and active trial practitioner with at least five years of litigation experience;

(B) Have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these nine jury trials, at least five must have involved felonies or two must have involved the charge of murder; and

(C) Have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.

Part III. Trial Associate Counsel. To be certified to serve as trial associate counsel in a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-3.1. Eligibility Criteria. Trial associate counsel shall:

(A) Be an experienced and active trial or appellate practitioner with at least three years of litigation experience; and

(B) Have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.

…

Standard 7-6.2. Alternative Requirements; Trial Lead Counsel. An attorney seeking certification as trial lead counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-2.1(A) of this Chapter ;

(B) Substantially satisfy Standard 7-2.1(B) or 7-2.1(C); and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-6.3. Alternative Requirements; Trial Associate Counsel. An attorney seeking certification as trial associate counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-3.1(A) of this Chapter;

(B) Substantially satisfy Standard 7-3.1(B) of this Chapter; and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

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

Standard III. Operating Policies and Procedures

…

C. Counsel Eligibility Standards

The following classes of attorneys are created to set the minimum standards for counsel in capital and non-capital cases at trial, appellate, and postconviction stages.

Class A: Counsel qualified as lead counsel in capital cases.

Class B: Counsel qualified as co-counsel in capital cases.

…

1. Qualifications for A

1.1 Member of the Nebraska bar or admitted *pro hac vice*.

1.2 Experienced and active in criminal defense with not less than five years experience in criminal litigation.

1.3 Prior experience as lead counsel in at least ten jury trials of serious or complex cases tried to completion, including:

(1) two murder cases as co-counsel and five felony jury trials of a Class III or higher felony, or

(2) one murder trial in which the death sentence was sought, and five felony jury trials of Class III or higher felony.

1.4 Experience in trial practice which includes the use of and challenge of psychiatric and other forensic experts, including, but not limited to ballistic, fingerprint, handwriting, DNA, pathologists, psychologists, and addictionologists.

1.5. Demonstrates proficiency and commitment which exemplify the quality of representation appropriate to capital cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

2. Qualifications for B

2.1 Member of the Nebraska bar or admitted *pro hac vice*.

2.2 Experienced and active in criminal defense with not less than three years experience in litigation of criminal defense.

2.3 Prior experience as lead or co-counsel in:

a. At least five jury trials of serious or complex cases tried to completion, including (1) one murder case or (2) two jury trials of Class III or higher felony.

2.4 Demonstrates proficiency and commitment which exemplify quality of representation appropriate to capital cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

…

4. Alternative Qualification

The Chief Counsel may determine an attorney is qualified even though the attorney may not meet all qualifications above. The Chief Counsel may, in his/her discretion permit any counsel to participate in a given case. The Chief Counsel will look to the following factors in deciding whether to consider such a special request:

4.1 Extensive criminal and/or civil trial experience ;

4.2 Clearly demonstrated ability to provide competent representation ;

4.3 Experience in death penalty trial not meeting standards above, such as work as counsel other than lead or co-counsel ;

4.4 Specialized postgraduate training in defense of persons accused in capital crimes, such as experience in a death penalty resource center or law school postconviction project;

4.5 Availability of ongoing consultation support from experienced death penalty counsel.

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

Standard II. Qualification of Lawyers

…

B. Evaluation Criteria

1. Qualifications for Counsel

…

(b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

…

(iii) Homicide Cases

(1) If the defense organization is assigned homicide cases, in addition to requiring that lawyers meet all the requirements for handling felony cases, does it require additional experience, including prior experience examining expert witnesses, before certifying lawyers as qualified to handle homicide cases?

(2) Does the defense organization require that lawyers conducting their first homicide trial be supervised by a lawyer who has previously tried homicide cases as lead or sole counsel?

Specific Guideline:

Each staff lawyer assigned by the defense organization to handle homicide cases without supervision must have had actual court experience in at least sixty criminal cases during the previous five years, involving at least:

(i) thirty negotiated pleas, dismissals, or other non-trial dispositions, at least ten of which occurred postindictment;

(ii) fifteen hearings in which oral testimony was taken and a decision was rendered;

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

A. TRIAL COUNSEL

1. Court-appointed "lead counsel" must:
   a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
   b. Have at least five years of criminal litigation practice with demonstrated competence.
   c. Have had, within the past two years, some specialized training in capital litigation.
   d. Have at least one of the following qualifications:
      i. Experience as "lead counsel" in the defense of at least one capital case ;
      ii. Experience as "co-counsel" in the defense of at least two capi tal cases;
      iii. Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.
   e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.
   f. Have demonstrated proficiency and commitment to quality represent ation.
2. Court-appointed "co-counsel" must:
   a. Meet all of the requirements of "lead counsel" except 1(b) and 1(d).

Washington Defender Association, Standards for Public Defense Services

Standard Fourteen. Qualification of Attorneys

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
   a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
   b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

2. Trial attorneys' qualifications according to severity or type of case:

   a. Death Penalty Representation. Each attorney acting as lead counsel in a death penalty case shall meet the following requirements:

      1. The minimum requirements set forth in Section 1; and

      2. at least five years criminal trial experience; and

      3. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

      4. have served as lead or co-counsel in at least one jury trial in which the death penalty was sought; and

      5. have completed at least one death penalty defense seminar within the previous two years.

3. Appeals Attorney Qualifications/Experience

Commentary. All of the several standards for trial attorney qualifications also set standards for appeals attorneys, except for the Georgia guidelines. Again, the ABA and NLADA standards are virtually identical and serve as the model for the states' standards.

See also, Utah Rules of Criminal Procedure, Rule 8, "Appointment of Counsel," §(d); Arizona Supreme Court Rules of Criminal Procedure, Rule 6.8, "Standards for Appointment of Counsel in Capital Cases," §(c), "Appellate and Postconviction Counsel" (1996); Indiana Rules of Criminal Procedure Criminal Rule 24, "Capital Cases," §(J), "Appointment of Appellate Counsel"; Philadelphia General Court Regulation 89-3, Rule 406, "Standards for Appointment of Counsel," Rule 406-2, "Appeals in Death Penalty Cases" (1996); and Second Judicial Circuit of Florida, *Conflict Attorney Policies*, Policy I, "Basic Qualification," §(E) "Capital Appellate Division" (1997). The Montgomery (Alabama) Capital Murder Appointment Procedures, Section 12, call for trial attorneys to continue to represent their clients in capital cases through the direct appeal process.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 5.1 Attorney Eligibility

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel . At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointments

…

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;

ii. the general qualifications identified in paragraph 1(a), above; and

iii. the attorney's willingness, unless relieved, to serve as counsel in any postconviction proceedings that may follow the appeal.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel . At a minimum, however, assistant appellate attorney candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

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

Standard F. Appointment of Appellate Counsel

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

1. *Murder and Class A or B felony.* To be eligible to serve as appointed counsel in a case where the accused is charged with murder or a Class A or B felony, an attorney shall be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation and have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender commission.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(5) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to those regulations and "Guideline 5.1(11), Attorney Eligibility," as published in the 1989 version of the American Bar Association elines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments appellate panel shall be certified by the board.

Rule 105-3-12 Appointments in Capital Cases

…

(c) Appeals. The court shall appoint the state appellate defender to represent an indigent defendant in each appeal of a capital felony conviction in accordance with K.A.R. 105-10-2.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part IV. Appellate Lead Counsel. To be certified to serve as lead counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-4.1. Eligibility Criteria. Unless certified in accordance with Part VI of this Chapter, appellate lead counsel shall:

(A) Be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases;

(B) Be an experienced and active trial or appellate practitioner with at least three years experience in the field of criminal defense;

(C) Have prior experience within the last three years as lead co unsel in the appeal of no fewer than three felony convictions in federal or state court; and

(D) Have prior experience within the last three years as lead counsel or associate counsel in the appeal or postconviction application, in federal or state court, of at least one case where a sentence of death was imposed.

Part V. Appellate Associate Counsel. To be certified to serve as associate counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-5.1. Eligibility Criteria. Unless certified in accordance with Part IV of this Chapter, appellate associate counsel:

(A) Shall be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases; and

(B) May have less experience than an attorney qualified to serve as lead appellate counsel, although such attorney shall have demonstrated adequate proficiency in appellate advocacy in the field of felony defense.

Part VI. Alternative Certification Procedure. Notwithstanding Parts II through IV of this Chapter, a district court judge may move the Board to certify as trial lead counsel, trial associate counsel, or appellate lead counsel, an attorney who does not strictly satisfy the specific standards above.

Standard 7-6.4. Alternative Requirements; Appellate Lead Counsel. An attorney seeking certification as appellate lead counsel under Part VI of this Chapter shall:

(A) Satisfy Standards 7-1.1, 7-1.2, 7-4.1(A) and 7-4.1(B) of this Chapter;

(B) Substantially satisfy Standard 7-4.1(C) or 7-4.1(D); and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to filing a brief in the appeal of a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

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

Standard III. Operating Policies and Procedures

C. Counsel Eligibility Standards

…

5. APPEAL

5.1 Lead appellate counsel assignments should be distributed to attorneys who:

a. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. are experienced and active trial or appellate practitioners with at least five years experience in the field of criminal defense; and

c. have five years experience in criminal litigation and criminal appeals as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal

of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder or aggravated murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

d. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

e. demonstrate proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

5.2 Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate the following:

a. member of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. at least three years experience in the practice of law as an appellate lawyer. The appellate experience may include advising clients on questions or interpretations of law and/or administrative policies concerning criminal law, or serving as an attorney for state or federal appellate courts, or a combination of the above. The appellate attorney shall have knowledge of state and/or federal statutory and case law and constitutional provisions, the principles and practices of criminal law, judicial procedures and rules of evidence, the principles and practices of legal research, the procedures of trial, and the techniques of preparing and drafting legal documents and forms; and

c. familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

d. demonstrates proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

5.3 Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

a. experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs 1 or 2 above;

b. specialized postgraduate training in the defense of persons accused of capital crimes;

c. the availability of ongoing consultation support from experienced death penalty counsel.

The Chief Counsel is to ensure that any lawyer representing an appointed indigent client will provide competent representation.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standards for Appellate Counsel in Capital Cases

1. Appellate Qualifications and Experience

(a) Sole Appellate Counsel. To be eligible to be appointed as sole appellate counsel on direct appeal in a capital case, an attorney must demonstrate that he or she:

(1) has at least five years of criminal trial or criminal appellate or postconviction experience, or has at least three years of concentrated criminal litigation experience;

(2) is familiar with the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(3) also has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney.

(b) Two Appellate Counsel. To be eligible to be appointed as **one of two appellate counsel** on direct appeal in a capital case:

(1) one attorney must demonstrate that he or she has the qualifications set forth in (a) above.

(2) the second attorney must demonstrate that he or she:

(i) has at least three years of criminal litigation or postconviction experience;

(ii) is familiar with the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(iii) has had primary responsibility for the appeal, in any state or federal court, of at least three felony convictions, at least one of which was on behalf of the defendant.

(c) Trial Counsel. If otherwise qualified under these standards, and with the consent of the client, a defendant's capital trial counsel may seek to be appointed capital appellate counsel on the same defendant's appeal.

(d) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Screening Panel, after consideration of the recommendation of the Capital Defender Office, may waive such requirement by demonstration by the attorney that he or she, by reason of extensive civil litigation and/or appellate experience or other exceptional qualifications, is capable of providing effective representation as appellate counsel in a capital case.

2. Applications to the Capital Defender Office

…

(b) Required Submissions. In support of an application, an attorney shall submit to the Capital Defender Office:

(1) at least two briefs, written exclusively or primarily by the applicant, the opposing briefs, and the decisions;

(2) descriptions of any capital or other criminal appellate advocacy or other criminal practice program attended;

(3) the names, addresses and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one appellate adversary, familiar with the applicant's work as an effective advocate;

(4) the applicant may submit the name, address and phone number of one appellate judge, if the judge is familiar with the applicant's work as an effective advocate; and

(5) any other material that may be relevant to fully evaluate the applicant's appellate qualifications and experience.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

B. APPELLATE COUNSEL—Attorneys qualifying as court appointed "lead counsel" under Section A(1) automatically qualify as "lead" appellate counsel. Other appointed appellate counsel must meet the following requirements:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
2. Have briefed and argued the merits in:
   a. At least three criminal cases in appellate court; or
   b. The appeal of a case in which the death penalty was imposed.
3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedures of appellate practice.

4. Postconviction Attorney Qualifications/Experience

Commentary. As with the trial and appeal attorney standards, the ABA and NLADA standards serve as the model for state standards. Note that of the nine state standards for trial attorney qualifications, two (Georgia and Indiana) have no standard for postconviction counsel. The sole set of state or local standards that include capital case representation is the Philadelphia *General Court Regulation* 89-3, Rule 406, "Standards for Appointment of Counsel," and Rule 406-4, "Postconviction Petitions by Prisoners Under Sentence of Death" (1996). The Arizona Supreme Court *Rules of Criminal Procedure*, Rule 6.8, "Standards for Appointment of Counsel in Capital Cases," sets identical requirements for appellate and postconviction counsel.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 5.1 Attorney Eligibility

III. POSTCONVICTION

A. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

   ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

   iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

   iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

   v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

   vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

   i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

   ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

   iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointments

…

d. Special Considerations in the Appointment of Counsel in Postconviction Proceedings. In appointing postconviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal postconviction proceedings and in capital postconviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1 Attorney Eligibility

III. POSTCONVICTION

A. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in par agraph A above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(6) Each Attorney assigned or appointed to represent an indigent p erson who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(III), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Each attorney who is eligible to serve on the capital appointments postconviction panel shall be certified by the board.

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

Standard III. Operating Policies and Procedures

…

C. Counsel Eligibility Standards

6. POSTCONVICTION

6.1 Assignments to represent indigents in postconviction proceedings in capital cases for lead and co-counsel assignments should be distributed to a ttorneys who:

a. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense, and five years experience in appellate advocacy; and

c. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex criminal cases of violence which were tried to completion, as well as prior experience as appellate counsel in at least five cases before the Nebraska Supreme Court where the conviction involved a period of incarceration in excess of one year for a serious violent felony and the conviction resulted from a jury trial, and have been counsel in at least two habeas corpus proceedings in federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel or co-counsel in at least two cases in which the charge was first degree murder; or alternatively,

of the five trials, at least one was first degree murder and the additional four were serious violent felonies; and

d. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

e. demonstrate proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in the standards above relating to appellate co-counsel.

6.2 Alternate Procedures: Assignments to represent indigents in postconviction proceedings in capital cases for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

a. five years prior experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph 1 above;

b. five years experience and specialized training in the defense of persons accused of capital crimes;

c. the availability of ongoing consultation support from experienced death penalty counsel for at least five years.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standards for State Postconviction Counsel in Capital Cases

1. State Postconviction Qualifications and Experience

(a) State Postconviction Counsel. To be eligible to be appointed as lead counsel on an initial motion pursuant to section 440.10 or 440.20 of the Criminal Procedure Law and any appeal therefrom in a capital case, an attorney must demonstrate that he or she:

(1) has at least six years criminal trial, criminal appellate or state or federal postconviction experience, or has at least four years of concentrated criminal or civil litigation experience;

(2) is familiar with:

(i) the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(ii) the practice and procedure of the federal courts with regard to federal habeas corpus petitions;

(3) has conducted twelve trials before judges, arbitration panels or juries to verdict, decision, or hung jury, in serious and complex civil or criminal cases;

(4) has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney;

(5) has substantial familiarity with, and extensive experience in the use of, expert witnesses and scientific and medical evidence including, but not limited to, mental health and pathology evidence; and

(6) meets two of the following criteria:

(i) has tried five homicides to verdict or hung jury with at least three as defense counsel;

(ii) has, at the trial level, represented to disposition defendants in eight homicide cases;

(iii) has represented capital defendants in three state or federal postconviction proceedings;

(iv) has brought five motions, pursuant to section 440.10 or 440.20 of the Criminal Procedure Law, where hearings were held and witnesses examined.

(b) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Screening Panel, after consideration of the recommendation of the Capital Defender Office, may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, 440 motion practice, appellate and/or postconviction experience or other exceptional qualifications, is capable of providing effective representation as postconviction counsel in a capital case.

2. Applications to Capital Defender Office

(a) Applications. In support of an application, an attorney shall submit to the Capital Defender Office a form prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts. It shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement that he or she requests be waived, and shall set forth in detail his or her criminal or civil litigation, 440 motion practice, appellate and/or postconviction experience or other exceptional qualifications that justify waiver.

(b) Required Submissions. In support of an application, an attorney shall submit to Capital Defender Office:

(1) a description of a trial or postconviction strategy in a case handled by the attorney and reflective of the attorney's thorough advocacy. This strategy may have, for instance, aimed to achieve a favorable pre-trial disposition or to alter the range of sentencing options;

(2) at least two memoranda of law prepared by the attorney in connection with separate cases;

(3) at least two appellate briefs written exclusively or primarily by the applicant, the opposing briefs, and the decisions;

(4) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one adversary, familiar with the applicant's work as an effective advocate;

(5) the applicant may submit the name, address and phone number of one judge, if the judge is familiar with the applicant's work as an effective a dvocate;

(6) a description of specialized trial, appellate or postconviction capital defense training programs regularly attended; and

(7) any other material that may be relevant to fully evaluate the applicant's qualifications and experience.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Virginia Cases

Standard C. Habeas Corpus Counsel

1. Habeas Corpus "Lead Counsel" must satisfy <u>one</u> of the following requirements:
   a. Be qualified as "lead counsel" pursuant to Section A(1) and possess familiarity with Virginia as well as federal habeas corpus practice.
   b. Possess experience as counsel of record in Virginia or federal postconviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.
2. Habeas Corpus "Co-Counsel" must satisfy <u>one</u> of the following requirements:
   a. Service as lead or co-counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the last three (3) years;
   b. Have at least (7) years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

5. Monitoring of Performance and Removal from Roster

Commentary. Both the ABA and NLADA standards call for monitoring attorney performance for purposes of future appointments and removal. The NLADA standards add some additional material to emphasize that monitoring is not to interfere with the existing case appointment and implies that case removal be sought only where the client has no objections. Of the eight states that follow the ABA and NLADA standards in some form for attorney qualifications, only Louisiana provides for attorney monitoring. The New York Court of Appeals Standards simply provide for the exercise of the removal power as a function of the court. See also, Arkansas Public Defender Commission Minimum Standards, Attorney Qualifications Certification Criteria, "Removal from Certification Lists for Cause" (1997); Second Judicial Circuit of Florida, Conflict Attorney Policies, Policy (IV), "Terms of Appointment, (B) Performance Review Committee and (C) Periodic Evaluation, (i) Evaluation Forms and (v) Removal from Conflict List"; and Eleventh Judicial Circuit of Florida, Circuit Conflict Committee, Policies and Procedures, "Policy:Decertification and Other Sanctions" (1982) (not limited to capital cases).

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 7.1 Monitoring; Removal

A. The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender o ffice to respond in writing.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 7.1 Monitoring; Removal

(a) The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an

unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender o ffice to respond in writing.

(b) In fulfilling its monitoring function, however, the appointing authorit y should not attempt to interfere with the conduct of particular cases. Representation of an accused establishes an inviolable attorney-client relationship. In the context of a particular case, removal of counsel from representation should not occur over the objection of the client.

(c) No attorney or defender office should be readmitted to the appointment roster after removal under (a) above unless such removal is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part VII. Monitoring; Removal. Attorneys certified within the guidelines of this Chapter shall be monitored to ensure eligibility.

Standard 7-7.1. Status and Training Criteria. An attorney who fails to maintain his or her status and educational requirements as defined in Part I of this Chapter shall not be considered certified for purposes of appointment in capital cases. An attorney may seek recertification once the criteria of Part I are satisfied.

Standard 7-7.2. Ineffectiveness. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to an indigent client's case, the attorney shall not be considered certified for purposes of appointment in capital cases. In this instance, an attorney shall be given an opportunity to respond in writing to specific charges of ineffectiveness.

Standard 7-7.3. Review of Active Representation. Representation of an accused establishes an inviolable attorney-client relationship. Thus, an attorney's eligibility to represent an indigent client may not be reviewed, except by a court of proper jurisdiction, on the basis of conduct involving a case in which the attorney is presently actively representing the indigent client.

Standard 7-7.4. Recertification. An attorney decertified under Standard 7-7.2 shall not be recertified unless the decertification is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

6. Retention and Eligibility

…

(b) Removal from the Court of Appeals Roster. The Court of Appeals may remove from its roster of attorneys any attorney who, in the Court's judgment, has not provided competent, thorough representation.

6. Requirement for Training

Commentary. The ABA and NLADA standards for attorney qualifications include a training requirement. The NLADA version is represented here, as is the ABA's additional standard on training.

The Louisiana standards for training are also reprinted here from the trial attorney qualifications along with a standard for maintaining training. Also included here are the federal and New York Court of Appeals standards.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 9.1 Training

Attorneys seeking eligibility to receive appointments pursuant to these Guidelines should have completed the training requirements specified in Guideline 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis, to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

8. Training

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1 Attorney Eligibility

The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

I. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

…

(vi) have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought;

B. Trial co-counsel assignments should be distributed to attorneys who:

…

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought…

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

…

ii. Specialized postgraduate training in the defense of persons accused of capital crimes…

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Standard 9.1 Training

Attorneys seeking eligibility to receive appointments pursuant to these Standards should have completed the training requirements specified in Standard 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

NLADA Defender Training and Development Standards

Standard 7.1 Death Penalty Defense

Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and postconviction.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part I. General Principles of Certification Eligibility. The following standards shall be applied to attorney certification under any part of this chapter:

…

Standard 7-1.3. Initial Training. Within one year of an initial application for certification under the standards of this Chapter, the attorney shall complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-1.4. Continuing Training. To maintain certification, counsel shall, every two years from the date of certification, successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

…

Standard 7-7.1. Status and Training Criteria. An attorney who fails to maintain his or her status and educational requirements as defined in Part I of this Chapter shall not be considered certified for purposes of appointment in capital cases. An attorney may seek recertification once the criteria of Part I are satisfied.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

5. Training

(a) Certification. An Attorney shall not be eligible to be appointed as postconviction counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a capital postconviction course prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts.

