PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION

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PREFACE

These guidelines are intended to be used as a guide to professional conduct and performance.

The object of these guidelines is to alert the attorney to the courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.

All of the steps covered in these guidelines are not meant to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The guidelines recognize that representation in criminal and juvenile offender cases is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically "fits" the case, the client and the court proceeding.

These guidelines may or may not be relevant in judicial evaluation about alleged misconduct of defense counsel to determine the validity of a conviction. They may be considered with other evidence concerning the effective assistance of counsel. [1]

[1] *See State v. A.N.J.*, 168 Wn.2d 91,110 (2010).

Guideline 1.

1.1 Role of Defense Counsel

a. The paramount obligation of criminal defense counsel is to provide conscientious, ardent, and quality representation to their clients at all stages of the criminal[2] process. Attorneys also have an obligation to abide by ethical requirements and act in accordance with the rules of the court.

> 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. Defense counsel, in common with all members of the bar, are subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, 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.

b. It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes of the legal profession applicable in Washington. 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.

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. Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

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 shall move to withdraw.

[2] These Performance Guidelines also apply to the juvenile offender adjudication process.

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

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

d. Counsel should respond promptly to client complaints.

e. Counsel should continue representation of the client until replaced.

f. Counsel has a duty to cooperate with successor counsel

1.4 Relationship with Client

a. **Early Contact.** The attorney shall make contact with the client at the earliest possible time. If the client is in custody, contact should be within 24 hours of appointment and shall be within no more than 48 hours unless there is an unavoidable extenuating circumstance. The lawyer should send a representative to see the client within 24 hours if the lawyer is not able to see the client within 24 hours.

b. **Barriers to Communication.** Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. Counsel should ensure access to and use of appropriate interpreter services when necessary for client communication.

c. **Establishment of the Relationship.** Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation. Defense counsel should explain counsel's obligation of confidentiality, the attorney-client privilege and the limits of the privilege.

d. **Interviewing the Client.** As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused

e. **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.

f. **Duty to Keep Client Informed.** 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. Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

g. **Advising the Accused**.

1. 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 evaluation of the probable outcome.

2. 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.

h. **Control and Direction of the Case.**

1. Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(a) what pleas to enter;

(b) whether to accept a plea agreement;

(c) whether to waive jury trial;

(d) whether to testify in his or her own behalf; and

(e) whether to appeal.

2. 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.

Guideline 2.

2.1 General Obligations of Counsel Regarding Pretrial Release

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

2.2 Pretrial Release Interview

a. Preparation:

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

1. Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

2. Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

3. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

4. Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

5. Be familiar with any procedures available for reviewing the trial judge's setting of bail.

b. The Interview:

1. The purpose of the interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case, including diversion and alternative court options.

2. Information that should be acquired includes, but