(b) Interim Certification. The Screening Panel, or the Court of Appeals, in its discretion, may permit an attorney to be eligible for such appointment if the attorney meets all of the other requirements for qualification and experience, and the Capital Defender Office confirms that such attorney is in active pursuit of such training and certification.

6. Retention and Eligibility

(a) On-Going Training. To remain eligible for appointment as counsel, an attorney must attend and successfully complete capital training sessions as prescribed by the Capital Defender Office.

C. Plan Elements

The following groups of standards are included in this section:

1. Requirement for a formal plan
2. Provision for support services
3. Related standards

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services," especially American Bar Association Defense Services Standard 5-1.2(d).

1. Requirement for a Formal Plan

Commentary. The formal plan requirements as set forth by the ABA guidelines and the NLADA standards are identical, with only a few language differences. Both are included for the sake of completeness.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 3.1 The Legal Representation Plan

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Guidelines. This Guideline envisions two equally acceptable approaches for formalizing the process of appointment:

a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt standards and procedures for the appointment of counsel in capital cases consistent with these Guidelines, and perform all duties in connection with the appointment process as set forth in these Guidelines.

b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

    i. are members of the bar admitted to practice in the jurisdiction;

    ii. have practiced law in the field of criminal defense for not less than five years;

    iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

    iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

    v. are dedicated to quality legal representation in capital cases.

The committee should adopt standards and procedures for the appointment of counsel in capital cases, consistent with these Guidelines, and perform all duties in connection with the appointment process.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 3.1 The Legal Representation Plan

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Standards. This Standard envisions two equally acceptable approaches for formalizing the process of appoin tment:

(a) The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt Standards and procedures for the appointment of counsel in capital cases consistent with these Standards, and perform all duties in connection with the appointment process as set forth in these Standards.

(b) In jurisdictions where it is not feasible to cen tralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction;

   ii. have practiced law in the field of criminal defense for not less than five years;

   iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

   iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

   v. are dedicated to quality legal representation in capital cases.

The committee should adopt Standards and procedures for the appointment of counsel in capital cases, consistent with these Standards, and perform all duties in connection with the appointment process.

2. Provision for Support Services

Commentary. The ABA and NLADA standards for support services are virtually identical. See their corresponding standards in *Compendium* Volume I, "Standards for the Administration of Defense Services." The Louisiana standards follow the spirit, if not the letter, of these two national standards. The federal standards will be relevant to states with a state public defender system. See also, Indiana Rules of Criminal Procedure, Criminal Rule 24: Capital Cases, Section (c)(2) and (c)(3) "Incidental Expenses."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 8.1 Supporting Services

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

7. Experts

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 8.1 Supporting Services

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Standards with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for

effective defense representation at every stage of the proceedings, including the sentencing phase.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part X. Support Services.

Standard 7-10.1. Securing Support Services. Counsel appointed to represent a capital defendant should secure all proper and necessary support services, including, but not limited to, investigative, expert, mitigation, and any other support services necessary to prepare and present an adequate defense. An attorney should use all available support services and facilities needed for an effective performance at every stage of the proceedings, including pretrial, trial and sentencing. Counsel should seek financial and technical assistance from all possible sources, including the district indigent defender board and the Capital Program, Expert Witness/Testing Fund, and District Assistance Fund of the Louisiana Indigent Defender Board.

3. Related Standards

Commentary. In Georgia, the contract attorney program may not handle death penalty cases as part of the contract. Compare ABA Defense Services Standards S 5.3.3(vi) providing that contracts for defense services should "include special provisions for complex matters such as capital cases."

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

Guideline 2.7 Contract Attorney Program

The inclusion of capital felonies where the death penalty is sought as a portion of the contract is prohibited.

D. Financial

The standards in this section address the following topics:

1. Client eligibility
2. Attorney compensation rate

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services."

1. Client Eligibility

Commentary. In addition to the Nebraska standards herein, see also those standards found under in *Compendium* Volume I, "Standards for the Administration of Defense

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

Standard II. Definitions

…

D. INDIGENT

An indigent party is defined as:

(a) A party who is:

(i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

(ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or

(iii) Serving a sentence in a correctional institution and has no available funds; or

(iv) Held in custody in jail and has no available funds; or

(b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

E. INCOME

Income shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.

Standard VIII. Nebraska Commission on Public Advocacy Standards to Determine Indigency

These rules shall apply to any party who has a right to be represented by an attorney of the Commission on Public Advocacy. The eligibility for appointment of an attorney at public expense shall be determined in conformance with these rules.

A. DEFINITION OF TERMS

The following definitions shall apply to these rules:

1. **Income** shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.

2. **Indigent** for purposes of this rule shall mean:

   (a) A party who is:

      (i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

      (ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or

      (iii) Serving a sentence in a correctional institution and has no available funds; or

      (iv) Held in custody in jail and has no available funds; or

   (b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

B. AFFIDAVIT OF INDIGENCY

A party who desires to proceed as an indigent represented by an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources (FORM 1). The party shall be advised of the penalties for perjury. The defendant has an ongoing duty to update the affidavit as his or her financial status changes.

C. DETERMINATION OF INDIGENCY

If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent under these rules. The court shall record its finding on the affidavit of indigency (FORM 1) and file it with the papers in the case. The county or prosecuting attorney shall have no standing in the determination of indigency or the appointment of counsel.

D. ASSIGNMENT OF COUNSEL/NOTICE OF ASSIGNMENT

If the court finds that a party is indigent, the court shall appoint an attorney or the Commission on Public Advocacy to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel (FORM 2) and shall file a copy in the case file.

E. REVIEW OF INDIGENCY DETERMINATION

1. A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.

2. A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

2. Attorney Compensation Rate

Commentary. The ABA and NLADA standards implicitly recognize the need to compensate attorneys in capital cases at rates higher than those paid other assigned counsel. As the federal recommendations point out, this is necessary to attract the experienced attorneys required in such cases. The two state fee schedules do not, however, necessarily follow the national recommendations. See also, Indiana Rules of Criminal Procedure, Rule 24: Capital Cases, Sections (c)(1) and (k)(1), "Hours and Contrast the Gwinnett Judicial Circuit, Internal Operating Procedure 98-5, "Fee Schedule," Guideline 11.2, which provides for a $100 compensation rate for lead counsel and $75 for second chair counsel, with Cobb County Indigent Defense Program Guidelines, Article V, Section 2(a), Rate of Payment in Death Penalty Cases, setting the reimbursement rate as $50/$40 for counsel with no maximum.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 10.1 Compensation

A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.

C. Periodic billing and payment during the course of counsel's representation shoul d be provided for in the representation plan.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

…

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 10.1 Compensation

a. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

b. Capital counsel should also be fully reimbursed for reasonable incidental e xpenses.

c. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

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

2.6 Fees Paid to Lawyers Under a Panel Program

Capital felonies in which the death penalty is sought should be compensated based on hourly rates and the time spent as documented in records submitted by the attorneys.

Compensation for a capital felony case in which the death penalty is sought shall be at least at the same hourly rate as other cases, but each case should be examined by the court and the fee total should be based on a complete examination of the individual case. Special attention shall be given to continuing counsel obligations in death penalty cases when conviction and imposition of the death penalty occur.

Ohio Public Defender, Standards and Guidelines for Appointed Counsel Reimbursement

Section II. State Maximum Fee Schedule for Appointed Counsel Reimbursement

…

B. Trial Level Proceedings

1. Reimbursement for representation in trial level cases will be made based on the maximum rate of $40.00 per hour for out-of-court services and $50.000 per hour for in-court services.

2. The prescribed maximum fees permitted in trial level proceedings are:

Offense Proceeding	Fee Maximum
Aggravated Murder (w/specs) as per O.R.C. 2929.04(A) and 2941.14(B)	$40,000 (Ohio Supreme Court Rule 65 of the Rules of Superintendence of the Common Pleas Courts requires the appointment of two (2) attorneys in capital offense cases. This fee is the maximum that will be paid on the combined bills of both attorneys appointed to the case.)
Aggravated Murder (w/o specs)	$6,000/1 attorney
	$8,000/2 attorneys
Murder	$3,000

…

D. Appellate Level Proceedings

…

2. Reimbursement for representation of appellate level proceedings involving a death sentence will be made based on the maximum rate of $45.00 per hour for both out-of-court and in-court services.

3. The prescribed maximum fees permitted in appellate level proceedings are listed below. The rates apply to each level of appeal.

Offense/Proceeding	Fee Maximum
Aggravated Murder (death sentence imposed)	$10,000
Aggravated Murder (sentence other than death)	4,000
Murder	1,500

E. Postconviction and Habeas Corpus Proceedings

…

3. Reimbursement for postconviction and state habeas corpus proceedings involving a death sentence shall be made based on the maximum rate of $45.00 per hour for both out-of-court and in-court services to a maximum of $10,000 for each stage of the postconviction or habeas corpus proceedings.

E. Workload

Limitations on the number of cases an attorney should accept are a common standard for trial attorneys. (See *Compendium* Volume I, "Standards for the Administration of Defense Services.") However, special problems relating to workload limitations and distribution exist in capital cases.

The standards in this section address the following topics:

1. Requirement that workload not be excessive
2. Specification of the number of attorneys per case

1. Requirement That Workload Not Be Excessive

Commentary. The ABA and Louisiana standards set forth general principles that speak to how excessive caseloads can interfere with proper representation in capital cases. In contrast, the Nebraska standards set forth statistical expectations for the number of death penalty cases an attorney can be expected to handle. See also, Indiana Rules of Criminal Procedure, Rule 24: Capital Cases, Section (B)(3), (J)(2). Compare ABA Defense Services Standard 5-53(a) providing that "special consideration should be given to the workload created by representation in capital cases."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 6.1 Workload

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part IX. Workload. The following standards shall serve as guides to attorneys eligible for appointment in capital cases.

Standard 7-9.1. Professional Obligation. Attorneys accepting appointments pursuant to these standards should provide each indigent client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Standard 7-9.2. Determination of Workload. To determine maximum workload, an attorney should consider, among other factors, quality of representation, speed of turnover of cases, percentage of cases tried, extent of support services available, court procedures, and involvement in complex litigation.

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

Standard III. Operating Policies and Procedures

A. Caseload Standards for the Commission

…

2. Recommended Caseload Standards

The Commission recognizes that the cases it wil l accept will not likely fall into the general caseload statistical categories which compare the percentage of cases in which a plea is entered to the percentage of cases which go to trial. …[T]he cases themselves will be more complex since the Commission will be handling serious felony, with sizeable records; this too will reduce the normal caseload. These assumptions also hold true for the appellate attorneys. The more complex the cases and the larger the record, fewer appeals can be handled by the appellate attorneys. Therefore, the following yearly caseload standards, per attorney, are recommended, with the understanding that the Commission will be monitoring these standards very carefully over the next year, since there is no history to rely upon, making them subject to change:

…

b. Litigation capital attorney—2 to 3 first degree murder death penalty cases, and an additional 2 to 3 first degree murder, non-death penalty cases (4 first degree non-death penalty cases equal 1 first degree death penalty case). Under no circumstance more than 3 death penalty cases and 1 non-death penalty case at any given time.

…

d. Appellate capital attorney—a combination of 2 to 3 first degree murder death penalty appeals, and 2 to 3 first degree non-death penalty appeals (4 first degree non-death penalty appeals equal 1 first degree death penalty appeal). Under no circumstance more than 3 death penalty appeals and 1 non-death penalty appeal at any given time.

…

D. Workload

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

2. Specification of the Number of Attorneys per Case

Commentary. There is relatively strong agreement among those groups adopting death penalty standards that two attorneys should be appointed in these cases. See also, Kansas Regulation 105-3-12 (*supra*) authorizing appointment of co-counsel. The Georgia guidelines do not speak directly to the point but generally refer to the ABA standards for direction (Georgia Guideline 2.4, *supra*). The Washington state standards refer to "lead counsel," implying two counsel to represent defendant, Standard 14, *supra*. The Indiana standards, the New York Court of Appeals standards, and the New York City requirements do not refer to the number of counsel to be appointed. See also, Utah Rules of Criminal Procedure, Rule 8(b); Arkansas Public Defender Commission, Minimum Standards, Attorney Qualification Certification Criteria, "Number of Attorneys per Case"; Indiana Rules of Criminal Procedures, Rule 24(B); and North Carolina General Statutes §7A-450(b)(1) for an endorsement of the two-attorney standard.

In addition, the Alameda County Bar Association Rules and Regulations of the Court Appointed Attorneys' Program and the Eleventh Judicial Circuit of Florida Circuit Conflict Committee Policies and Procedures seem to implicitly accept a two-attorney appointment by providing separate eligibility criteria for lead and assistant counsel. The Philadelphia General Court Regulation 89-3 authorizes lead counsel to seek appointment of a second attorney from the court when the death penalty issought, but does not require such appointment.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.1 Initial Provision of Counsel

…In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 2.1 Number of Attorneys Per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

…

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or postconviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or postconviction review that, in combination with co-counsel, will assure high quality representation.

…

3. Appointment of More Than Two Lawyers

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 2.1 Number of Attorneys Per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part VIII. Number of Attorneys for Capital Defense. The following number of attorneys should be appointed in cases involving an indigent defendant charged with a capital crime or where an appeal has been lodged in a case where the death penalty has been imposed.

Standard 7-8.1. Trial Counsel. In cases where a defendant is charged with a crime for which the death penalty may be imposed, not less than two certified trial

attorneys, one of which must be certified trial lead counsel in accordance with this Chapter, shall be assigned to represent the defendant.

Standard 7-8.2. Appellate Counsel. In cases where the death penalty has been imposed on an indigent defendant and an appeal has been taken, an attorney, certified as appellate lead counsel in accordance with this Chapter, shall be assigned to represent the defendant. It is recommended, but not mandated, that a certified appellate associate counsel be assigned to assist in the appeal, although the degree of participation of the associate counsel may be less than lead counsel.

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

Standard III. Operations Policies and Procedures

…

B. Number of Attorneys per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

Preface

While…Virginia Code…does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings.

F. Attorney Performance: Pretrial

The three sets of standards reproduced in this section—the ABA guidelines, the NLADA standards, and the Nebraska standards—are all virtually identical in language and content.

This section contains standards on the following topics:

1. Requirement for performance standards
2. Need to prepare as if death penalty to be sought
3. Theory of case
4. Independent investigation
5. Close contact with client
6. Pretrial motions
7. Plea negotiations
8. Need to inform client of plea options
9. Explanation of plea contents and implications

Compare the standards below (except for "Need to Prepare As If Death Penalty to Be
Compendium Volume II, "Standards for Attorney Performance."

1. Requirement for Performance Standards

Commentary. Both the ABA and NLADA standards set forth a requirement for establishing performance standards. Presumably, these standards are to be used in conjunction with the Monitoring and Removal Standards *supra*. See also relevant standards in *Compendium* Volume II, "Standards for Attorney Performance."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.1 Establishment of Performance Standards

A. The appointing authority should establish standards of performance for counsel appointed in death penalty cases.

B. The standards of performance should include, but should not be limited to, the specific standards set out in Guidelines 11.3 through 11.9.

C. The appointing authority should refer to the standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Guideline 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Guideline 7.1).

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.1 Establishment of Performance Standards

a. The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

b. The Standards of performance should include, but should not be limited to the specific Standards set out in Standards 11.3 through 11.9.

c. The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

2. Need to Prepare As If Death Penalty to Be Sought

Commentary. A prosecutor's decision to proceed in seeking the death penalty may be delayed to garner information about the appropriateness of the death penalty. Vigorous counsel can at this point affect the prosecutor's decision by presenting mitigating evidence to show the inappropriateness of the death penalty. Even when this is not possible, acting on the assumption that the death penalty will be pursued is necessary to have sufficient time to gather all relevant evidence. The three standards here agree that prompt action is needed in potential capital cases.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.3 Determining That Death Penalty Is Being Sought

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.3. Determining That the Death Penalty Is Being Sought

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

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

Standard VII. Performance Standards for Counsel in Capital Cases

A. Capital Standard No. 1: Determining Whether Case Is Death Case

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one. Even if the case has not been filed as capital murder, if there exists <u>any</u> chance that the case could be amended to charge capital murder, counsel should utilize capital defense

techniques and standards listed below. There can be no substitute for early attention to investigation and preservation of evidence.

3. Theory of Case

Commentary. Trials are often a contest between two versions of what happened, that offered by the prosecution and that offered by the defense. A theory of the case is needed to ensure that the defense version is coherent and believable and that it ties together the various "facts" of the case. It also provides a basis for the defense investigation to seek out witnesses and other evidence.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.7.1 General Trial Preparation

A. As the investigations mandated by Guideline 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

B. If inconsistencies between guilt/innocence and penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.1 General Trial Preparation

(a) As the investigations mandated by Standard 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

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

Standard VII. Performance Standards for Counsel in Capital Cases

I. Capital Standard No. 9: General Trial Preparation

1. As the investigations mandated by Capital Standard No. 2 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

4. Independent Investigation

Commentary. The ABA and NLADA standards for investigating duties of defense counsel are virtually identical in their specifications. The Nebraska standards closely follow these two national standards. See also the standards relating to investigation in *Compendium* Volume II, "Standards for Attorney Performance."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.4.1 Investigation

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

   A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

   C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused:

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

B. Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors.

C. Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs including cognitive limitations and learning disabilities; military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

D. Seek necessary releases for securing confidential records relating to any of the relevant histories.

E. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in C above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses 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 or mitigation specialist conduct the 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 r equest 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 for:

   A. preparation of the defense;

   B. adequate understanding of the prosecution's case;

   C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

   D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.1 Investigation

a. Counsel should conduct independent investigations relating to the guilt/i nnocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

b. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

c. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

d. Sources of investigative information may include the following:

   (1) Charging documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

(2) An in-depth interview of the client should be conducted within 24 hours of counsel's entry into the case unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

B. Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors.

C. Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

D. Seek necessary releases for securing confidential records relating to any of the relevant histories.

E. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

(3) Potential witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect

the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses 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 or mitigation specialist conduct the 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 for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

D. Presentation of mitigation.

Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

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Standard VIII. Performance Standards for Counsel in Capital Cases

B. Capital Standard No. 2: Investigation

Counsel should conduct independent investigations relating to the guilt/innocence and the penalty phases of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Sources of investigative information may include the following:

1. Charging Documents

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

   1.1 The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   1.2 The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty ;

   1.3 Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In the event there is a good reason to postpone this interview, it should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover [the steps] below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

   2.1 Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

   2.2 Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any

aggravating factors under the applicable death penalty statute and any mitigating factors.

2.3 Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior, and special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

2.4 Seek necessary releases for securing confidential records relating to any of the relevant histories.

2.5 Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in 2.3 above.

3. Potential Witnesses

Counsel generally should interview potential witnesses, including:

3.1 Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

3.2 Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), possible mitigating evidence to show why the client should not be sentenced to death;

3.3 Members of the victim's family.

Counsel should attempt to conduct interviews of potential witnesses 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 or mitigation specialist conduct the 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. Counsel should establish a reliable system of tracking the receipt of all information.

5. Physical Evidence

Counsel should, immediately upon entry into the case, make a prompt request to the police or investigative agency and prosecutor for preservation of all physical evidence, field notes, electronic recordings of police dispatch and emergency

numbers or expert reports made in connection with the investigation, unless a sound tactical reason exists for refraining from doing this.

6. The Scene

   Where possible, 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 (weather, time of day, and lighting conditions).

7. Expert Assistance

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

   a. preparation of the defense;

   b. adequate understanding of the prosecution's case;

   c. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

   d. presentation of mitigation.

   Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

5. Close Contact with Client

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.4.2 Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.2 Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

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Standard VIII. Performance Standards for Counsel in Capital Cases

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C. Capital Standard No. 3: Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory. Maintenance of good relations with the client and his/her family is absolutely essential to effect a comp etent defense.

6. Pretrial Motions

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.5.1 The Decision To File Pretrial Motions

A. Counsel should consider filing a pretrial motion whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

B. Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. 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 including disclosure of aggravating factors to be used in seeking the death penalty, and any 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, including:
    a. the fruits of illegal searches or seizures;
    b. involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
    c. unreliable identification testimony 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 may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
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 evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion in limine. including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
13. matters of trial or courtroom procedure;
14. change of venue;
15. abuse of prosecutorial discretion in seeking the death penalty;
16. challenges to the process of establishing the jury venire.

Guideline 11.6.2 The Contents of Plea 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 penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
   2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
   3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing a pretrial motion wherever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

(b) Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial m otion 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 including disclosure of aggravating factors to be used in seeking the death penalty, and any 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, i ncluding:
   A. the fruits of illegal searches or seizures;
   B. involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
   C. unreliable identification testimony 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 may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
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 evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion *in limine*, including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
13. matters of trial or courtroom procedure;

14. change of venue;
15. abuse of prosecutorial discretion in seeking the death penalty;
16. challenges to the process of establishing the jury venire.

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D. Capital Standard No. 4: The Decision to File Pretrial Motions

1. Counsel should file pretrial motions whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.
2. Counsel should consider every pretrial motion potentially available, and should evaluate all motions in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial motion are:
    a. the pretrial custody of the accused;
    b. the constitutionality of the implicated statute or statutes;
    c. the potential defects in the charging process;
    d. the sufficiency of the charging document;
    e. the propriety and prejudice of any joinder of charges or defendants in the charging document;
    f. the discovery obligations of the prosecution including disclosure of aggravating factors to be used in seeking the death penalty, and any reciprocal discovery obligations of the defense;
    g. the suppression of evidence gathered as the result of violations of the Fourth, Fifth, or Sixth Amendments to the United States Constitution, including:
        (i) the fruits of illegal searches or seizures
        (ii) involuntary statements or confessions; statements or confessions in violation of the accused's right to counsel or privilege against self incrimination;
        (iii) unreliable identification testimony which would give rise to substantial likelihood of irreparable misidentification;

h. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

i. access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;

j. the defendant's right to a speedy trial;

k. the defendant's right to continuance in order to adequately prepare his or her case;

l. matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion *in limine*, including requests for sequestered, individual voir dire, especially as to publicity and the death qualification of jurors and any challenges to overly restrictive rules or procedures;

m. matters of trial or courtroom procedure;

n. change of venue;

o. abuse of prosecutorial discretion in seeking the death penalty;

p. challenges to the process of establishing the jury venire.

7. Plea Negotiations

Commentary. Most criminal cases are resolved by guilty pleas. Cases involving homicide charges are no different in this regard.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.6.1 The Plea Negotiation Process

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. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the potential results of going to trial.

B. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

C. Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

D. Counsel should not accept any plea agreement without the client's express authorization.

E. The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.1 The Plea Negotiations Process

(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. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the potential results of going to trial.

(b) Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

(c) Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated

settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

(d) Counsel should not accept any plea agreement without the client's express authorization.

(e) The existence of ongoing plea negotiations with the prosecu tion does not relieve counsel of the obligation to take steps necessary to prepare a defense. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate.

Standard 11.6.2 The Contents of Plea 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 penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

(b) In developing a negotiation strategy, counsel should be completely familiar with, *inter alia*:

1. concessions that the client might offer, such as:
   a. an agreement not to proceed to trial on the merits of the charges;
   b. an agreement not to assert or further litigate particular legal i ssues;
   c. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
   d. an agreement to engage in or refrain from any other conduct, appropriate to the case.
2. benefits the client might obtain from a negotiated settlement, including *inter alia*:
   a. a guarantee that the death penalty will not be imposed;
   b. an agreement that the defendant will receive, with the assent of the court, a specified sentence;
   c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
   d. an agreement that one or more of multiple charges will be reduced or di smissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;

f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.

(c) In conducting plea negotiations, counsel should be familiar with:

1. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of *nolo contendere* or other plea which does not require the client to personally acknowledge guilt;

2. the advantages and disadvantages of each available plea according to the circumstances of the case;

3. whether a plea agreement can be made binding on the court and on penal/parole authorities.

(d) In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

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E. Capital Standard No. 5: The Plea Negotiations Process

1. Counsel should explore with the client the possibility and desirability of reac hing a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the pote ntial results of going to trial.

2. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

3. Counsel should keep the client fully informed of any continued plea discu ssion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

4. Counsel should not accept any plea agreement without the client's express authorization.

5. The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate.

F. Capital Standard No. 6: The Contents of Plea Negotiations

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2. In developing a negotiation strategy, counsel should be complet ely familiar with, *inter alia*:

   a. Concessions that the client might offer, such as:

      (i) an agreement not to proceed to trial on the merits of the charges;

      (ii) an agreement not to assert or further litigate particular legal issues;

      (iii) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal acti vity;

      (iv) an agreement to engage in or refrain from any other conduct, appropriate to the case.

   b. Benefits the client might obtain from a negotiated settlement, including *inter alia*:

      (i) a guarantee that the death penalty will not be imposed;

      (ii) an agreement that the defendant will receive, with the assent of the court, a specified sentence;

      (iii) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to se ntencing;

      (iv) an agreement that one or more of multiple charges will be reduced or dismissed;

      (v) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal co nduct;

      (vi) an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.

3. In conducting plea negotiations, counsel should be familiar with:

   a. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of *nolo contendere* or other plea which does not require the client to personally acknowledge guilt;

   b. the advantages and disadvantages of each available plea according to the circumstances of the case;

   c. whether a plea agreement can be made binding on the court and on penal/parole authorities.

4. In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

8. Need to Inform Client of Plea Options

Commentary. The client is the final decision-maker as to whether to plead guilty. The attorney's responsibility is to make sure that the plea decision is an informed one. The standards here spell out what information the client must have for that decision to be an informed decision.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.6.2 The Contents of Plea 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 penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

Guideline 11.6.3 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 along with the advantages, disadvantages and potential consequences of the agre ement.

B. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.2 The Contents of Plea 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 penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as

direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

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F. Capital Standard No. 6: The Contents of Plea Negotiations

1. In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:

   a. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;

   b. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good time credits;

   c. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

9. Explanation of Plea Contents and Implications

Commentary. Once the client determines that a plea of guilty is in her or his best interests, the standards require defense counsel to fully explain the exact terms of the plea agreement and what will occur in court when the plea is entered. There should be no surprises at the plea hearing for the client, for counsel, or for the court.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.6.4 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 from the judge and providing a statement concerning the offense.

B. During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.3 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 along with the advantages, disadvantages and potential consequences of the agreement.

(b) The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

Standard 11.6.4 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 client 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 from the judge and providing a statement concerning the offense.

(b) During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

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G. Capital Standard No. 7: The Decision to Enter a Plea of Guilty

1. 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 along with the advantages, disadvantages and potential consequences of the agreement.

2. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

H. Capital Standard No. 8: Entry of the Plea Before the Court

1. Prior to the entry of the plea, counsel should:

   a. 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;

   b. 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 ente ring a plea;

   c. 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 from the judge and providing a statement concerning the offense.

2. During entry of the pleas, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

G. Attorney Performance: Trial

The standards in this section address the following:

1. Preparing for voir dire
2. Preserving objections to error
3. Establishing a plan to avoid death sentence

In addition to the standards herein, *Compendium* Volume II, "Standards for Attorney Performance," includes several other trial-related topics such as presenting evidence, responding to prosecution's case, etc.

1. Preparing for Voir Dire

Commentary. Jury selection may be the most important responsibility of the trial attorney. Jury selection in capital cases is especially complex as the standards in this section indicate.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.7.2 Voir Dire and Jury Selection

A. Counsel should consider, along with potenti al legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.2 Voir Dire and Jury Selection

(a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

(b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

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

Standard VII. Performance Standards for Counsel in Capital Cases

J. Capital Standard No. 10: Voir Dire and Jury Selection

1. Counsel should consider, along with potential legal challenges to the pro cedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

2. Preserving Objections to Error

Commentary. Implicit in these standards is the requirement that defense counsel protect the client from being prejudiced by erroneous entry of evidence detrimental to the client's interests. The Nebraska standard also suggests that counsel may have strategic reasons for not always making objections.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.7.3 Objection to Error and Preservation of Issues for Postjudgment Review

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and federal grounds, any given question for review.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.3 Objection to Error and Preservation of Issues for Postjudgment Review

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and federal grounds, any given question for review.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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K. Capital Standard No. 10: Objection to Error and Preservation of Issues for Postjudgment Review

1. Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state

and Federal grounds, any given question for review. While there may be a sound reason to forgo an objection, counsel should presume that all possible objections should be made.

3. Establishing a Plan to Avoid Death Sentence

Commentary. Trials in capital cases involve two separate hearings—determination of guilt/innocence and sentencing. Standards for formulating a theory of the case for the guilt phase were presented earlier. Similarly, counsel must also establish a plan to avoid a death sentence should a finding of guilty occur. As the NLADA and Nebraska standards make plain, these two trial components may have inherent conflicts that will need to be minimized.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.8.3 Preparation for the Sentencing Phase

A. As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

B. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.1 General Trial Preparation

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(b) If inconsistencies between guilt/innocence and penalty phase defense arise, counsel should seek to minimize them by procedural or substantive tactics.

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

Standard VII. Performance Standards for Counsel in Capital Cases

I. Capital Standard No. 9: General Trial Preparation

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(2) If inconsistencies between guilt/innocence and penalty phase defense arise, counsel should seek to minimize them by procedural or substantive tactics.

H. Attorney Performance: Sentencing

The standards in this section address the following:

1. Preparing for sentencing
2. Conducting sentencing investigation
3. Considering own sentencing report
4. Preparing for prosecutor arguments at sentencing
5. Considering full scope of defense arguments

Compare the standards set forth here to those set forth in *Compendium* Volume II, "Standards for Attorney Performance."

1. Preparing for Sentencing

Commentary. The ABA, NLADA, and Nebraska standards present the same recommendations for sentencing preparation. Perhaps the most significant of these is the requirement that counsel begin preparation for the sentencing hearing as soon as possible because the issues and evidence presented at a sentencing hearing are both different from and sometimes more difficult to identify than those presented at the guilt phase. This requirement goes hand in hand with the requirement to identify and present all mitigating factors.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

Guideline 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

A. Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

B. If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Standards 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.

C. Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.

D. Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

Guideline 11.8.3 Preparation for the Sentencing Phase

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C. Prior to the sentencing phase, counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the

accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

D. If the client will be interviewed by anyone other than people working with def ense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

E. Counsel should consider, and discuss with the client , the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

   1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

   2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

   3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

   4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

Standard 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

(a) Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

(b) If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Standards 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.

(c) Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.

(d) Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

(e) Counsel should develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained.

Standard 11.8.3 Preparation for the Sentencing Phase

(a) As set out in Standard 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

(b) Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

(c) Prior to the sentencing phase, counsel should discuss with the client specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

(d) If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

(e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

(f) In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a

favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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L. Capital Standard No. 12: Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

1. Counsel must be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases. Complete familiarity with U.S. Supreme Court precedents is required.

M. Capital Standard No. 13: Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

1. Counsel should be familiar with the procedures for capital sentencin g in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecutor's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

2. If the client has chosen not to proceed to trial and a plea o f guilty or its equivalent has been negotiated and entered in accordance with Standards 5 through 8, counsel must seek to ensure compliance with all portions of the plea agreement beneficial to the client.

3. Counsel must seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing jury and judge in determining the sentence to be imposed.

4. Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing jury and judge in the most effective possible way.

N. Capital Standard No. 14: Preparation for the Sentencing Phase

1. As set out in Standard 2, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel must seek information to present to the sentencing jury and judge in

mitigation or explanation of the offense and to rebut the prosecution's se ntencing case.

2. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

3. Prior to the sentencing phase, counsel should discuss with t he client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing jury and judge, and the strategy for meeting the prosecution's case.

4. If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

5. Counsel should consider, and discuss with the client , the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

6. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

    a. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

    b. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

    c. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

    d. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

2. Conducting Sentencing Investigation

Commentary. The NLADA standards require two separate but related investigations, one for the guilt stage and one for the sentencing stage of the trial. No further detail is provided. In contrast, the Nebraska standards provide specific guidelines for the investigation. See also *Attorney Performance Standards*, Volume II.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.1 Investigation

a. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued exped itiously.

…

c. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Standard 11.8.3 Preparation for the Sentencing Phase

(a) As set out in Standard 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

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

Standard VII. Performance Standards for Counsel in Capital Cases

B. Capital Standard No. 2: Investigation

Counsel should conduct independent investigations relating to the guilt/innocence and the penalty phases of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Sources of investigative information may include the following:

1. Charging Documents

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

   1.1 The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   1.2 The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty ;

   1.3 Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In the event there is a good reason to postpone this interview, it should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover 2.1-2.5 below (if this is not possible during the initial interview, these steps should be accomplished as soon as poss ible thereafter):

   2.1 Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

   2.2 Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

   2.3 Collect information relevant to the sentencing phase of trial including, but not limited to: medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

2.4 Seek necessary releases for securing confidential records relating to any of the relevant histories.

2.5 Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in 2.3 above.

3. Potential Witnesses

Counsel generally should interview potential witnesses, including:

3.1 Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

3.2 Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), possible mitigating evidence to show why the client should not be sentenced to death;

3.3 Members of the victim's family.

Counsel should attempt to conduct interviews of potential witnesses 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 or mitigation specialist conduct the 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. Counsel should establish a reliable system of tracking the receipt of all information.

5. Physical Evidence

Counsel should, immediately upon entry into the case, make a prompt request to the police or investigative agency and prosecutor for preservation of all physical evidence, field notes, electronic recordings of police dispatch and emergency numbers or expert reports made in connection with the investigation, unless a sound tactical reason exists for refraining from doing this.

6. The Scene

Where possible, 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 (weather, time of day, and lighting conditions).

7. Expert Assistance

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

a. preparation of the defense;

b. adequate understanding of the prosecution's case;

c. rebuttal of any portion of the prosecution's case at the guilt/innocence phase

or the sentencing phase of the trial;

d. presentation of mitigation.

Experts assisting in investigation and other preparation of the defen se should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

3. Considering Own Sentencing Report

Commentary. The ABA, NLADA, and Nebraska standards present identical recommendations for counsel's responsibilities to rebut any official sentencingreport that is detrimental to the client and to offer a defense sponsored report. See also *Compendium* Volume II, "Standards for Attorney Performance," for additional considerations.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.8.4 The Official Presentence Report

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:

   1. The strategic implications of requesting that an optional report be prepared;

   2. The value of providing to the rep ort preparer information favorable to the cl ient.

B. Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

C. Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

D. Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should be present.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.4 The Official Presentence Report

(a) If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:

   1. The strategic implications of requesting that an optional report be pr epared;

   2. The value of providing to the report preparer information favorable to the cl ient.

(b) Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should be present.

(c) Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

(d) Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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O. Capital Standard No. 15: The Official Presentence Report

1. If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:
   a. The strategic implications of requesting that an optional report be prepared;
   b. The value of providing to the report preparer information favorable to the client.
2. Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.
3. Counsel should take steps to preserve and protect the client's interest regard ing material that has been challenged by the defense as improper, inaccurate or misleading.
4. Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should present.

4. Preparing for Prosecutor Arguments at Sentencing

Commentary. The adversarial system of justice for fact finding at trial extends to the sentencing phase of capital case proceedings. Defense counsel are thus required to rebut as best they can the arguments made by the prosecution and the facts they rely on.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.8.5 The Prosecutor's Case at the Sentencing Phase

A. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.5 The Prosecutor's Case at the Sentencing Phase

(a) Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Standard 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

(b) If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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P. Capital Standard No. 16: The Prosecutor's Case at the Sentencing Phase

1. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Refer to Standard 1, above).
2. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should employ appropriate pretrial or trial strategies in response.

5. Considering Full Scope of Defense Arguments

Commentary. Imposition of the death penalty requires that the sentencing body consider both aggravating and mitigating circumstances. The standards herein provide a convenient checklist, albeit not complete, of potential mitigating factors that can be presented to the court or jury.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.8.6 The Defense Case at the Sentencing Phase

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.

B. Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
2. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;
3. Military service (including length and type of service, conduct, and special training);
4. Employment and training history (including skills and performance, and barriers to employability);
5. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
6. Rehabilitative potential of the client;
7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses ;
8. Expert testimony concerning any of the above and the resulting im pact on the client, relating to the offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence

report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.6 The Defense Case at the Sentencing Phase

(a) Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.

(b) Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
2. Educational history (including achievement, performance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;
3. Military service (including length and type of service, conduct, and special training);
4. Employment and training history (including skills and performance, and barriers to employability);
5. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
6. Rehabilitative potential of the client;
7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses;
8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

(c) Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

(d) Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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Q. Capital Standard No. 17: The Defense Case at the Sentencing Phase

1. Counsel should present to the sentencing jury and judge all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.
2. Among the topics counsel should consider presenting are:
    a. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
    b. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;
    c. Military service (including length and type of service, conduct, and special training);
    d. Employment and training history (including skills and performance, and barriers to employability);
    e. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
    f. Rehabilitative potential of the client;
    g. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses ;
    h. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.
3. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the

official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

4. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

I. Attorney Performance: Postjudgment

The following standards relating to postjudgment are included in this section:

1. Trial counsel duties
2. Appellate counsel duties
3. Postconviction counsel duties
4. Clemency counsel duties
5. Related standards

1. Trial Counsel Duties

Commentary. The principle of continuity of representation ends in most jurisdictions once the trial is completed and sentence imposed. A new attorney will often be responsible for subsequent appellate proceedings. However, provision must be made for ensuring that the experiences of the trial attorney are not lost to the appellate process. These standards place the burden on the trial attorney to preserve the client's appeal right and to cooperate with appellate counsel.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.9.1 Duties of Trial Counsel in Postjudgment Proceedings

A. Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.

B. Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.

C. Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.

D. Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.1 Duties of Trial Counsel in Postjudgment Proceedings

(a) Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.

(b) Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.

(c) Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally term inated.

(d) Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

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

Standard VII. Performance Standards for Counsel in Capital Cases

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R. Capital Standard No. 18: Duties of Trial Counsel in Postjudgment Proceedings

1. Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.
2. Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.
3. Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.
4. Trial counsel should cooperate with subsequent co unsel concerning information regarding trial-level proceedings and strategies.

2. Appellate Counsel Duties

Commentary. See also *Compendium* Volume IV, "Standards for Appellate Representation."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.9.2 Duties of Appellate Counsel

A. Appellate counsel should be familiar with all state and federal appellate and postconviction options available to the client, and should consider how any tactical decision might affect later options.

B. Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is warranted.

C. Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.

D. Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

E. Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.2 Duties of Appellate Counsel

(a) Appellate counsel should be familiar with all state and federal appellate and postconviction options available to the client, and should consider how any tactical decision might affect later options.

(b) Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is wa rranted.

(c) Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.

(d) Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

(e) Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

3. Postconviction Counsel Duties

Commentary. Even after the appeals court has upheld the conviction and sentence, the client still has postconviction remedies in federal court and in most state courts. Postconviction counsel's minimum duties are spelled out by these standards. However, they do not say whether the state is obligated to provide counsel at public expense at this stage of the process.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.9.3 Duties of Postconviction Counsel

A. Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.

B. Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's file(s).

C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.3 Duties of Postconviction Counsel

(a) Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.

(b) Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsels' file(s).

(c) Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

4. Clemency Counsel Duties

Commentary. The last step in the process is executive clemency. Clemency is totally discretionary and not often granted. Nonetheless, diligent counsel should pursue this final avenue for reprieve from a death penalty judgment.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.9.4 Duties of Clemency Counsel

A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

C. Clemency counsel should take appropriate steps to ensure that clemency is sought i n as timely and persuasive a manner as possible.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.4 Duties of Clemency Counsel

(a) Clemency counsel should be familiar with the procedures for and permissib le substantive content of a request for clemency.

(b) Clemency counsel should interview the client and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

(c) Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

5. Related Standards

Commentary. The final responsibility of counsel is to seek stays of execution where this is possible. The standards' reference to the client's mental health is significant because present law does not permit execution of a defendant who is so mentally ill that he or she cannot appreciate the significance of what is occurring.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

Guideline 11.9.5 Duties Common to All Postjudgment Counsel

A. Counsel representing a capital client at any point after imposition of the death sentence should he familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

B. Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

C. Counsel should continually monitor the client s mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.5 Duties Common to All Postjudgment Counsel

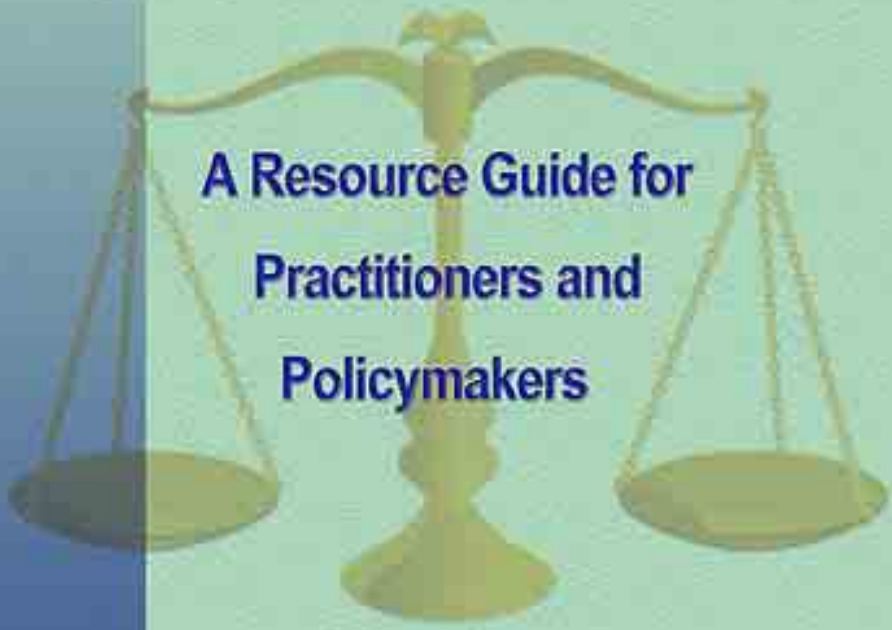
(a) Counsel representing a capital client at any point after imposition of the death sentence should be familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

(b) Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

(c) Counsel should continually monitor the client's mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems



A Resource Guide for Practitioners and Policymakers

Volume IV
Standards for
Appellate Representation

December 2000

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Foreword

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

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

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

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

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

Mary Lou Leary
Acting Assistant Attorney General
Office of Justice Programs

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Acknowledgments

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Introduction

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

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

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

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

Sponsorship and Development

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

Methodology

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

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

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

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

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

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

List of Standards and Table of Key Elements

Standards Included

National

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

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

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

State and Local

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

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

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

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

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

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

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

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

Key Elements

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

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

A. Appellate Offices

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

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

1. Separate Units, Offices, and Agencies

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

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

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 4.3 Relationship of Appellate and Trial Functions; Task Allocation

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

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

(a) Counsel on appeal should be different from trial counsel and capable of exercising independent review of the competence and performance of trial counsel.

(b) An appellate defender should not have responsibility for any trial work while in an appellate capacity and should remain in appellate work for a substantial period of time in order to provide continuous representation to a client throughout the appellate process.

(c) While the appellate function should be separate from the trial function, under certain circumstances the trial attorney should be permitted to handle the appeal provided that there is an independent review of the record by appellate personnel.

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

(a) Appellate counsel should contact and fully discuss the appeal with trial counsel; and

(b) The trial defender office should have the capacity to process interlocutory and emergency appeals.

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

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

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

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

(a) Adequate resources for the hiring of expert witnesses and inves tigative services;

(b) Administrative personnel to maintain docket control cards, open files, accumulate all court records before the case is assigned to a defender, and set up initial appointments with and explain the appellate process to clients;

(c) Word processing systems and equipment; and

(d) An adequate library and brief-bank with access to a complete resource library.

    (1) Adequate personnel should be available to operate the library and maintain and index the brief-bank.

    (2) Individual staff attorneys should be provided with a functional working library for their own offices.

    (3) All slip sheet opinions released by the jurisdiction's appellate courts should be obtained by the office upon release, indexed and immediately distributed to the appellate attorneys.

2. Appropriate, Adequate Facilities

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

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G. *Facilities*

1. Office Space

   a. *Area for staff*. Generally 150 sq. ft. should be allocated for each full-time or equivalent staff member.

   b. *Privacy*. Each attorney should be provided an individual, private, fully walled office in which to work; investigators, social workers, and paralegal personnel should have available private office space in which they can interview persons.

   c.

      i. The appellate defender office should generally not be located in a government office building or in the same building as the prosecutor, but should be located in an area which is accessible to public transportation, is amenable to client visits, and is convenient to the primary appellate court.

      ii. The appellate defender should be located in a building which has easy access to the public and which ensures the security of office personnel.

      iii. The appellate defender office should have the appearance of a professional law office, and not a government agency. The appellate defender and all staff should work towards minimizing the institutional appearance of the office and maximizing its professional appearance.

      iv. Adequate space should be allocated in the appellate defender's office for library, waiting rooms, conference space, and lounge areas for staff.

      v. The appellate defender office should have adequate heating, air conditioning, and lighting to perform its required duties.

2. Library

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

i. One complete set of state statutes and court rules;

ii. One set of statutes annotated, covering those statutes and rules governing criminal and appellate law and procedures;

iii. Those sections of the state digest and/or state legal encyclopedia covering criminal law;

iv. A directory of all attorneys, judges, and prosecutors in the jurisdiction; and

v. A dictionary.

b. *At a minimum*, each appellate defender shall have an in-house library with at least the following material:

i. A complete set of:

1) United States Supreme Court decisions;

2) All published state appellate court decisions;

3) Federal Reporter;

4) State Statutes Annotated;

5) State Digest;

6) State legal encyclopedia;

7) Law reviews published in the state;

8) Either *Am. Jur.* or *C.J.S.*;

9) Pattern criminal jury instructions for the state;

10) Federal Digest;

11) State *Shepards Citations*;

12) Current ABA Standards for Criminal Justice; and

13) Current prison, parole, and probation regulations for that jurisdiction.

ii. One set of all published state appellate court decisions since 1960 for every ten attorneys.

iii. Current *Criminal Law Reporter.*

iv. Legal Dictionary

v. One standard treatise on:

1) criminal substantive law;

2) criminal procedure; and

3) criminal evidence.

c. Priority should be given to expanding the law library beyond this minimum collection.

d. Each appellate defender shall identify those complete law libraries convenient to its offices which contain regional and state reporters, Federal Supplement, all major law reviews, and such standard references as *A.L.R.* and *Words and Phrases*. The appellate defender shall endeavor to work out procedures for the staff to use such materials during working and non-working hours and, where appropriate, to withdraw materials from the library.

3. Other Research Aids

a. Briefbank

i. Each appellate defender office shall have an index of briefs such as will allow other staff members and other researchers to have access to briefs completed by the office.

ii. Each office shall have a procedure for requiring the cataloging of briefs done by the office.

iii. Each office shall have a procedure for requiring the cataloging of motions/research done by the office.

b. Automated Research Devices

i. Where funds are available, each appellate defender should determine the feasibility of using automated research equipment to do legal research.

ii. The automated equipment should be put in a location that is accessible to all staff members, but disrupts the research of other staff members as little as possible.

iii. The office should develop procedures to ensure the utilization of the automated equipment by staff members.

iv. The office should monitor the cost efficiency of all automated equipment within the office to determine whether it is sufficient for the office's purpose.

c. Unless it would seriously disrupt the operation of defender office, the appellate defender should make its library, brief bank, and research tools available to other public defenders and members of the private bar.

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

Guideline 2.7 Research resources

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

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

3. Efficient Management Structure

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

A. *Regular Office Procedures*

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

B. *Management Information Systems*

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

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

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

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

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H. *Feedback*

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

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

Guideline 2.5 Contact with courts and prosecutors

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

(b) The Appellate Defender should establish a cordial and professional relationship with the Director of the Criminal Appeals Division of the Attorney General's office so that mutual problems can be solved administratively or with a concerted effort.

(c) Appellate counsel should act in a professional and dign ified manner in all dealings with judges and prosecutors.

B. Defender Administrative Process

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

This section addresses the following topics:

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

1. System for Handling Conflict-of-Interest Cases

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

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

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

…

E. *Procedures for Handling Conflict of Interest Cases*

1. Each office shall have a written definition of situations which constitute a conflict of interest, requiring the assignment of outside counsel. Those situations shall include:

   a. When the appellate defender is appointed to provide representation to codefendants, absent extraordinary circumstances warranting joint representation and the consent of all clients involved;

   b. When the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation;

   c. When two or more clients have entered pleas of guilty or have advanced defenses at trial which were not inconsistent, but assert for the first time after conviction that one or more of the clients were more culpable than others;

   d. When it is necessary for the appellate attorney to interview or examine in a

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

e. When, in the pursuit of an appeal or postconviction hearing, it is necessary to assert for the first time that another client of the office committed perjury at trial.

2. If a conflict of interest exists, it exists for the entire office, and assigning the case to another attorney within that entire agency will not cure the conflict.

3. As soon as a case is identified as meeting the definition of "conflict of intere st case" the case shall be immediately identified and assigned to counsel outside the defender office. The office shall adopt a procedure for ensuring a prompt review of each case to make a timely decision as to whether a conflict of interest is probable.

4. The procedure followed by the office shall be adequate to obtain independent counsel in a timely manner.

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

1. Counsel shall, to the best of his or her ability, act as the defendant's counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.

2. Counsel shall not represent more than one of multiple codefendants on appeal regardless of whether the codefendants express a preference for joint representation and there is no apparent conflict of interest.

…

20. Counsel shall not seek or accept fees from the defendant or from any other source on the defendant's behalf other than those authorized by the appointing authority.

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

Guideline 1.4 Conflicts of Interest

(a) The appellate division shall adopt a procedure for ensuring a prompt review of each case to make a timely decision as to whether a conflict of interest is probable. Individual counsel must be alert to all potential and actual conflicts of interest that would impair counsel's abi lity to represent a client.

(b) Counsel shall seek the Appellate Defender's opinion regarding any potential conflicts. The Appellate Defender shall make the final determination as to whether the potential conflict warrants withdrawal.

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

2. System for Case Assignment and Supervision

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

. . .

C. *Assignment, Management, Supervision and Case Flow*

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

c. The attorney's and the office's previous contact with the client.

6. The appellate defender shall adopt procedures for monitoring the flow and movement of cases to determine:

   a. Any inappropriate delays in individual cases;

   b. Any attorneys who are not handling cases in an appropriate timeframe;

   c. Any systematic delays which can be identified and corrected; and

   d. Assignment of cases and anticipating future caseloads.

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

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

VIII. Case Management and Quality Control

…

B. Evaluation Criteria

…

2. Case Management and Quality Control Criteria for Appellate Organizations

   (a) The defense organization should have adequate procedures for identifying and categorizing cases to ensure that more experienced lawyers are assigned to more complex cases.

3. Written Procedures for Services to Inmates

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

…

D. *Scope of Representation*

…

9. The appellate defender shall have the discretion to assist prison inmates and others seeking redress of institutional grievances, and shall have the discretion, where resources are available, to provide representation to such persons in appropriate litigation challenging the conditions of such confinement.

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

4. System for Ensuring Complete Case Argument

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

…

E. *Timing of Postconviction Representation*

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

…

G. *Staffing*

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

…

L. *Brief Preparation*

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

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

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

Standard IV. Performance Standards and Complaint Procedures

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

…

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

…

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

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

Guideline 3.1 Brief and memorandum preparation

(a) All briefs and memoranda filed by appellate counsel shall conform to the Rules of Appellate Procedure.

(b) All briefs and memoranda shall have a professional, ne at appearance, without typographical errors or misspellings, and be generally comparable in appearance to briefs filed by the best law firms in the state.

(c) Appellate counsel shall not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

(d) All briefs and memoranda shall make appropriate use of legal authority. Briefs shall utilize out-of-state and federal authority in support of positions when no local authority exists or local authority is contrary to the weight of recent decisions from other jurisdictions. Briefs shall not contain run-on citations listing many cases in support of one general or vague propos ition.

(e) All briefs and memoranda shall utilize a method of citation consistent with the *Manual of Citation and Form for the Courts of the State of New Mexico* (1992).

(f) The Appellate Defender shall adopt a procedure for screenin g the briefs and memoranda that are filed by the office, which should include a careful review of each pleading by an attorney other than the one who drafted the pleading.

(g) The Appellate Defender shall adopt procedures for providing an "issues meeting" between the attorney handling a case and other members of the attorney staff at which the issues raised in the case can be discussed.

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

IV. Supervision

B. Evaluation Criteria

…

6. Appellate Defender organizations should maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following:

   (a) gathering and reviewing entire trial court record;

   (b) communication with trial counsel and the client;

   (c) identifying all potential appellate issues, including those raised by trial

counsel of the client or that otherwise may not appear in the record;

(d) conducting appropriate legal research;

(e) filing postjudgment or appellate motions;

(f) writing and editing motions and briefs;

(g) preparing and presenting oral argument;

(h) seeking further appeals in the event of an adverse decision by the Appellate Division

(i) briefing and arguing any further appeals.

VIII. Case Management and Quality Control

…

B. Evaluation Criteria

…

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

(a) The defense organization should have adequate procedures an d sufficient data-processing capacity to ensure that it has the complete record, including periodic letters sent to responsible persons/entities requesting any necessary documents.

…

(e) The defense organization should have adequate procedures to ensure t hat all appellate motion and briefing schedules are met and that appeals are prosecuted as expeditiously as possible, particularly when the client is incarcerated.

(f) The defense organization should have adequate procedures to ensure that full consideration is given to filing reply briefs in appropriate cases.

(g) In addition to the documents required for trial defense organizations, the appellate defense organization should require that active case files contain the following:

(i) entire trial record;

(ii) factual summaries of interviews with trial counsel; and

(iii) appellate filings and orders.

5. Procedures for Oral Argument Preparation

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

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

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

…

M. *Oral Argument*

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

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

Standard IV. Performance Standards and Complaint Procedures

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

…

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

…

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

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

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

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

Guideline 3.2 Oral argument

(a) Appellate counsel should request oral argument when counsel determines that an oral presentation may advance the client's interest more than the written arguments alone.

(b) Appellate counsel should be adequately prepared for oral argument. In preparation, counsel shall review the briefs of both parties, file letters of supplemental authority as warranted, and update their legal research. No argument should ever be read.

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

VIII. Case Management and Quality Control

A. Evaluation Criteria

…

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

…

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

6. Case Termination Duties

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

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

…

18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the course of action which may be pursued as a result of that disposition and the scope of any further representation counsel will provide.

19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

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

VIII. Case Management and Quality Control

…

B. Evaluation Criteria

…

3. Transition to Other Defenders

…

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

C. Caseload

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

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

…

F. *Caseload*

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

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

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

G. *Staffing*

1. In order to ensure quality representation and to adequately support requests for staffing and funding, each appellate unit shall develop staffing ratios related to the caseload and number of attorneys in the office.

2. Prior to the creation of any appellate unit, or as soon thereafter as possible, a clearly articulated caseload standard staffing ratio and caseload weighting system should be developed—and publicly stated—with written plans for alternative methods of providing representation in the event those standards are exceeded.

H. *Case Weighting and Staffing Ratios*

1. An appellate defender office or division shall annually complete twenty-two work-units for each full-time attorney or the equivalent. In jurisdictions which require an abridgement of the testimony by the appellant, the annual workload shall be twenty (20) work-units. The number of work-units shall be determined as follows:

   a. A brief-in-chief or *Anders* brief filed in a case in which the court transcripts are 500 pages or less shall be one work-unit, except as otherwise provided herein.

   b. In cases in which the defendant has not been sentenced to death, one additional work-unit shall be added for each additional 500 pages of court transcript.

   c. In cases in which the defendant has been sentenced to death, the preparation of the brief shall constitute ten (10) work units and the procedures specified in subparagraphs f, g, h, and i shall constitute ten times the work-units specified in those subparagraphs.

   d. A brief involving only the validity of a guilty plea or only the propriety of a sentence…shall constitute one-half work unit.

   e. A case which is closed by the appellate unit with the submission of neither a brief nor postconviction motion shall constitute between one-quarter and one-half work-units, depending on the length of the record reviewed and work done on the case.

   f. A case which is closed by the appellate unit after the disposition of a postconviction motion or writ but without the submission of an appellate-court brief shall constitute between one-half and one work-unit

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

g. A case in which an evidentiary postconviction hearing is conducted by the appellate unit and in which an appellate court brief is submitted shall constitute between one and one-half to two work-units.

h. The preparation of a reply brief or a petition for review or certiorari in a state court shall be…one-quarter work -unit. A petition for a writ of certiorari filed in the Supreme Court of the United States shall be one -half work-unit.

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

Standard 6. Caseload Control in Local Programs

6.1 Caseload Control in Programs

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

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

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

…

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

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

Standard J. Caseloads of Counsel

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

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

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

Table 1

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

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

Table 2

Law Clerk – Appeal	One for every two attorneys

Table 3

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

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

Standard 3(2)(c)

2. Recommended Caseload Standards

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

…

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

Washington Defender Association, Standards for Public Defense Services

Standard Three. Caseload Limits and Types of Cases

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

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

…

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

D. Attorney Qualifications and Training

Included herein are standards relating to the following topics :

1. Selection, qualifications, and removal
2. Training

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

1. Selection, Qualifications, and Removal

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

NLADA Standards and Evaluation Design for Appellate Defender Offices

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

A. *Selection of the Chief Defender in "Stand Alone" Appellate Defender Offices*

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

B. *Selection of the Chief Appellate Defender in a Mixed Trial/Appellate Office*

1. In an office which provides representation both at the trial and appellate levels, a separate unit or section should be established to provide appellate representation.
2. The chief of the appellate unit or section shall be selected by, and serve at the pleasure of, the chief public defender.
3. The chief of the office's appellate unit shall have the following qualifications:
    a. A demonstrated ability to administer the unit;

b. The demonstrated expertise in appellate litigation, particularly in criminal cases;

c. The demonstrated ability to prepare effective written arguments and to edit the briefs of other attorneys; and

d. A demonstrated ability to interact appropriately with staff members, clients, and members of the public in general.

4. The salary of the chief of the appellate unit shall be equal to that of the highest paid attorney providing appellate representation on behalf of the prosecution in that jurisdiction.

5. The chief of the appellate unit shall not be selected on the basis of po litical affiliation, and it should not be assumed that when a new chief defender takes office the head of the appellate unit should be changed.

C. *Selection of Legal Staff*

1. All members of the defender office shall be hired on the basis of merit after ope n recruitment and hiring that has been publicly advertised in appropriate manners. Every effort shall be made to recruit and hire qualified persons of both genders and diverse racial and ethnic backgrounds.

2. The primary qualifications of staff attorneys in an appellate defender unit shall be:

a. The desire and ability to provide quality representation to indigent persons on appeal in criminal cases as demonstrated by such prior activities as:

i. Previous representation of criminal defendants;

ii. Clinical or law school work in legal writing, appellate advocacy, or similar activities;

iii. Clerkship or similar positions on appellate courts; and,

b. The ability to interact in a timely, professional, and appropriate manner with office staff, court personnel, and clients.

3. It is not to be assumed that an attorney whose primary previous experience is in the trial of cases is qualified to be an appellate defense counsel. Such persons shall independently demonstrate their ability to provide appellate representation to eligible defendants.

4. All members of the public defender staff shall have indefinite appointments to the positions, and shall continue to serve even when there is a new chief defender.

5. The salaries of the staff of the state public defender shall be equal to or higher than the salaries of persons doing comparable work in the prosecutor's office.

6. Staff members shall not be selected on the basis of political affiliation or be required to provide information regarding political affiliation.

7. Members of the public defender staff shall be discharged only for cause shown, and have an appropriate vehicle to appeal such dismissal or discipline to an

appropriate independent agency. Such "cause" for discharge shall include the failure to provide competent, effective, or timely representation in a significant number of cases.

Standard II. Criteria for Assuring the Efficiency of the Legal Representation

…

D. *Internal Structure of the Appellate Defender Office*

1. In a mixed trial and appellate defender office:

   a. Recruitment and hiring in a mixed office shall be done jointly by the chief defender and the director of the appellate unit, so as to ensure that persons with a particularized interest or skill in appellate litigation are hired for that unit.

   b. Stability in the appellate defender unit should be encouraged, and short-term transfers of attorneys into the appellate unit should be discouraged, although it may be advantageous to allow appellate attorneys to spend short periods of time in trial units. It is preferable to have the attorney who briefed the case handle it subsequently, including oral argument.

   c. All budgeting and staffing decisions within a public defender office shall be done jointly by the chief defender and the head of the appellate unit, with the chief defender having ultimate responsibility for the overall budget of the agency.

2. In stand-alone appellate defender offices, the appellate defender should develop such procedures as are necessary to the appropriate operation of the office, including the appointment of intermediate supervisory staff, procedures governing branch offices, and inclusion of such procedures in the office manual.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.2 Education, Training and Experience

(a) To provide quality appellate representation, counsel must be familiar with the substantive criminal law and the rules of criminal and appellate procedure. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the distinct practices of each of the appellate courts.

(b) When handling a criminal appeal, counsel should have sufficient experience, training and/or supervision to provide quality representation. The Department should afford sufficient training and supervision to enable lawyers to provide quality representation.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

II. Qualifications of Lawyers

A. Performance Standard: Lawyers employed by defense organizations should have sufficient qualifications and experience to enable them to render quality representation to their clients. Trial counsel should be able to provide quality representation throughout each case, from initial assignment through final judgment and any necessary postjudgment proceedings. Appellate counsel should be able to prove quality representation from initial appointment through final determination on appeal.

B. Evaluation Criteria

1. Qualifications for Counsel

(a) General Criteria for Trial and Appellate Counsel

(i) Does the defense organization require all lawyers to be proficient in essential litigation skills, including:

(1) legal analysis

(2) manual and computer-assisted legal research;

(3) persuasive writing;

(4) oral advocacy

(5) communication with clients; and, as appropriate,

(6) the use of social service and investigative support services?

(ii) Does the defense organization require that its lawyers keep up-to-date on developments in criminal practice and procedure?

…

(c) Criteria for Appellate Counsel

(i) The Defense organization should require recent criminal appellate experience or a combination of criminal trial and appellate experience prior to certifying a lawyer as qualified to handle an appeal.

(ii) Alternatively, the defense organization should require that lawyers who possess no recent criminal law experience are sufficiently trained and closely supervised.

(iii) The defense organization should ensure that appellate lawyers are able to identify appellate issues, pursue postjudgment relief, research the law, write persuasive briefs and motions and deliver persuasive oral arguments.

Specific Guidelines:

(a) Lawyers briefing and arguing their own appellate cases should have experience in at least ten criminal cases, including writing at least five criminal appellate briefs and arguing at least five criminal appeals, the majority of which involved substantive, non-sentencing issues, within the previous three years.

(b) Before assigning an appellate case to a lawyer who does not have the requisite experience set forth in Specific Guideline (a), the defense organization should require the lawyer:

(i) to complete a comprehensive training program on substantive and procedural criminal law, as well as written and oral advocacy, provided by the defense organization itself or a recognized provider of continuing legal education;

(ii) to be supervised by an experienced lawyer who is familiar with the facts and issues in the case and who shall perform a detailed review of, and approve all substantive work performed by, that lawyer, until the lawyer satisfies the minimum experience requirements of Specific Guideline (a); and

(iii) to moot the arguments prior to appearing before the court.

2. Training

Commentary. Only two of the major sets of standards provide for training of appellate attorneys. In addition, the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services state that the unit attorneys should be provided a course of training in appellate practice and that there will be weekly conferences of the unit attorneys to discuss new issues of law and practice. See also the training standards in *Compendium* Volume I, "Standards for the Administration of Defense Services."

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

…

K. *Training*

1. Training for attorneys.
    a. Each appellate defender office shall have an estab lished training program for entry level attorneys which should be commenced prior to the attorney actually providing representation in any case. "On the job" training, based upon what the attorney will learn from individual cases, is not adequate. Such training shall involve both appellate defender staff, court personnel, and others.
    b. The appellate defender shall have ongoing continuing legal education programs for attorneys, and specially designed ongoing training for all members of the staff, including support staff and the most senior attorney.
    c. The appellate defender shall make use of national programs which are of particular relevance to appellate defenders, and shall work with funding sources to ensure funding for both in-state and out-of-state continuing legal education programs.
2. The appellate defender office shall have training for all staff members that enter the office, including secretarial persons. Such training should include a background on the importance of the appellate defender and the relationship of the work each staff member [performs] to the ultimate goal of the office of providing quality and efficient representation.
3. The appellate defender should take an active role in the continuing legal education of the entire bar, and should work actively with the providers of continuing legal education to ensure participation.
4. The appellate defender shall cooperate and work with attorneys wh o provide trial representation to:
    a. Identify issues which might be raised at trial which reflect new or developing legal trends;

b. Properly preserve at trial issues which might be raised on appeal;

c. Acquaint the trial bar with recent decisions which have an impact on the trial cases; and

d. Share the appellate defender research facilities if such materials are not available elsewhere and the appellate defender has adequate materials and office space.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

F. Appointment of Appellate Counsel

The comprehensive plan shall provide for the appointment of lead appellate counsel meeting the following qualifications.

…

2. Other Cases. To be eligible to serve as appointed counsel in other cases, an attorney shall have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard III. Certification and Assignment Procedures

A. Criminal

…

6. Criminal Appeals and Other Postconviction Matters

Training Requirement:

Applicants for certification to accept these cases must complete an 8-hour Appeals and Postconviction Training Program offered by CPCS. Registration information is found in the CPCS Certification Bulletin.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.6 Training

(a) The appellate defender shall work with the Director of Training and Staff Development to establish a training program for all entry-level appellate attorneys.

(b) The appellate defender shall ensure that in-house Public Defender t raining programs include training specifically related to appellate practice.

(c) The appellate division shall have training for all staff members that enter the office, including secretarial persons. Such training shall include an explanation of the critical role of an appellate defender office.

(d) The appellate defender shall cooperate and work with trial attorneys to:

1. identify issues which might be raised at trial which reflect new or developing legal trends;
2. properly preserve at trial issues which might be raised on appeal; and
3. stay abreast of significant recent appellate court decisions.

(e) The Appellate Defender shall work with the Director of Training and Staff Development to support state-wide departmental training programs.

E. Performance

Included herein are standards relating to the following topics :

1. Determining issues to appeal
2. Diligence and accuracy
3. Duty to meet with trial lawyers
4. Duty to meet with client
5. Bail release during appeal
6. Assessing postconviction remedies
7. Miscellaneous duties

1. Determining Issues to Appeal

Commentary. The several standards on determining which issues to include in the appeal cover a broad spectrum of issues. Some of these issues are

- Continued representation
- Meritorious versus non-meritorious issues
- Client versus attorney decisions
- Federal constitutional claims
- Office procedures for determining appeal issues

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.3 Counsel on Appeal

(a) Appellate Counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.

(b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(d) Appellate counsel has the ultimate authority to decide which arguments to make on appeal. When appellate counsel decides not to argue all of the issues that his or her client desires to be argued, appellate counsel should inform the client of his or her pro se briefing rights.

(e) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

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N. *Discretionary Review*

1. Each office should have procedures for determining how cases should be reviewed and what standard should be applied when deciding whether a discretionary appeal to either state or federal court should be taken.
2. Review of each case for determining whether it is appropriate for discretionary review shall be based upon articulated standards, and in the event the attorney handling the case determines that such discretionary review shall not be pursued, the case shall be reviewed by another attorney other than the one who initially presented the case. In offices of five or more attorneys, supervisory staff shall be designated for this purpose.
3. Following an unsuccessful first appeal, the defendant shall be informed of the alternatives for discretionary review, and given the opportunity to articulate a desire to seek such review. In the event a competent client indicates that no further appeals shall be pursued, no further action shall be taken by the appellate defender. In the event the client desires to pursue a discretionary appeal or further discretionary review, the ultimate decision of whether such discretionary review shall be pursued is the attorney's, and not the client's.
4. Every appellate defender in a state system shall have the availability of review in the federal courts by habeas corpus. State appellate defenders shall not be restricted to state courts.
5. When a defendant absconds during the pendency of an appeal, no new appeals or petitions should be filed on his/her behalf. Any pending appeal shall be completed, unless it appears that the fact that the defendant has escaped will prejudice the defendant at any new trial. Except when learned through information governed by the attorney-client privilege, the appellate defender shall inform the court having jurisdiction over the case that the defendant has absconded.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

…

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

…

11. In any case in which the defendant faces lengthy incarceration, probation, or parole the appellate defender should consider whether there are federal constitutional claims which, in the event that relief is denied in the state appellate courts, would form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, the appellate defender should raise and argue such federal constitutional claims, unless the appellate defender concludes that there is a tactical basis for not including such claims and the client assents.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.

…

9. Counsel should assert claims of error which are supported by facts of record which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.

10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.1 Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

Guideline 1.3 General Duties of Appellate Defense Counsel

(a) When agreeing to act as counsel or accepting appointment, counsel has an obligation to work with the Department to make sure that counsel has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a

particular matter. If counsel believes that counsel is unable to offer quality representation in a particular case, counsel shall immediately advise counsel's supervisor who shall review the situation to ensure the client receives quality representation.

(b) Counsel has a continuing duty to keep the client informed of the progress of the case.

2. Diligence and Accuracy

Commentary. Only two standards provide specific performance standards for appellate attorneys. In addition, in defining "diligence," the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services require the appellate attorney assigned to a case to "immediately" communicate with the client and within three weeks read the entire transcript of the case and confer about issues of law that may be raised. See also *Compendium* Volume II, "Standards for Attorney Performance," and Gwinnett Judicial Circuit (Georgia) Internal Operating Procedures 98-5, G8.4, "Conduct of Appeal," paralleling ABA Standard 4-8.4.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.4 Conduct of Appeal

(a) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts.

(b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.

(c) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

14. Counsel shall be accurate in referring to the record and the authorities relied on in both written and oral presentations to the court.

15. Counsel shall comply with all applicable court rules regarding the timely filing of pleadings and with such other timing requirements as may be specified by the court in a particular case.

3. Duty to Meet with Trial Lawyers

Commentary. The appeals attorney's responsibility to meet with the trial attorney is the converse of the trial attorney's duty to confer with the appeals attorney. (See "Performance Standards" in this volume.) In addition to the standards cited here, see the Massachusetts Guidelines for the Appeals Unit of the Committee for Public Counsel Services, which state that where the trial attorney was provided through the committee, the appellate attorney "shall be entitled to receive reasonable assistance from the client's trial attorney." See also *Compendium* Volume II, "Standards for Attorney Performance," for trial counsel's responsibilty to meet with appellate counsel.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

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J. *Contact with Trial Counsel*

1. Each appellate defender office should have a clearly articulated procedure for contact with trial counsel which shall include, at a minimum, notifying trial counsel that the appellate defender unit has been assigned to provide appellate representation to the defendant and should include such other general procedures as appear necessary within that jurisdiction.
2. In any case in which appellate counsel argues that trial counsel provided ineffective representation, appellate counsel should give notice to the trial attorney of such asserted claim.
3. Each office shall develop clearly-articulated internal procedures for screening cases in which claims of ineffectiveness are raised.
4. Appellate defenders working in a mixed office which includes a trial representation unit should always be mindful of the potential conflict in providing representation to an individual represented by that same office at trial. Attorneys should carefully consider claims of ineffectiveness in every case, and immediately take action to remove the case from the public defender's office when such claim appears to be arguable.
5. The appellate defender should encourage coope ration with trial counsel, including the trial attorney providing assistance on appeal, provided, however, that appellate counsel is primarily responsible for the handling of such a case.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.4 Contact with Trial Counsel

(a) Appellate counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the clients issues on appeal.

(b) In any case in which appellate counsel argues that trial counsel provided ineffective representation, appellate counsel should give notice to trial counsel of such asserted claim.

(c) The Appellate Defender should encourage cooperation between appellate and trial counsel, provided, however, that appellate counsel is primarily responsible for the appeal.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VIII. Case Management and Quality Control

A. Evaluation

…

2. Case Management and Quality Control Criteria for Appellate Organizations

   (a) Appellate lawyers should consult with trial counsel regarding potential appellate or postjudgment issues that may not appear in the record.

4. Duty to Meet with Client

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance," for standards on meeting with client and keeping client informed, and standards herein relating to identifying appeal issues and client role in that action. In addition, see the definition of "diligence" in the Massachusetts Committee for Public Counsel Service Guidelines.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

…

D. *Scope of Representation*

1. The appellate defender shall have a clearly-articulated policy of discussing the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. Such policies shall include discussing any possible adverse consequences or strategic problems when pursuing such appeal, even when there is an arguable issue to appeal. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of…strategic consi derations.

…

I. *Client Contact*

1. All appellate defender clients shall be personally interviewed by the attorney who will actually be handling the case.

   a. Each appellate defender unit shall adopt written office policies which require each client to be seen by the attorney actually providing representation in that case. Such policy shall include at least one visit, and such additional visits as are required by the particular facts and circumstances of the case.

   b. Each appellate defender office shall work out, in advance, procedures with those correctional institutions which will be visited by appellate defender staff to insure the least possible delay and misunderstanding.

   c. The appellate defender shall work with institutional officials to ensure that each correctional institution makes arrangements for a private interview room for attorney/client visits. An attorney shall not be expected to interview a client in a general visiting room, a room divided by a screen or glass partition, or a room in which a listening device is installed. An attorney shall not be expected to interview a client while the client is wearing handcuffs, leg irons, or chains. The appellate defender should work with the department of corrections and the superintendents of each institution to ensure an advance understanding of the facilities needed for

private interview space.

2. Mail Contact

   a. The appellate defender shall take all necessary steps to ensure that the attorney/client privilege is protected in all correspondence to and from an incarcerated individual. The appellate defender shall work with the prison administration and the attorney general in the state to ensure that the appropriate law in that jurisdiction is followed in relation to the opening and/or censoring of attorney/client mail.

   b. The appellate defender shall inform his or her client of the status of the case at each step in the appellate process, shall explain any delays in the case, and shall provide general information to every client regarding the process and procedures which will be taken in the matter, and the anticipated timeframe for such processing.

   c. The appellate defender shall provide the client with each su bstantive document filed in the case by both the prosecution and the defense.

   d. The appellate defender shall respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval.

3. Telephone contact

   a. The appellate defender should inquire as to the possibility of gaining telephone contact with clients who are incarcerated when such a brief telephonic contact can further the client's interest.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

…

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

   …

   2. The appellate defender shall keep the client informed of all significant developments in the client's case. The appellate defender shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval. The appellate defender shall accept collect telephone calls from an incarcerated client, provided that such calls are of a reasonable number and at reasonable intervals

…

4. After reading the transcript, the appellate defender shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall invite the client to visit the appellate defender at the appellate defender's office, for the purpose of conferring with the client about the issues which may be raised on the client's appeal.

6. If, after the conference described in Standard 4, the client insists on having briefed on his or her appeal a contention which, in the judgment of the appellate defender, cannot be supported by any rational argument, the appellate defender (a) shall inform the client of the client's right with respect to such contention; (b) shall supply the client with a copy of the *Moffett* opinion; and (c) if the client thereafter wishes to invoke his or her rights with respect to such contention, shall comply in all respects with the guidelines of the *Moffett* case….

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

3. Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation ….
4. Counsel shall fully apprise the defendant of the reasonably foreseeable consequences of pursuing an appeal in the particular case under consideration….

11. When a defendant insists that a particular claim be raised on appeal against the advice of counsel, counsel shall inform the defendant that he or she has the right to present that claim to the appellate court *in propria persona*. Should the defendant choose to proceed in such manner, counsel shall provide procedural advice and such clerical assistance as may be required to conform the defendant's pleadings for acceptability to the court.
12. Assigned counsel shall not take any steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VIII. Case Management and Quality Control

…

B. *Evaluation*

…

2. Case Management and Quality Control Criteria for Appella te Organizations

…

(c) Appellate lawyers should conduct informed consultation with each client regarding the issues to be raised on appeal or through postjudgment motions, as well as the viability of further appeals in the event of an adverse decision by the Appellate Div ision.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 1.3 General Duties of Appellate Defense Counsel

…

(b) Counsel has a continuing duty to keep the client informed of the progress of the case.

Guideline 2.1 Scope of Appellate Representation

(a) Appellate counsel shall discuss the merits, strategy and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic consi derations.

Guideline 2.3 Client Contact

(a) Appellate counsel shall communicate with all clients, unless the client cannot be found through reasonable measures. Counsel should aspire to communicate with each client either in person or telephonically.

(b) Appellate counsel shall inform his or her client of the status of the case at each step in the appellate process, shall explain any delays, and shall provide general information

to every client regarding the process and procedures which will be taken in the matter, and the anticipated timeframe for such processing.

(c) Appellate counsel shall provide the client with a copy of each substantive document filed in the case by both the prosecution and the defense.

(d) Appellate counsel shall respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval.

(e) Upon disposition of the case by the court, appellate counsel shall promptly and accurately inform the client of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.

(f) The Appellate Defender shall take all necessary steps to ensure that the attorney-client privilege is protected in all correspondence to and from an incarcerated individual.

Guideline 3.5 Continuing Responsibility to Raise Issue of Client's Incompetence.

Appellate counsel should consider the client's competence to make critical appellate decisions whenever counsel has a good faith doubt as to the client's competence to proceed. Counsel may move for an evaluation over the client's objection, and if necessary, counsel may make known to the court those facts which raise the good faith doubt of competence to proceed on appeal.

5. Policy for Seeking Bail Release During Appeal

Commentary. Performance standards for trial attorneys require local attorneys to seek pretrial release for their clients. A similar obligation applies to appellate attorneys.

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

…

D. *Scope of Representation*

…

2. The appellate defender shall have a clearly articulated policy regarding seeking the release of defendants on appellate bond which shall include the filing of appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

…

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

…

6. If it appears to the appellate defender that…the re is a reasonable possibility that an incarcerated client might receive a stay of sentence …, the appellate defender shall bring in the appropriate court a motion to stay the client's sentence.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.1 Scope of Appellate Representation

…

(b) Appellate counsel shall assist trial counsel in filing appropriate motions in the district court seeking the client's release on bond pending appeal. If necessary, appellate counsel shall draft and file such motions.

6. Assessing Postconviction Remedies

Commentary. Failure of an appeal does not necessarily terminate the case. Appeal to a higher court may be available. Postconviction remedies may also be available, including federal constitutional claims or the availability of newly discovered evidence in many (but not all) states.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.5 Postconviction Remedies

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other postconviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a postconviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a postconviction proceeding should be guided generally by the standards go verning the conduct of lawyers in criminal cases.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction, and Murder Cases

…

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

…

15. If the decision of the Appeals Court is adverse to the client, the appellate defender shall promptly inform the client of the client's right to make application to the Supreme Judicial Court for further appellate review of the case; and, if the client requests that such application be made, the appellate defender shall prepare and file on the client's behalf an application to the Supreme Judicial Court for further appellate review of the case within the time prescribed…. When the Supreme Judicial Court has ruled on the application for further appellate review, the appellate defender shall promptly inform the client by letter of the ruling.

16. In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the chief Counsel or his/her designee, to seek relief from the

client's conviction, when in the best judgment of the appellate defender there exists a reasonable likelihood that such relief may be obtained by petition for writ of certiorari to the United States Supreme Court, in the federal courts on petition for writ of habeas corpus, or in state court by a motion for new trial or other postconviction relief.

17. In any case in which federal habeas corpus relief is potentially available but in which the appellate defender does not seek or obtain approval to continue representation, the appellate defender shall inform the client of the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court or the filing of a motion for new trial (as to any federal constitutional issues not already exhausted) in the state trial court.

18. Following the completion of any unsuccessful direct appeal from a conviction, the appellate defender shall inform the client of the opportunity to file within sixty (60) days a motion to revise and revoke the sentence pursuant to Mass. R. Crim. Pro. 29. Upon request of the client, the appellate defender shall either file and litigate said motion or shall provide assistance to the client so that the client may file such motion *pro se*.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.1 Scope of Appellate Representation

…

(i) The Appellate Defender shall have the discretion to assist non-clients in seeking appropriate postconviction remedies, including seeking counsel on appeal, obtaining the necessary forms for filing motions in state and federal courts, and explaining to inmates the law as it relates to the facts of each case.

7. Miscellaneous Duties

Commentary. The miscellaneous standards address the timing of appellate representation, other representational duties, and challenges to effectiveness of trial counsel.

Timing of Appellate Representation

NLADA Standards and Evaluation Design for Appellate Defender Offices

Standard I. Criteria for Assuring the *Quality* of Legal Representation

…

E. *Timing of Postconviction Representation*

1. The appellate defender shall cooperate with the trial courts, appellate courts, trial public defenders and private attorneys to ensure that all appeals desired by criminal defendants are timely pursued. The appellate defender should further directly assist defendants in filing the necessary jurisdictional documents to perfect appeals in a timely manner.
2. The appellate defender shall cooperate with trial courts, appellate courts, trial defenders, and private attorneys to ensure that no defendant is without legal representation between trial and appeal, while awaiting the assignment of counsel by the court. Such cooperation might include the development of rules or procedures for ensuring that no hiatus in counsel exists, and working with the appropriate courts in developing procedures such as to ensure continuity of representation.
3. The appellate defender should take all steps necessary to reduce the delays and time necessary for the processing of appeals which adversely affect the client. Such efforts include the development of appropriate appellate court rules which minimize the unnecessary procedures for perfection and prosecution of an appeal.
4. Cases in which the defendant is incarcerated only on the basis of the conviction under appeal shall be handled in a priority manner.
5. The public defender shall cooperate with the courts and court r eporters to ensure the prompt completion of the appropriate record on appeal. The public defender shall not determine the merit of any case without the careful review of such records.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.2 Timing of Postconviction Representation

(a) Appellate counsel shall cooperate with trial courts, appellate courts, trial public defenders and private attorneys to ensure that all appeals desired by criminal defendants are timely pursued.

(b) Appellate counsel shall cooperate with trial courts, appellate courts, trial public defenders and private attorneys to ensure that no defendant is without legal representation between trial and appeal.

(c) Appellate counsel shall cooperate the courts, court reporters and tape monitors to ensure the prompt completion of the appropriate record on appeal.

(d) The appellate defender should take all steps necessary to reduce the delays and time necessary for the processing of appeals which adversely affect the client.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

Standard IV. Performance Standards and Complaint Procedures

A. District Court Jurisdiction, Superior Court Jurisdiction and Murder Cases

…

3. Performance Standards Governing the Representation of Clients on Criminal Appeals and Postconviction Matters

1. Immediately upon receipt of the assignment of a direct appeal or new trial motion to an appellate defender, the appellate defender shall: (a) file an appearance in the appropriate court and (b) communicate with the client to inform the client of the assignment. Immediately upon receipt of the assignment of a screening concerning a motion to withdraw guilty plea, the appellate defender shall communicate with the client to inform the client of the assignment, but should only file an appearance after the appellate defender has conducted a review to determine that there is a meritorious basis for the motion. Upon receipt of the assignment of a screening other than a motion to withdraw guilty plea, the appellate defender may, but is not required to, contact the defendant and should file an appearance in court only after assignment of counsel has been approved by the chief counsel or his/her designee.

…

3. Within three weeks after the receipt of the transcript by an appellate defender, the appellate defender shall read the entire transcript of the case.

If the appellate defender is still subject to CPCS' mentor requirements, as determined by the Director of Legal Resources and Support Services, the appellate defender shall immediately provide the mentor with a copy of the transcript and shall confer with the mentor as to the issues to be raised in the appeal. The appellate defender, whether still subject to mentor requirements or not, may at any time also confer with the Supervising Appellate Counsel, Private Counsel Division.

…

14. The appellate defender shall promptly inform the client by letter of the decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision.

Other Representational Duties

NLADA Standards and Evaluation Design for Appellate Defender Offices

I. Criteria for Assuring the *Quality* of Legal Representation

…

D. *Scope of Representation*

…

3. The appellate defender shall have a clearly-articulated policy regarding the filing of motions in the appellate court which should include providing the client with the most complete and effective representation in the appellate court through the appropriate motion practice.
4. The appellate defender may provide representation in interlocutory (prejudgment) appeals, and shall make the availability of the office known to attorneys providing representation to criminal defendants at trial.
5. The appellate defender shall be assigned appeals taken by the prosecution in the same manner in which appeals are assigned when taken by the defendant.

…

11. The appellate defender shall file *amicus curiae* briefs in state appellate courts when issues are raised in cases litigated by other counsel when such cases will have a significant impact on a large number of defender clients and the briefs filed by counsel can be effectively augmented by such *amicus* briefs; in all other cases the appellate defender shall have the discretion to file *amicus* briefs.

Michigan Appellate Assigned Counsel System, Minimum Standards for Indigent Criminal Appellate Defense Services

5. In any appeal of right, counsel shall comply with the applicable court rules regarding the timely and proper filing of claims of appeal and shall take any other steps which may be necessary to protect the defendant's right to review.
6. Counsel shall promptly request and review all transcripts and lower court records.

…

13. Counsel should seek to utilize publicly funded support services designed to enhance their capacity to present the law and facts to the extent that such services are available and may significantly improve the representation they can provide.

…

17. Counsel shall keep the defendant apprised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.
18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.
19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation

Guideline 2.1 Scope of Appellate Representation

…

(c) Appellate counsel shall provide the client with the most complete and effective representation through an appropriate motions practice.

(d) The appellate division may provide representation in interlocutory appeals and extraordinary writs, and shall make the availability of the division known to attorneys providing representation to criminal defendants at trial.

(e) The appellate division shall be assigned appeals taken by the prosecution in the same manner in which appeals are assigned when taken by the defendant.

(f) The Appellate Defender shall have authority to seek discretionary review in any state appellate court.

(g) The Appellate Defender, with the approval of the Chief Public Defender, shall have the discretion to seek review of any state court conviction in the United States Supreme Court by writ of certiorari.

(h) The Appellate Defender shall have the discretion to assist prison inmates and others seeking redress of institutional grievances.

…

(j) The Appellate Defender shall have the discretion to file *amicus curiae* briefs in state appellate courts when issues are raised in cases litigated by other counsel, when such cases may have a significant impact on the appellate division's clients and the briefs filed by counsel can be effectively augmented by such *amicus* briefs.

Challenges to the Effectiveness of Counsel

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-8.6. Challenges to the Effectiveness of Counsel

(a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.

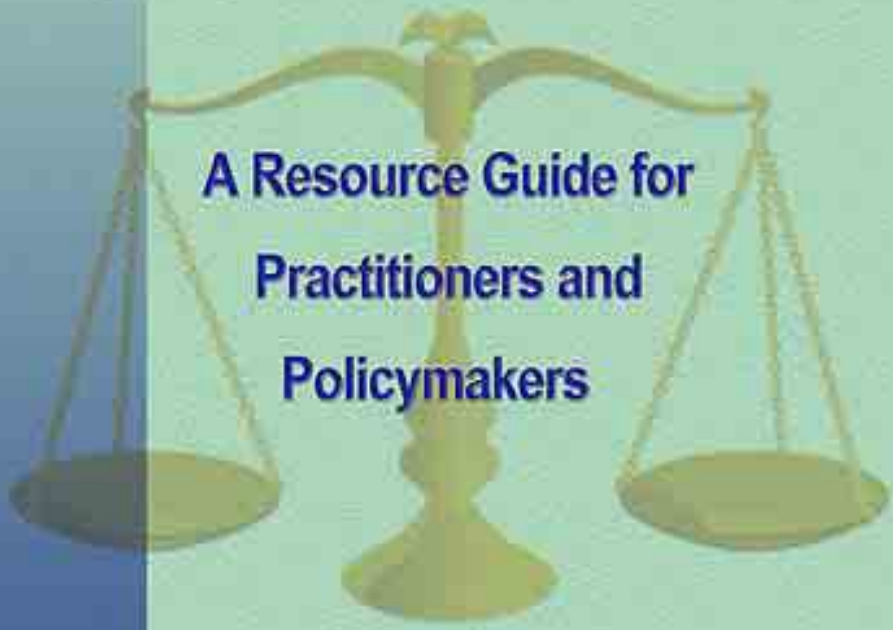
(b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems



A Resource Guide for Practitioners and Policymakers

Volume V

Standards for

Juvenile Justice Defense

December 2000

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Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has

Gideon v. Wainwright to provide every criminal defendant charged with a serious crime with competent counsel." Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar "to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices." Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

The standards presented here do not necessarily represent the only acceptable models. Rather, they have been collected to give practitioners and policymakers examples of the range of current "best practices" developed at the state and local level, along with the recommendations of several national standards-setting bodies.

The Office of Justice Programs is making the *Compendium* available in hard copy, CD, and electronic formats. It is our hope that this resource will be used by State and local governments and agencies to compare standards from other jurisdictions and develop their own, thereby helping to assure the fulfillment of the Sixth Amendment and of *Gideon v. Wainwright.*

Mary Lou Leary
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Introduction

The *Compendium of Standards for Indigent Defense Systems* presents national, state, and local standards relating to five major aspects of indigent defense:

- Administration of defense systems (Volume I)
- Attorney performance (Volume II)
- Capital case representation (Volume III)
- Appellate representation (Volume IV)
- Juvenile justice defense (Volume V)

These standards are non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants. Some standards are aspirational, that is, a goal for the future; other standards are enforced by operating or funding agencies. The standards and rules collected here were issued by national organizations; state agencies; bar associations; pu blic defender agencies; state high courts; and local court or bar associations.

The *Compendium* is intended to be useful for persons preparing to establish, review, or improve a public defense program or system. It should also be useful for persons dealing with funding sources; for agencies or organizations that are developing standards governing either criminal defense systems or individual attorney performance; and for academics and courts that need a reference point.

Sponsorship and Development

The *Compendium* was commissioned by the Bureau of Justice Assistance in the Office of Justice Programs of the United States Department of Justice. It was developed by the staff of the Institute for Law and Justice with guidance from an advisory board of practitioners and academics in the field of criminal defense systems. The assistance of the Spangenberg Group is also gratefully acknowledged, especially in helping identify state and local standards for inclusion in the *Compendium*.

Methodology

Once a standard was identified, ILJ staff sought permission from the sponsoring agency to reprint the standard here. The intent of the *Compendium* was to be as inclusive as possible. No effort was made to include only the "best" standards. If any standards have been left out, we apologize to the standards' sponsors.

Each volume lists specific topics, such as provision of training or the need for adequate facilities, and then presents all the standards relevant to those topics. By and large, the selection of topics followed the topical headings used in the standards the mselves.

The materials included in the *Compendium* go beyond standards themselves. In several instances, we have included court rules and agency operational policies that are the functional equivalent of standards. The inclusion of such materials points to the need to put standards into context. At the state level, standards do not exist by themselves. Their content is often shaped by state legislation and court rules, either of which may have been the force requiring the development of the standards. Thus, to understand state and local standards, some knowledge of the governing state law is required. By necessity, any state law that creates a defense services delivery mechanism also treats the issues of governance, structure, jurisdiction, funding, and many other topics often covered by standards. While this *Compendium of Standards for Indigent Defense Systems* includes a limited review of state laws, an exhaustive review is beyond its reach.

Implicit in the standards are the ethical requirements expected of all attorneys in all types of cases. In a sense, the standards are but commentary to certain overriding ethical principles: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for this representation" (ABA Model Rules of Professional Conduct 1.1, adopted 1983). Further, as the Model Code of Professional Responsibility (Canon 7) directs, "A lawyer should represent a client zealously within the bounds of the law." What the standards do is identify how those principles can be achieved and measured in the indigent defense setting, no matter what type of indigent defense system is used.

These standards may be used either to evaluate an existing system (consisting of public defenders, contract firms, private assigned counsel, or a combination of such systems) or to compare or consider replacing one type of system with another.

The standards allow funders to determine whether providers of defense services are performing effectively and efficiently. For the clients, who can neither choose nor readily change their attorneys, these standards provide some measure of assurance that their lawyers will provide high-quality, zealous representation. Finally, these standards inform both funders and attorneys what services are required and what services need to be funded.

List of Standards and Table of Key Elements

Standards Included

National

American Bar Association, *Juvenile Justice Standards Relating to Appeals and Collateral Review*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Interim Status*, 1979

American Bar Association, *Juvenile Justice Standards Relating to the Juvenile Probation Function*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Monitoring*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Pretrial Proceedings*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Transfer Between Courts*, 1979

State and Local

Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, 1997

Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, 1995

Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, 1999

Minnesota Office of the State Public Defender, *Caseload Standards for District Public Defenders in Minnesota*, 1991

North Dakota Legal Counsel for Indigents Commission, *Indigent Defense Guidelines and Procedures*, 1998

Washington Defender Association, *Standards for Public Defense Services*, 1989

Key Elements

Category	Type of Standard	Source	Cite
A. Purpose of Standards			
	Purpose of standards	ABA Interim Status	1.1, 1.3
B. Attorney Role			
	Function of defense counsel	ABA Counsel for Private Parties	1.1
		ABA Counsel for Private Parties	2.1 (A)(i)(ii)
	Role of counsel	Connecticut Guidelines	Guideline 1.2
		Massachusetts Manual	Policy IV A2 J1.1, 1.3
	Attorney qualifications and training	Indiana Standards	Standard E4
		Massachusetts Manual	Policy III A(4) Para. 2 Policy IV A2 J1.2
		Washington Standards	Standard Fourteen
	Independence of counsel	ABA Counsel for Private Parties	2.1 (D)
C. Juvenile Defense Administration			
	Organization of services	ABA Counsel for Private Parties	2.2 (except next)
	Workload	ABA Counsel for Private Parties	2.2 (B) (iv)
		Indiana Standards	Standard J
		Minnesota Standards	Standard 2
		Washington Standards	Standard Three
	Attorney compensation	ABA Counsel for Private Parties	2.1 (B)
	Support services	ABA Counsel for Private Parties	2.1 (C)
		ABA Transfer Between Courts	2.3 (C)
	Monitoring system	ABA Monitoring	3.1 (A) (D), 3.2, 3.3
	Client eligibility	North Dakota Guidelines	Guideline 1 B
D. Counsel Appointment			
	Scope of right to counsel	ABA Counsel for Private Parties	2.3
		ABA Pretrial Proceedings	5.3 (A)
		ABA Juvenile Probation Function	2.13
		ABA Transfer Between Courts	2.3 (A) (B)
	Time of appointment	ABA Counsel for Private Parties	2.4 (A)
		ABA Pretrial Proceedings	2.2 (C)
	Duration of appointment	ABA Counsel for Private Parties	2.4 (B)
		ABA Monitoring	3.1 (B)
	Waiver of counsel	ABA Counsel for Private Parties	6.2

Category	Type of Standard	Source	Cite
E. Attorney Responsibilities Generally			
	Need to act diligently and promptly	ABA Counsel for Private Parties	1.5
	Need to act ethically	ABA Counsel for Private Parties	1.2, 1.3, 3.4, 4.4, 7.5, 7.7, 7.10
F. Lawyer–Client Relationship			
	Client meetings	ABA Counsel for Private Parties	4.2
	Keeping client informed	ABA Counsel for Private Parties	3.5
	Confidentiality	ABA Counsel for Private Parties	3.3
		Massachusetts Manual	Policy IV A2 J2.5 (c)(d)
	Resolving conflicts of interest	ABA Counsel for Private Parties	3.1, 3.2
		ABA Interim Status	8.1
	Advice to give client	ABA Counsel for Private Parties	5.1, 5.3, 8.3
	Testimony by respondent	ABA Counsel for Private Parties	7.9
	Decision making	ABA Counsel for Private Parties	5.2
G. Attorneys' Initial Duties			
	Early release	ABA Interim Status	8.2
		ABA Counsel for Private Parties	6.1, 6.4
	Visiting detention facility	ABA Interim Status	8.3
	Acting promptly	ABA Counsel for Private Parties	4.1
	Challenging prior counsel	ABA Counsel for Private Parties	10.7
	Initial duties	Massachusetts Manual	Policy IV A2 J2.1 to 2.5
H. Pretrial Duties			
	Client interviews	ABA Counsel for Private Parties	4.2
	Discovery	ABA Counsel for Private Parties	7.3 A
		ABA Pretrial Proceedings	3.1, 3.2 (B), 3.13, 3.16
		Massachusetts Manual	Policy IV A2 J5.5, 5.10
	Continuing duty	ABA Pretrial Proceedings	3.15
	Duty to investigate	ABA Counsel for Private Parties	4.3, 8.2
		Massachusetts Manual	Policy IV A2 J5.1
	Making of motions	ABA Counsel for Private Parties	7.3 B
		Massachusetts Manual	Policy IV A2 J5.3, 5.7, 5.9

Category	Type of Standard	Source	Cite
I. Transfer Hearings			
	Transfer hearings	Massachusetts	Policy IV A2 J3.1 to 3.4
	Post-hearing remedies	ABA Counsel for Private Parties	8.5
J. Plea Negotiations			
	Consideration of early disposition	ABA Counsel for Private Parties	6.3, 7.1
		Massachusetts Manual	Policy IV A2 J6.2
		Massachusetts Manual	Policies IV A2 J 6.1, 6.3
	Other plea-related duties	Massachusetts Manual	Policies IV A2 J6.4-6.6
K. Trial			
	Juror selection	ABA Counsel for Private Parties	7.6
		Massachusetts Manual	Policy IV A2 J7.4
	Witness examination	ABA Counsel for Private Parties	7.8
		Massachusetts Manual	Policies IV A2 J7.6, 7.7
	Other trial duties	Massachusetts Manual	Policy IV A2 J7.1, 7.2, 7.3, 7.5, 7.8, 7.9, 7.10
L. Disposition/Sentencing			
	Counsel's importance at sentencing	ABA Counsel for Private Parties	9.1
	Duty to investigate	ABA Counsel for Private Parties	9.2
		Massachusetts Manual	Policy IV A2 J8.1
	Client counseling	ABA Counsel for Private Parties	9.3
	Hearing duties	ABA Counsel for Private Parties	9.4
	Counseling after disposition	ABA Counsel for Private Parties	9.5
	Continuing duty to client	ABA Counsel for Private Parties	10.1
		Massachusetts Manual	Policy IV A2 J9.2
	Other disposition duties	Massachusetts Manual	Policies IV A2 J8.2 to 8.5
M. Postdispositional Hearing Duties			
	Post dispositional hearings	ABA Counsel for Private Parties	10.2
		Massachusetts Manual	Policy IV A2 J 9.1
	Right to counsel on appeal	ABA Appeals and Collateral Review	3.1
	Cooperation with appeals counsel	ABA Counsel for Private Parties	10.3
	Continuing counsel	ABA Counsel for Private Parties	10.5, 10.6

A. Purpose of Standards

These two standards underscore the difference between the punitive criminal justice system and the rehabilitation model of the juvenile justice system. Compare to Section A, "Function of Standards," in *Compendium* Volume II, "Standards for Attorney Performance."

ABA Juvenile Justice Standards Relating to Interim Status

1.1 Scope and overview

The standards in this volume set out in detail the decision making process that functions between arrest of a juvenile on criminal charges and final disposition of the case. By limiting the discretion of officials involved in that process, and by imposing affirmative duties on them to release juveniles or bear the burden of justification for not having done so, the standards seek to reduce the volume, duration, and severity of detention, and of other curtailment of liberty during the interim period.

1.3 Guidelines for measuring progress

To the extent that these standards require time-consuming or costly modifications in the law, practice, and facilities of a jurisdiction, they should be viewed as guidelines by which to measure the progress of the jurisdiction toward compliance with the stated goals. Detailed specifications are presented wherever possible, so that departures from them will be visible, and officials can be called to account for them.

B. Attorney Role

Standards included here address the following topics:

1. Function of defense counsel
2. Role of counsel
3. Attorney qualifications and training
4. Independence of counsel

See also *Compendium* Volume II, "Standards for Attorney Performance," pages A3-A5, B2-B4.

1. Function of Defense Counsel

Commentary. Implicit in these standards is the principle that counsel has a key role to play in all juvenile proceedings, without regard to any doctrinaire "right to counsel." To support this expanded right to counsel, the ABA standards also seek to expand the number of qualified attorneys available to represent clients in juvenile proceedings.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

1.1 Counsel in juvenile proceedings, generally

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

2.1 General principles concerning the provision and organization of legal se rvices

A. Responsibility for provision of legal services.

Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

(i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to repr esent parties involved in such matters.

(ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

2. Role of Counsel

Commentary. The following standards regarding the role of counsel differ greatly in their specificity and direction. The Connecticut standard includes auxiliary responsibilities that are commonly associated with juvenile status. The Massachusetts standards are more specific to juvenile defense. See also *Compendium* Volume II, "Standards for Attorney Performance," pages A3-A5.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense

Guideline 1.2. Role of Defense Counsel in Juvenile Matters

(a) Counsel should abide by the guidelines enumerated in Guideline 1.1.

(b) Counsel in juvenile matters often has occasion to cou nsel the client and, in some cases, the client's family with respect to related non-legal matters (e.g., education, family, therapy, etc.), which should be discharged to the best of counsel's training and ability or with appropriate assistance of other professions by referral.

(c) Counsel should be prepared to assist in securing appropriate legal or other services for the client in matters arising from or related to the juvenile proceedings.

(d) Counsel should be familiar with dispositional alternatives and services, should investigate the client's social, educational and psychological history, and should advocate a plan approved by the client generally proposing the least restrictive alternative.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to insure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

The role of counsel in delinquency… cases is to be an advocate for the child. Counsel should insure that the interests and rights of the client are fully protected and advanced, irrespective of counsel's opinion of the client's culpability. This requires fully explaining

to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings. Counsel should also make sure the juvenile fully understands all court proceedings, as well as all his/her rights and defenses. Upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent .* Counsel should not discuss any attorney–client privileged communications with the parent, or any other person, without the express permission of the juvenile. Counsel should advise the juvenile of the above at the onset of the attorney–client relationship. Counsel should fully inform both the juvenile and the juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications. The lawyer should counsel the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his own decisions and advocate the juvenile's viewpoint and wishes (as determined by the juvenile) to the Court. Counsel should refrain from waiving substantial rights or substituting his own view, or the parents' wishes, for the position of the juvenile.

* The use of the word parent hereafter refers to parent, guardian, custodial adult or person assuming legal responsibility for the child.

J 1.3 General Duties of Defense Counsel

The role of counsel is to insure that the juvenile is afforded due process. Counsel should assert rights and raise all issues in the context of the case where strategically appropriate. This includes the filing of motions, supporting memoranda and handling the delinquency or youthful offender proceedings generally in accordance with the standards for performance in criminal proceedings.

(a) Counsel's primary and most fundamental responsibility is to promote and pr otect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.

(b) Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case. Counsel must also arrange for prompt and thorough consultation with the parent or guardian, said consultation to be within parameters established by the client.

(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients. It is recommended that counsel anticipate that juvenile clients will require more contact between court dates than the average adult client .

(d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client.

(e) Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.

(f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead delinquent or not delinquent and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.

(g) The attorney should explain that final decisions concerning trial s trategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.

(h) Counsel's obligation to the client continue s on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.

(i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.

(j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.

(k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.

(l) Where counsel is unable to communicate with the client or his or her guardian because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance including an interpreter for pre-trial preparation, interviews, and investigation, as well as in-court proceedings.

(m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize inconvenience to others.

(n) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

3. Attorney Qualifications and Training

Commentary. No standard for attorney qualifications requires training or experience in the juvenile justice system. Compare relevant provisions in *Compendium* Volume I, "Administration of Defense Services," and Volume II, "Attorney Performance Standards," pages B2-B4. However, many, if not most, jurisdictions have continuing legal education requirements. Compare relevant provisions in *Compendium* Volume I, "Administration of Defense Services," pages E26-E31.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

E. Appointment of Counsel

…

4. *Juvenile Delinquency*. To be eligible to serve as lead counsel in a case where a juvenile is alleged to be delinquent because he or she committed an act that would be Murder or a Class A or B felony if committed by an adult, an attorney shall meet the qualifications for appointment as provided in 1 or 2 above as may be appropriate. To be eligible to serve as lead counsel in other juvenile delinquency cases, an attorney shall have tried to completion a comparable case in adult court, or have at least one (1) year of experience in juvenile delinquency proceedings.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

III. A. 4. Juvenile Delinquency Cases

Training Requirement: The training requirement is satisfied by attendance at a five-day seminar, *Zealous Advocacy*. The program is administered through Massachusetts Continuing Legal Education (MCLE) at various locations throughout the state several times a year.

J 1.2 Education, Training and Experience Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex delinquency or youthful offender cases only after having had experience and/or training in less complex criminal/delinquency matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal

representation, including information about practices of prosecutors and other court personnel.

To provide competent representation in delinquency …, counsel must be familiar with [state law]…as well as relevant case law. Counsel should also be cognizant of the roles of the Department of Youth Services (DYS), Social Services (DSS), Mental Retardation (DMR), and Mental Health (DMH). Counsel should be aware of the various service delivery systems and placement processes. Counsel should have a basic understanding of the law regarding: DYPS classification procedures, Children in Need of Services (CHINS), Care and Protection, school suspension and expulsion, special education, and DSS Fair Hearings. Counsel should be aware that each of these other areas of law and social service systems has a potential overlap with the delinquency/youthful offender proceedings.

Washington Defender Association, Standards for Public Defense Services

Standard Fourteen: Qualifications of Attorneys

1. In order to assure that indigent accused receive the effective as sistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
   a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
   b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. Trial attorneys' qualifications according to severity or type of case:

   e. Juvenile Cases Class A Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
      i. Minimum requirements set forth in section 1, and
      ii. Either:
         a. has served one year as a prosecutor; or
         b. has served one year as a public defender; or
         c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
      iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
   f. Juvenile Cases Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
      i. Minimum requirements set forth in Section 1; and
      ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or

c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.

g. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

4. Independence of Counsel

Commentary. The independence of counsel is a basic precept of the adversary system. Compare *Compendium* Volume I, "Standards for the Administration of Defense Services," pages E5-E9.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.1 General principles concerning the provision and organization of legal se rvices

…

D. Independence

Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer–client relationship.

C. Juvenile Defense Administration

The standards in this section address the following topics:

1. Organization of services
2. Workload
3. Attorney compensation
4. Support services
5. Monitoring system
6. Client eligibility

Compare relevant standards in *Compendium* Volume I, "Standards for the Administration of Defense Services."

1. Organization of Services

Commentary. The standards for the organization of juvenile defense services track standards for criminal defense services. (See *Compendium* Volume I, "Standards for the Administration of Defense Services," pages F1 *et seq*.) However, they do not include any reference to contract defense services.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.2 Organization of Services

A. In general.

Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

B. Defender systems.

(i) Application of general defender standards.

A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

(ii) Facilities.

If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

(iii) Specialization.

While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

C. Assigned counsel systems.

An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

2. Workload

Commentary. The ABA standards reiterate the important principle that attorneys should not overextend themselves. The three state standards set specific numerical guideposts for identifying excessive annual workloads. The standards agree that juvenile workload should be capped at a lesser number than that set for defense representation in misdemeanor cases, but they differ on the degree. Indiana sets a standard at two-thirds that for misdemeanor cases (200 juvenile cases versus 300 misdemeanor cases), Washington about one-third (250 juvenile versus 700 misdemeanor cases), and Minnesota only one-quarter (175 versus 700). See comparable provisions in *Compendium* Volume I, "Standards for the Administration of Defense Services," pages E49-E62.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.2 Organization of Services

…

B. Defender systems.

…

(iv) Caseload.

It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

J. Caseloads of Counsel

The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

1. *Caseloads for Public Defenders Without Adequate Support Staff*. Salaried or contractual public defenders in a county public defender office that does not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. The categories in Table 1 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 1

Type of Case	Full Time	Part Time (50%)
TRIAL		
Juvenile delinquency	200	100

2. *Caseloads for Public Defenders With Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office with support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. The categories in Table 3 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 2

Investigator Juvenile	One for every six attorneys
Secretary Juvenile	One for every five attorneys

Table 3

Type of Case	Full Time	Part Time (50%)
TRIAL		
Juvenile delinquency	250	125

Minnesota Office of the State Public Defender, Caseload Standards for District Public Defenders in Minnesota

2. Recommended Caseload Standards

The following caseload standards, per attorney, are recommended, with the understanding that each "type of case" line defines a full year's work for an attorney:

Type of Case	Full-Time	One-Half Time
Other Juvenile	175 per year	87.5 per year

Washington Defender Association, Standards for Public Defense Services

Standard Three: Caseload Limits and Types of Cases

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel

should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

250 Juvenile Offender cases per attorney per year

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

3. Attorney Compensation

Commentary. Under the standard below, the scope of work for which an attorney should be compensated is greater than the scope for which criminal defense attorneys are traditionally compensated. See comparable provisions relating to attorney compensation and defender salaries in *Compendium* Volume I, "Standards for the Administration of Defense Services," pages G6-G8 and H15-H26.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.1 General principles concerning the provision and organization of legal se rvices.

…

B. Compensation for services.

(i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

(ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, infra, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.

(iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.

(iv) Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

4. Support Services

Commentary. See comparable provisions in *Compendium* Volume I, "Standards for the Administration of Defense Services," pages E18-E25. Note that the ABA standards specially mention the need for experts in transfer hearings.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.1 General principles concerning the provision and organization of legal se rvices

…

C. Supporting services.

Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.

(i) Where lawyers are assigned, they should have regular access to all r easonably necessary supporting services.

(ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.

ABA Juvenile Justice Standards Relating to Transfer Between Courts

2.3 The hearing

…

C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.

5. Monitoring System

Commentary. The ABA standards relating to juvenile justice include a unique concern for monitoring compliance with all appellate standards. There are no comparable standards for attorney duties in criminal court.

ABA Juvenile Justice Standards Relating to Monitoring

3.1 Monitoring individual cases

The primary responsibility for monitoring individual cases rests with counsel for the juvenile.

…

D. Counsel should be cognizant of his or her monitori ng capability in individual cases, and perform a monitoring function in accordance with these standards insofar as applicable in order to facilitate coordination and cooperation with systemic monitoring activities. When necessary, counsel should commence legal action, including filing of appropriate motions in juvenile court, seeking appellate review, initiating civil suits, and applying for writs, to compel the adoption of or compliance with standards and practices that provide a basis for monitoring.

3.2 Establishment of lawyers' committee

Whether counsel is provided by public defender or legal aid organization, arrangement with the private bar, or by some other means, a specific lawyers' committee of the bar association comprised of counsel representing juveniles in the juvenile justice system should be established on a local or regional basis, to systematically monitor the activities and performance of the juvenile justice agencies in accordance with the applicable provisions of these standards and the Counsel for Private Parties volume.

3.3 Role of lawyers' committee

In performing this monitoring function, the lawyers' committee should:

A. advise, assist, criticize, and evaluate local or regional juvenile justice agencies;

B. publish regular, periodic reports on its findings in all appropriate media;

C. draft and disseminate comments on proposals for changes in legislation, rules, regulations, policies, and practices relating to activities of the juvenile justice system;

D. ensure that the bases for monitoring provided for under these standards and the other volumes of the Juvenile Justice Standards Project or similar bases under the laws, rules, and regulations of the jurisdiction, are established and maintained;

E. assist and cooperate with the monitoring activities conducted by any other monitoring mechanism to the fullest extent possible while preserving client confidentialities.

6. Client Eligibility

Commentary. As the final two paragraphs of this standard make clear, appointment of counsel in juvenile proceedings can have a different dynamic than in adult criminal cases. Compare applicable standards in *Compendium* Volume I, "Standards for the

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

1. Guidelines for Determining Eligibility for Indigent Defense Services

…

Section B. Juveniles

The eligibility guidelines for an adult defendant should be considered in determination of eligibility of juveniles.

The financial and legal responsibility of parents or adoptive parents is provided:

l. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them.

2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if the parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter shall, unless undue financial hardship would ensue, be responsible for providing legal counsel and for paying other necessary expenses of representation for their child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents.

Consideration should also be given to potential conflicts of interest for attorneys employed by a juvenile's family.

The judge should consider appointment of counsel for appropriate juveniles even if counsel is not requested by the juvenile or the parent.

D. Counsel Appointment

Standards in this section address the following issues:

1. Scope of right to counsel
2. Time of appointment
3. Duration of appointment
4. Waiver of counsel

Compare standards in *Compendium* Volume I, "Standards for the Administration of Defense Services," pages B1-B17 and D1-D7.

1. Scope of Right to Counsel

Commentary. These standards implement the principle that counsel in juvenile proceedings is essential, as set forth above (page B2). See also *Compendium* Volume I, "Standards for the Administration of Defense Services," pages D2-D6.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.3 Types of proceedings

A. Delinquency…proceedings.

(i) Counsel should be provided for any juvenile subject to delinquency….

(ii) Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency …., including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

ABA Juvenile Justice Standards Relating to the Juvenile Probation Function

2.13 Juvenile's right to counsel at intake

A juvenile should have an unwaivable right to the assistance of counsel at intake:

A. in connection with any questioning by intake personnel at an intake interview involving questioning in accordance with Standard 2.14 or other questioning by intake personnel, and

B. in connection with any discussions or negotiations regarding a nonjudicial disposition, including discussions and negotiations in the course of a dispositional conference in accordance with Standard 2.14.

ABA Juvenile Justice Standards Relating to Transfer Between Courts

2.3 The hearing

A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.

B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.

2. Time of Appointment

Commentary. See also the relevant standards set forth in *Compendium* Volume I, "Standards for the Administration of Defense Services," pages B2-B5 and D2-D4.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.4 Stages of proceedings

A. Initial provision of counsel.

(i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

(ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

ABA Juvenile Justice Standards Relating to Pretrial Proceedings

2.2 Initial appearance

…

C. At the initial appearance, counsel should be appointed if necessary, and a date should be set for the fact-finding hearing.

3. Duration of Appointment

Commentary. See comparable provisions in *Compendium* Volume I, "Administration of Defense Services," page B6.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

2.4 Stages of proceedings

…

B. Duration of representation and withdrawal of counsel.

(i) Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.

(ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.

(iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

ABA Juvenile Justice Standards Relating to Monitoring

3.1 Monitoring individual cases

…

B. Counsel should be provided for the entire period during which the juvenile is under the jurisdiction of the court.

4. Waiver of Counsel

Commentary. Waiver of the right to counsel in juvenile justice proceedings is subject to several complications stemming from the status of the juvenile. See*Compendium* Volume I, "Standards for the Administration of Defense Services,"page D5.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

6.2 Waiver of the rights of mature respondents

A. A respondent considered by counsel to be mature should be permitted to act through counsel in the proceedings. However, the juvenile may not personally waive any right:

   1. except in the presence of and after consultation with counsel; and

   2. unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding the decision. If the parent requires an interpreter for this purpose, the court should provide one.

B. The decision to waive a mature juvenile's privilege against self-incrimination; the right to be tried as a juvenile or as an adult where the respondent has that choice; the right to trial, with or without a jury; and the right to appeal or to seek other postadjudication relief should be made by the juvenile. Counsel may decide, after consulting with the juvenile, whether to waive other rights of the juvenile.

E. Attorney Responsibilities Generally

Standards here address two topics:

1. Acting diligently and promptly
2. Acting ethically

Compare standards in *Compendium* Volume II, "Standards for Attorney Performance," pages C1-C5.

1. Acting Diligently and Promptly

Commentary. The counterpart to the requirement that attorneys not acceptcases they do not have the capacity to handle (pages D3-D5) is that the cases they do accept must be handled with professionalism.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

1.5 Punctuality

A lawyer should be prompt in all dealings with the court, including attendance, submissions of motions, briefs and other papers, and in dealings with clients and other interested persons. It is unprofessional conduct for counsel intentionally to use procedural devices for which there is no legitimate basis, to misrepresent facts to the court or to accept conflicting responsibilities for the purpose of delaying court proceedings. The lawyer should also emphasize the importance of punctuality in attendance in court to the client and to witnesses to be called, and, to the extent feasible, facilitate their prompt attendance.

2. Acting Ethically

▌ *Commentary.* The backdrop to all standards is the responsibility to act ethically.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

1.2 Standards in juvenile proceedings, generally. (Counsel governed by general standards of conduct.)

A. As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

1.3 Misrepresentation of factual propositions or legal authority

It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discussions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client's responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense is a statement of the party's posture with respect to the proceeding and is not a representation of fact or of legal authority.

3.4 Advice and service with respect to anticipated unlawful conduct

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

4.4 Relations with prospective witnesses

The ethical and legal rules concerning counsel's relations with lay and expert witnesses generally govern lawyers engaged in juvenile court representation.

7.5 Relations with court and participants

A. The lawyer should at all times support the authority of the court by preserving professional decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.

   (i) When court is in session, the lawyer should address the court and not the prosecutor directly on any matter relating to the case unless the person acting as prosecutor is giving evidence in the proceeding.

(ii) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court, the prosecutor or probation department personnel.

B. When in the company of clients or clients' parents, the attorney should maintain a professional demeanor in all associations with opposing counsel and with court or probation personnel.

7.7 Presentation of evidence

It is unprofessional conduct for a lawyer knowingly to offer false evidence or to bring inadmissible evidence to the attention of the trier of fact, to ask questions or display demonstrative evidence known to be improper or inadmissible, or intentionally to make impermissible comments or arguments in the presence of the trier of fact. When a jury is empaneled, if the lawyer has substantial doubt concerning the admissibility of evidence, he or she should tender it by an offer of proof and obtain a ruling on its admissibility prior to presentation.

7.10 Argument

The lawyer in juvenile court representation should comply with the rules generally governing argument in civil and criminal proceedings.

1.6 Public statements. (Juvenile counsel.)

A. The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.

B. Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA Standards Relating to Fair Trial and Free Press.

F. Lawyer–Client Relationship

Standards included here address the following topics:

1. Client meetings
2. Keeping client informed
3. Confidentiality
4. Resolving conflicts of interest
5. Advice to give client
6. Testimony by respondent
7. Decision making

Compare with standards in *Compendium* Volume II, "Standards for Attorney Performance," pages D1-D25.

1. Client Meetings

Commentary. See also the relevant provisions of *Compendium* Volume II, "Standards for Attorney Performance," pages D2-D4.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

4.2 Interviewing the client

A. The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.

B. In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

2. Keeping Client Informed

Commentary. Again, the client's juvenile status requires more of counsel in dealing with the parent or guardian. See also the comparable standards in *Compendium* Volume II, "Standards for Attorney Performance," pages D5-D7.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

3.5 Duty to keep client informed

The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation. This duty may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of confidentiality set forth in 3.3, above.

3. Confidentiality

Commentary. As the Massachusetts standards suggest, special rules may apply to confidentiality requirements in juvenile proceedings. Not discussed in the ABA standards is the question of how confidentiality requests affect parents or guardians. Compare provisions in *Compendium* Volume II, "Standards for Attorney Performance," page D16.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

3.3 Confidentiality

A. Establishment of confidential relationship.

Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 2.5 Special Concerns

…

(c) Counsel should be aware of the special privacy considerations given a juvenile, i.e., G.L. C.119, §65 requires all delinquency hearings be closed to the general public.

(d) Counsel should be aware that delinquency papers are not public documents. However, after two findings of delinquency on felony charges, the probation officer may make public the juvenile's name when the juvenile is charged with a third felony.

4. Resolving Conflicts of Interest

Commentary. Compare relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages D24-D28.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

3.1 The nature of the attorney-client relationship

A. Client's interests paramount.

However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

3.2 Adversity of interests

A. Adversity of interests defined.

For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:

(i) Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.

(ii) Formally represent more than one client and it is their duty to contend in be half of one client that which may prejudice the other client's interests at any point in the proceeding.

(iii) Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.

B. Resolution of adversity.

At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

ABA Juvenile Justice Standards Relating to Interim Status

8.1 Conflicts of interest

The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. In every case, doubt as to a conflict should be resolved by the appointment of separate counsel for the child and by advising

parents of their right to counsel and, if they are unable to afford counsel, of their right to have the court appoint such counsel. All parties should be informed by the initial attorney that he or she is counsel for the juvenile, and that in the event of disagreement between a parent or guardian and the juvenile, the attorney is required to serve exclusively the interests of the accused juvenile.

5. Advice to Give Client

Commentary. The second and third ABA standards below once again demonstrate the breadth of issues raised in juvenile justice cases compared to those in criminal proceedings. Compare to the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages D8-D13.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

5.1 Advising the client concerning the case

A. After counsel is fully informed on the facts and the law, he or she s hould with complete candor advise the client involved in juvenile court proceedings concerning all aspects of the case, including counsel's frank estimate of the probable outcome. It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case in order unduly or improperly to influence the client's determination of his or her posture in the matter.

B. The lawyer should caution the client to avoid communication about the case with witnesses where such communication would constitute, apparently or in reality, improper activity. Where the right to jury trial exists and has been exercised, the lawyer should further caution the client with regard to communication with prospective or selected jurors.

5.3 Counseling

A lawyer engaged in juvenile court representation often has occasion to counsel the client and, in some cases, the client's family with respect to nonlegal matters. This responsibility is generally appropriate to the lawyer's role and should be discharged, as any other, to the best of the lawyer's training and ability.

8.3 Advising and counseling the client concerning transfer

Upon learning that transfer will be sought or may be elected, counsel should fully explain the nature of the proceeding and the consequences of transfer to the client and the client's parents. In so doing, counsel may further advise the client concerning participation in diagnostic and treatment programs which may provide information material to the transfer decision.

6. Testimony by Respondent

Commentary. This standard must be read in conjunction with those requiring ethical behavior and confidentiality of client communications (page E3). There are no comparable standards for attorney duties in criminal court.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

7.9 Testimony by the respondent

A. It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.

B. If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.

   (i) If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.

   (ii) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

7. Decision Making

Commentary. See also the relevant provisions in *Compendium* Volume II, "Standards for Attorney Performance," pages D19-D23.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

5.2 (control and direction of the case)

A. Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:

(i) the plea to be entered at adjudication;

(ii) whether to cooperate in consent judgment or early disposition plans;

(iii) whether to be tried as a juvenile or an adult, where the client has that choice;

(iv) whether to waive jury trial;

(v) whether to testify on his or her own behalf.

B. Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.

C. If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

G. Attorneys' Initial Duties

Standards included here address these issues:

1. Early release
2. Visiting detention facility
3. Acting promptly
4. Challenging prior counsel
5. Initial duties

See also *Compendium* Volume II, "Standards for Attorney Performance," pages E2-E7.

1. Early Release

Commentary. See also the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages E2-E6. The two ABA Counsel for Private Parties standards here refer to specific juvenile justice features.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

6.1 Intake and early disposition, generally

Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client's rights.

6.4 Detention

If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.

Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

ABA Juvenile Justice Standards Relating to Interim Status

8.2 Duties

It should be the duty of counsel for an accused juvenile to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.

2. Visiting Detention Facility

Commentary. The special status of juveniles requires constant monitoring to ensure that standards are being adhered to, including visits to any detention facility or program.

ABA Juvenile Justice Standards Relating to Interim Status

8.3 Visit detention facility

Whenever an accused juvenile is held in some form of detention, the attorney should periodically visit the juvenile, at no less than seven day intervals, and review personally his or her well-being, the conditions of the facility, and opportunities to relax the conditions of detention or to secure release. A report on each such visit should be retained in the attorney's permanent file of the case.

3. Acting Promptly

Commentary. Compare this standard to relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages C2-C3. This general admonition must be integrated with other standards such as those for seeking early release.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

4.1 Prompt action to protect the client

Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests.

4. Challenging Prior Counsel

Commentary. This is a unique provision for trial level counsel, although similar standards for challenging inadequate defense on appeal appear in *Compendium* Volume IV, "Standards for Appellate Representation." There, of course, the relief sought for inadequate counsel is reversal of a conviction.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

10.7 Challenges to effectiveness of counsel. (Duty to assess prior counsel's effectiveness.)

A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.

A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.

5. Initial Duties

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance," pages E2-E6.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 2.1 Arraignment

(a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, obtain the police report, review the client's probation record, paying particular attention to any alleged defaults, and ascertain what other relevant information may be in the possession of the probation department or prosecution.

(b) Counsel should familiarize him/herself with the particular arraignment practices of each session in which s/he appears. For example some courts routinely obtain school attendance records at arraignment.

(c) In addition to meeting with the juvenile client, counsel should determine whether a parent is at the court in connection with the juvenile proceeding. Counsel should ascertain the adult's ability and willingness to assume custody of the juvenile or to post bail for the juvenile. Counsel should be aware that the court will usually release a juvenile to the care and custody of a parent. Counsel should also be aware that most juvenile courts will not release a juvenile without an apparently responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.

(d) Counsel should be familiar with the law regarding pre-trial detention on the grounds of "dangerousness." If the commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summonsing witnesses including the complainant.

(e) Counsel should insure that the client does not waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.

(1) A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the

attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c.111(e), mediation, or a continuance without a finding.

(2) Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or pretrial hearing as soon as practicable within fifteen (15) days. Counsel must discuss with the client his/her right to return to court within fifteen (15) days and may waive this right only after discussion with the client of the pros and cons of such a waiver.

(3) Counsel should be aware of [laws] regarding pretrial evaluation of a juvenil e. Counsel should consider and protect the juvenile's rights to relative confidentiality, evidentiary, and tactical issues.

(f) Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility. Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel should be aware that children present special competency and criminal responsibility issues and should be alert for these issues.

(g) Counsel should insure that every client (and parent) is provided with a card noting the next court date, an office appointment date, any other important dates, as well as complete information on how to contact the attorney.

J 2.2 Initial Interview and Preparation for Bail Hearing

(a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs.

(b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.

(c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of pretrial conditions of release. Such information should generally include:

(1) client's residence and length of time at that residence;

(2) family (names, addresses and phone numbers);

(3) health (mental and physical) and employment background;

(4) explanation of any court defaults and any other information on the record;

(5) probation/DYS/CHINS status;

(6) possible sources of bail money;

(7) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;

(8) client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client) names, addresses and phone numbers;

(9) client's school placement, status, attendance, special ed designation;

(10) possible adults willing to assume responsibility for the juveniles and/or post bail; and

(11) the names and addresses of any agencies involved with the child and/or parent, e.g. DSS worker, DMH worker, community health center, etc.

(d) Such information should be verified whenever possible.

(e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

(f) Counsel should obtain signed releases by the client and parent for mental health records, school records, DSS records, DYS records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information.

J 2.3 Bail or Detention Hearing

(a) Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.

(b) Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing.

(c) Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings, and, where appropriate and possible, be ready to present "proffers" that address those issues.

(d) Counsel should consider and advocate for reasonable conditions of release or recognizance such as pre-trial probation, electronic monitoring, "stay away" orders, curfews, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties.

(e) …Counsel should be aware that the statute provides for a presumption of personal recognizance. The focus of the bail hearing should be "whether the juvenile will appear for further court proceedings." Counsel should oppose any bail order which is in the nature of preventive detention, such as "DSS or DYS only cash bail", or any bail order where the purpose of detention is ostensibly for treatment. Counsel should

be careful in considering whether a "parent only cash bail" is tantamount to preventive detention.

(f) Even if release is not effected, counsel should advocate for the least amount of bail. The amount of bail and type of charge may determine the type of facility where the juvenile will be held, i.e., lower bail may result in a less restrictive setting within DYS. Therefore, bail appeals must be considered in every case where bail is imposed and the client is detained.

(g) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing. It is crucial that counsel learn the bail appeal procedures applicable to each jurisdiction in which they practice.

(h) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court, the sheriff, and DYS to any special needs of the client, e.g., medical problems, and request the court to order appropriate measures.

J 2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. "911" or "turret" tape recordings. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client's rights governing the prosecution's efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

(b) Counsel should be aware that the Juvenile Court Rules of Procedure and [law] require that discovery be in writing, and request that this requirement be honored in appropriate circumstances.

J 2.5 Special Concerns

(a) Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.

(b) Where appropriate, counsel should consider the advantages and disadvantages of seeking cross-complaints.

(c) Counsel should be aware of the special privacy considerations given a juvenile, i.e., [law] requires all delinquency hearings be closed to the general public.

(d) Counsel should be aware that delinquency papers are not public documents. However, after two findings of delinquency on felony charges, the probation officer

may make public the juvenile's name when the juvenile is charged with a third felony.

H. Pretrial Duties

The standards in this section address the following topics:

1. Client interviews
2. Discovery
3. Continuing duty
4. Duty to investigate
5. Making of motions

Compare standards in *Compendium* Volume II, "Standards for Attorney Performance," pages F1-F28.

1. Client Interviews

Commentary. See the standards for "Acting Promptly" in this volume, page E2. See also *Compendium* Volume II, "Standards for Attorney Performance," pages D2-D15.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

4.2 Interviewing the client

A. The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.

B. In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

2. Discovery

Commentary. These standards largely parallel those found in *Compendium* Volume II, "Standards for Attorney Performance," pages F12-F15. However, ABA Pretrial Standard 3.15 is unique to this context.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

7.3A Discovery

Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

In seeking discovery, the lawyer may find that rules specifically applicable to juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

ABA Juvenile Justice Standards Relating to Pretrial Proceedings

3.1 Scope of discovery

In order to provide adequate information for informed intake screening, diversion, and pleas in delinquency cases, and to expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

3.2 (Responsibilities of the trial court and of counsel)

…

B. Counsel for the petitioner and respondent should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the persons concerned.

3.13 Investigations not to be impeded

Subject to Standards 3.8 and 3.17, neither the counsel for the parties nor others officially involved in the case should advise persons having relevant material or information

(except the respondent) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

3.16. Custody of materials

Any materials furnished to an attorney pursuant to these standards should remain in the exclusive custody of such attorney and be used only for the purposes of conducting the case, and should be subject to such other terms and conditions as the court may provide. In the discretion of counsel for the respondent, the contents of furnished material may be disclosed to the respondent and, subject to a mature juvenile's consent under Standard 6.5 A.2, to the respondent's parent or guardian ad litem. Counsel should exercise utmost caution before doing so if disclosure might cause injury or embarrassment to the respondent or any other person and if disclosure is not necessary to protect the respondent's interests in the proceedings.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 5.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

(a) details of all identification procedures, including examination of any photographs shown and selected;

(b) written and oral statements of defendant/co-defendant(s);

(c) copies of statements by potential witnesses;

(d) copies of all official reports, e.g., police, arson, hospital, results of any scientific test;

(e) inspection of physical evidence;

(f) list of potential witnesses and addresses;

(g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;

(h) probation records of all potential witnesses;

(i) copies of Grand Jury minutes;

(j) exculpatory evidence, identified as specifically as possible, and including promises, rewards, and inducements made to witnesses;

(k) any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.).

J 5.10 Discovery compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply. Juvenile Court Rules of Criminal Procedure require written compliance.

3. Continuing Duty

Commentary. This standard simply restates what is probably the law in most jurisdictions that provide for discovery process. There are no comparable provisions in the attorney performance standards for attorney duties in criminal court. However, see ABA's *Standards for Criminal Justice: Discovery and Trial by Jury*, 3rd Edition, 1996, Standard 4.2.

ABA Juvenile Justice Standards Relating to Pretrial Proceedings

3.15 Continuing duty to disclose

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, such party should promptly notify the other party or opposing counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court should also be notified.

4. Duty to Investigate

Commentary. These standards are significantly less extensive than some of those set forth in *Compendium* Volume II, "Standards for Attorney Performance," pages F2-F7.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

4.3 Investigation and preparation

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

8.2 Investigation and preparation for transfer proceedings

In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 5.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client.

5. Making of Motions

Commentary. See also the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages F21-F28.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

7.3 B Other motions

Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's advantage.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 5.3 Pre-trial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure and the Juvenile Court Rules of Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity a motion may provide the commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as "waiver" of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy. Counsel should scrupulously avoid making misrepresentations in affidavits.

J 5.7 Substantive Pretrial Motions

Among the motions that counsel should consider are

(a) nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the cl ient;

(b) dismissal for unconstitutionality of the statute;

(c) dismissal for insufficiency of the complaint or indictment;

(d) dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury;

(e) request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;

(f) severance or joinder of defendants or charges;

(g) suppression of evidence obtained in violation of federal and Massachusetts law, i.e (1) illegally seized evidence, (2) "un-Mirandized" or involuntary statements, (3) identifications procured by impermissibly suggestive procedures. Counsel should take care to consider issues which may be unique to juvenile defendants such as the "interested adult rule" and school search scenarios;

(h) funds for experts, investigators, interpreters, etc. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses ;

(i) any other issues that are appropriate.

J 5.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should i nclude:

(a) investigation and discovery necessary to advance the claim;

(b) careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;

(c) subpoenas for pertinent evidence and witnesses;

(d) full understanding of the burdens of proof and evidentiary rules;

(e) careful consideration of the benefits/costs of having the client testify;

(f) careful preparation of any witnesses who are called, especially the defendant;

(g) submission of a memorandum of law. (In some cases, a memorandum is required; in most cases it is advisable.) Proposed findings of fact and law are often advisable, as well.

I. Transfer Hearings

This section includes standards on the following topics:

1. Transfer hearings
2. Post-hearing remedies

1. Transfer Hearings

Commentary. Transfer hearings to determine whether a juvenile should be charged as an adult rather than as a juvenile are unique proceedings. The procedure and rules governing the transfer hearing are unique to each jurisdiction. The Massachusetts standards presented below reflect the requirements of that state's law. Nonetheless, many aspects of these standards are relevant elsewhere.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 3.1 Initiation of Transfer Hearing Request

Counsel should be prepared to argue strenuously to the court, as well as to the assistant district attorney, that the case should not be heard as a transfer hearing, because the Commonwealth made an inadequate effort to bring the defendant into court before his/her 18th birthday or because such a proceeding would not be in the interests of justice. Counsel should also consider whether changes in the rest of the juvenile code have created new options for contesting this process.

J 3.2 Transfer Hearing Part A

(a) Counsel should be aware that transfer requires the judge to make a finding of probable cause that the defendant committed the charged offense. Counsel should always seek a complete and recorded probable cause hearing except in the most extraordinary circumstances. Counsel should order a copy of the tape or transcript. In many courts it will be appropriate to request a stenographer to assure a record of the hearing, given the poor quality of the recording systems around the state. Counsel should also argue that there is no statutory provision for substituting Grand Jury minutes for a hearing and that even if the Grand Jury minutes are admitted into evidence the defendant is still entitled to call any relevant witnesses.

(b) Counsel should refer to Section IV, Probable Cause Hearings, of the Standards for Criminal Practice, for other issues relating to preparation for the hearing.

J 3.3 Transfer Hearing Part B

(a) Counsel should be aware of the statutory findings (protection and interests of the public) that [state law] requires the judge to make. Counsel should be prepared to argue that the judge must consider, but is not limited to, the five subsidiary factors listed in [state law]. Counsel should also be prepared to argue that the Court should apply a "clear and convincing" evidence standard of proof to be met by the prosecution.

(b) Counsel must have up-to-date knowledge of the statutory and case law g overning these findings.

(c) Counsel shall, at a minimum, review, and unless inappropriate, obtain copies of the client's psychosocial evaluations, social services records, psychological reports and evaluations, placement or program evaluations and reports, school records, and

medical history. Protective orders concerning access to and prosecutorial use of such information should be requested. Counsel should consider moving under ex parte, if possible, for independent evaluations, reports and histories. Counsel shall also facilitate and make substantial efforts to secure services through school, community agencies, DSS, DYS, or DMH, as appropriate.

(d) Counsel should be prepared to present testimony by people who can provide helpful insight into the client's character, including: teachers, athletic personnel, counselors, DYS counselors, psychologists, community members, probation offices, religious affiliates, employers, or other persons with a positive personal and/or professional view of the defendant.

(e) Counsel should be certain that all Part B proceedings are recorded. Counsel's file should contain notes of names, addresses and essential testimony at the Part B proceeding. Due to the inadequacies of recording systems and the importance of the hearing, counsel should consider a motion for funds to obtain a court reporter.

(f) Counsel shall order the tape or transcript of Part A & B proceedings.

J 3.4 Post Transfer Responsibilities

(a) After dismissal of the juvenile complaints, the youth is arraigned on adult charges; counsel should be prepared to argue bail. Counsel should consider arguing that the defendant be held in a DYS facility, even if the youth has attained the age of 19. Counsel should advise the client of his/her right to a bail appeal, and of the advantages and disadvantages of pursuing such an appeal.

(b) Counsel shall carefully review the judge's findings to determine if the order of transfer is deficient. Where findings are deficient, counsel should file a Motion to Dismiss and/or Remand to Juvenile Court.

(c) Counsel's motion, affidavit and memorandum should set forth relevant testimony or materials, or refer to the lack thereof, presented at the Part B hearing. Because these motions are not *de novo* proceedings, relevant portions of the part B hearing should be appended. If new counsel is representing the youth, he/she should confer with prior counsel who represented the client in the juvenile court and review the proceedings in detail. Counsel should ascertain whether there have been any significant personal or family changes arising since the conclusion of the juvenile court proceedings. Counsel should secure any further evaluations or other materials that are in the youth's best interest. New counsel should, as appropriate, confer with any representatives of state agencies or others involved with the youth.

2. Post-Hearing Remedies

Commentary. In many jurisdictions, a decision to transfer the juvenile to adult criminal court can be reviewed *de novo* in the criminal court. In other jurisdictions, review may be limited to an abuse of discretion standard. In others, no trial court review may be allowed.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

8.5 Posthearing remedies. (Transfer.)

If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for post-transfer relief.

J. Plea Negotiations

Standards included here address these topics:

1. Consideration of early disposition
2. Other plea-related duties

Compare standards in *Compendium* Volume II, "Standards for Attorney Performance," pages H1-H10.

1. Consideration of Early Disposition

Commentary. Compare related standards in *Compendium* Volume II, "Standards for Attorney Performance," page H2.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

6.3 Early disposition

A. When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

B. A lawyer should not participate in an admission of responsibility by the client for purposes of securing informal or early disposition when the client denies responsibility for the acts or conditions alleged.

7.1 Adjudication without trial

Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 6.1 Plea Negotiations

(a) After interviewing the client and developing a thorough knowledge of the la w and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.

(b) Counsel should inform the client of any plea negotiations before t hey occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.

(c) Counsel is responsible for assuring that the juvenile understands the concept of plea bargaining in general, as well as the details of any specific plea offer made to him/her.

(d) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based *solely* on the client's acknowledgement of guilt or *solely* on a favorable disposition offer.

(e) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The client shall be kept informed of the status of the plea negotiations.

J 6.2 Client Decisions

(a) Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.

(b) Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial. It may be appropriate in rare cases to write a letter to the client outlining counsel's advice and the basis therefor.

(c) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial on the merits.

J 6.3 Preparation

(a) When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any, including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admi ssions.

(b) In advising a juvenile defendant regarding the consequences of a plea agreement, counsel must be certain that the client understands DYS placement policies including:

"staffing," classification, secure treatment, residential treatment, tracking, Grant of Conditional Liberty (GCL), and revocation of GCL.

(c) Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.

2. Other Plea-Related Duties

Commentary. See related standards in *Compendium* Volume II, "Standards for Attorney Performance," pages H11-H14.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 6.4 Consequences of Conviction

Counsel must also advise the client of the consequences of a conviction, including:

(a) the maximum possible sentence of all offenses;

(b) mandatory minimum sentences where applicable;

(c) effects of adult sentences on juvenile defendants;

(d) different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;

(e) potential liability for enhanced punishment after subsequent arrest;

(f) possible Federal charges or penalty enhancements;

(g) conviction consequences for non-citizens (G.L. c.278, §29D);

(h) Sex Offender Registration Act (G.L., c.6, §§178C *et seq*.) and DNA Seizure and Dissemination Act (G.L., c.22E) requirements;

(i) parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);

(j) potential civil liabilities;

(k) potential housing consequences for the defendant and his/her family;

(l) potential driving license consequences;

(m) potential school suspension or expulsion consequences.

J 6.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty unless the client either admits guilt to counsel, admits guilt to the court in a colloquy, only admits to sufficient facts, or tenders an *Alford* plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

J 6.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, argument for release pending sentencing or appeal.

K. Trial

Standards here address these topics:

1. Juror selection
2. Witness examination
3. Other trial duties

See also *Compendium* Volume II, "Standards for Attorney Performance," pages I1-I44.

1. Juror Selection

Commentary. As the ABA standards imply, important parallels between the criminal justice system and the juvenile justice system have serious implications for the latter's standards. See related standards in *Compendium* Volume II, "Standards for Attorney Performance," pages I8-I13.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

7.6 Selection of and relations with jurors

Where the right to jury trial is available and exercised in juvenile court proceedings, the standards set forth in sections 7.2 and 7.3 of the ABA Standards Relating to the Defense Function should generally be followed.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 7.4 Voir Dire and Jury Selection

(a) Preparation

(1) Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to those procedures.

(3) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.

(4) Counsel should develop and file in advance of trial written voir dire questions tailored to the particular case.

(5) Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.

(6) Counsel should consider asking for extra peremptory challenges

(7) Counsel should consider requesting appropriate voir dire questions regarding the prospective jurors' attitude regarding the juvenile's age and credibility, as well as attitudes toward juvenile crime and whether the Juvenile Court is lenient with juvenile cases.

(b) Examining the Prospective Jurors

(1) Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, "insanity" defenses.

(2) Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.

(3) When appropriate, counsel should consider requesting individual juror voir dire even when case law does not require it, particularly if the proposed voir dire questions may elicit sensitive information.

(c) Challenges

(1) Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.

(2) When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.

(3) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should make every effort to consult with the client in exercising challenges.

(5) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

(6) Counsel should be aware that the number of challenges in a juvenile case is governed by [state law].

2. Witness Examination

Commentary. See also the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages I20-I25.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

7.8 Examination of witnesses

The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.

It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 7.6 Confronting the Prosecution's Case

(a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.

(b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.

(c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.

(d) In preparing for and carrying out cross-examination, counsel should also:

(1) develop a coherent and sensible theory of the case, along with the framework of the closing argument;

(2) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;

(3) integrate cross-examination, the theory of the defense and closing argument;

(4) consider whether cross-examination of each witness is necessary or likely to generate helpful information;

(5) review and organize all prior statements and testimony of each witness;

(6) be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the wi tness;

(7) be alert to significant omissions or deficiencies in the testimony of any witness, e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics;

(8) consider using certified copies of prior convictions or pending cases of witnesses, keeping in mind that juvenile adjudications may be used in the same manner as adult convictions.

(9) be alert to all issues relating to witness competency or credibility, including bias or motive for testifying.

(e) If counsel is surprised by any statement or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.

(f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.

(g) Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a d efense case.

J 7.7 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).

(c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;

(2) after discussion with the client, make the decision whether to call any wi tnesses;

(3) develop a plan for direct examination of each potential defense witness;

(4) determine the implications that the order of witnesses may have on the defense case;

(5) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;

(6) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;

(7) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;

(8) attempt to obtain the prior records of all defense witnesses.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses on suitable courtroom dress, demeanor and procedures, including sequestration.

(g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

(h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.

(i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.

(j) Counsel should guard against improper cross-examination by the prosecutor.

(k) Counsel should conduct re-direct examination as appropriate.

(l) At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each charged count and/or aggravating el ement.

(m) Counsel should keep a record of all exhibits identified or admitted.

3. Other Trial Duties

Commentary. The Massachusetts standards presented here parallel those for criminal court proceedings. See, generally, *Compendium* Volume II, "Standards for Attorney Performance," pages I2-I7, I14-19, and I33-I40.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 7.1 General Trial Preparation

(a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

(1) summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable;

(2) summonsing all potentially helpful physical or documentary evidence;

(3) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful, e.g., testing of physical evidence opinion testimony, etc.;

(4) obtaining and reading transcripts and other records of prior proceedings in the case or related proceedings;

(5) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case.

(b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:

(1) copies of all relevant documents in the case;

(2) relevant documents prepared by investigators;

(3) proposed voir dire questions;

(4) outline of opening statement;

(5) cross-examination plans for all possible prosecution witnesses;

(6) outline of argument for required findings of not guilty and authorities supporting it;

(7) direct examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom each will be introduced;

(13) proposed jury instructions with supporting case citations;

(14) copies of all relevant statutes and cases, including statutes and cases relating to any potential lesser-included offenses;

(15) outline or draft of closing argument.

(c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.

(d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior bad acts, reputation testimony, prejudicial evidence) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

(e) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and be fully informed of the applicable law and practices regarding:

(1) preservation of each type of objection at every stage of the proceedings;

(2) offers of proof regarding evidence ruled inadmissible;

(3) recording of trial proceedings. Counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording.

J 7.2 Sequestration

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police, if possible) for trial.

J 7.3 Bench Trial or Jury Trial

(a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.

(b) Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

J 7.5 Opening Statement

(a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case.

(b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.

(c) Counsel's objectives in making an opening statement may include the following:

(1) to provide an overview of the theory of the defense case;

(2) to summarize the testimony of witnesses and the role of each in relationship to the entire case;

(3) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(4) to identify the weaknesses of the prosecution's case;

(5) to remind the jury of the prosecution's burden of proof;

(6) to clarify the jurors' responsibilities;

(7) to personalize the client and counsel to the jury.

(d) Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.

(e) Counsel should be prepared to object the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

J 7.8 Closing Argument

(a) Before argument, counsel must file and should seek to obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the Court's rulings.

(b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:

(1) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;

(2) favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(a) helpful testimony from direct and cross-examination;

(b) verbatim instructions drawn from the expected jury charge;

(c) responses to anticipated prosecution arguments;

(4) the effects of the defense argument on the prosecutor's possible rebuttal argument.

(d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at conclusion of argument), requesting a mistrial, or seeking cautionary instruction.

J 7.9 Jury Instructions

(a) Counsel must file proposed or requested jury instructions before closing argument.

(b) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

(c) Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.

(d) Where appropriate, counsel should object and argue against instructions proposed by the prosecution.

(e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.

(f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.

(g) If the court proposed giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

J 7.10 Taking Verdicts

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

L. Disposition/Sentencing

This section includes standards on the following topics:

1. Counsel's importance at sentencing
2. Duty to investigate
3. Client counseling
4. Hearing duties
5. Counseling after disposition
6. Continuing duty to client
7. Other disposition duties

Compare standards in *Compendium* Volume II, "Standards for Attorney Performance," pages J1-J31.

1. Counsel's Importance at Sentencing

Commentary. There is no comparable statement about the significance of counsel at sentencing in the standards relating to attorney duties in criminal court.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

9.1 (Active participation of counsel at disposition is essential.)

The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

2. Duty to Investigate

Commentary. Sentencing practice has become much more significant in the past two decades. These standards underscore the importance of the attorney's tasks at sentencing. Compare *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

9.2 Investigation and preparation. (At disposition.)

Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all witnesses material to the disposition decision.

If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 8.1 Preparation

Defense counsel should be familiar with and consider:

(a) the statutory penalties for each possible adjudication/conviction of the client, including each lesser-included offense and any repeat offender penalties. In particular counsel should be familiar with the sentencing provisions which distinguish between delinquency, youthful offender, and criminal adjudications.

(b) the official version of the client's prior record, if any;

(c) the position of the probation department with respect to the client;

(d) the sentencing recommendation and memorandum, if any, of the prosecutor;

(e) seeking the assistance of an expert—either through community resources, or the Committee for Public Counsel Services.

(f) the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure to prosecution as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure and Dissemination, school suspension or expulsion, expulsion from public housing;

(g) the sentencing practices of the judge, to the extent they may be determined;

(h) the sentencing guidelines, as they would apply to the case;

(i) referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing;

(j) any victim impact statement to be presented to the court;

(k) any other report to be presented to the court in aid of sentencing;

(l) seeking an evidentiary hearing; e.g., restitution amount;

(m) requesting a continuance for sentencing at a later date;

(n) any other information or proposals that may be helpful to the client.

3. Client Counseling

Commentary. Several provisions below address issues that are unique to the juvenile justice context. See also *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

9.3 Counseling prior to disposition

The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.

The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

4. Hearing Duties

Commentary. The ABA standards relating to counsel's duties at a disposition hearing include several that reflect the uniqueness of the juvenile court process compared to that used in criminal court. These standards for hearing duties are more detailed than those found in *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

9.4 Disposition hearing duties

It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.

Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

…

B. The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

5. Counseling after Disposition

Commentary. One unique feature of this standard is the duty to counsel compliance with the court's decision. By way of comparison, see *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

9.5 Counseling after disposition

When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and his or her family and to urge upon the client the need for accepting and cooperating with the dispositional order. If appeal from either the adjudicative or dispositional decree is contemplated, the client should be advised of that possibility, but the attorney must counsel compliance with the court's decision during the interim.

6. Continuing Duty to Client

Commentary. The ABA standards related to counsel's continuing duty to the client are far broader than those applicable to criminal defense attorneys, reflecting a significant difference in the roles played by counsel in the two different processes. While the Massachusetts standard below parallels standards applicable to criminal court attorneys, provisions similar (in thinking) to the ABA's are presented *supra* in this volume's "Role of Counsel" section, pages B3-B5.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

10.1 Relations with client after disposition

The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.

If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

…

B. The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 9.2 Continuing Duty to Represent

Counsel remains responsible for the case and client until and unless another attorney assumes those responsibilities. Trial Counsel should file a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Counsel should be prepared to provide appellate counsel a complete copy of the client's file as well as complete cooperation in preparing the appeal.

7. Other Disposition Duties

Commentary. See also the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages J15-J20.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 8.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

J 8.3 Pre-sentence reports

(a) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct inaccuracies before prejudice occurs.

(b) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

(c) Counsel should be aware that any juvenile sentenced as a youthful offender is entitled to have a pre-sentence investigation and report.

J 8.4 Defense recommendations

(a) Counsel should carefully consider and discuss with the client any sentencing recommendations to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to commitment to DYS or incarceration as an adult, e.g., community services, educational services, rehabilitative programs, DSS services, including shelter care, foster placement, or residential placement, DMH or DMR services, outpatient counseling, inpatient drug treatment, and restitution.

(b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.

(c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Note that G.L. c.119 permits CWOF even after trial for most charges. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses, e.g., reports or testimony from employers, community representatives and family.

(d) Where appropriate, counsel should carefully prepare the clien t or a close relative to address the court.

J 8.5 Dispositions

(a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.

(b) Counsel should request a reasonable t ime period for the payment of any fines or restitution.

(c) Counsel should make sure that the client fully understands the foreseeable consequences of the sentence, including any conditions or probation.

(d) Counsel should make sure that the client underst ands the DYS Classification Grid, as well as the possibility of extension of DYS commitment. (Unless inappropriate, counsel should also advise the parent of these factors.)

(e) Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.

(f) Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.

(g) If a DYS commitment results at disposition, it is highly recommended that counsel attend the case conference (also known as "staffing") which takes place after an initial evaluation period of approximately three weeks. When attendance is not feasible, the attorney may call or write the assigned caseworker recommendations.

(h) Counsel should be aware that delinquency findings on certain charges result in the juvenile's case being presented to the secure treatment classification panel. Where appropriate, counsel should notify DYDS in writing of the desire to attend the classification proceedings in order to advocate for the client.

M. Postdispositional Hearing Duties

Standards included here address the following topics:

1. Postdispositional hearings
2. Right to counsel on appeal
3. Cooperation with appeals counsel
4. Continuing counsel

1. Postdispositional Hearings

Commentary. The proceedings mentioned in this section are the equivalent of representation at both (1) motion hearings to reconsider sentencing based on change of status and (2) treatment status hearings (e.g., drug court hearings). As such, they can be compared with standards in *Compendium* Volume II, "Standards for Attorney Performance," pages J21-J22. Note that the Massachusetts standard here is unique to the juvenile justice context.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

10.2 Postdispositional hearings before the juvenile court

The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 5.2 Probation Surrender Hearings

Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: conduct an in-person interview with the probationer; discover and review the Probation Department file; discover and review records of the probationer's participation in mandated programs; obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g., urinalysis results); identify, locate, and interview exculpatory or mitigating witnesses, etc.

2. Right to Counsel on Appeal

Commentary. See also the relevant standards in *Compendium* Volume II, "Standards for Attorney Performance," pages J25-J27.

ABA Juvenile Justice Standards Relating to Appeals and Collateral Review

3.1 (Right to counsel on appeal.)

Any party entitled to an appeal under Standard 2.2 is entitled to be represented by counsel, and the appointment of counsel at public expense upon a determination of indigency.

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures

J 9.1 Appellate Rights

(a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence and should file such motion in a timely fashion if requested to do so by the client or, if appropriate, to insure an accurate and legal sentence.

(b) After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should timely file the appropriate notice of appeal and request either a tape or transcript of the prior court proceeding.

(c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration. If the stay is denied, counsel should consider appealing the denial of the stay to a single justice of either the Appeals Court or the Supreme Judicial Court.

3. Cooperation with Appeals Counsel

Commentary. Section B of the ABA standard here is unique to the juvenile justice context.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

10.3 Counsel on appeal

A. Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.

B. Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

4. Continuing Counsel

Commentary. See also *Compendium* Volume I, "Standards for the Administration of Defense Services," pages B10-B11, and Volume II, "Standards for Attorney Performance," pages J21-J24.

ABA Juvenile Justice Standards Relating to Counsel for Private Parties

10.5 Postdispositional remedies, protection of the client's right to trea tment

A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when postdispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

Counsel representing a client in postdispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

The lawyer engaged in postdispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

Counsel 10.6 Probation revocation, parole revocation

Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.

Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.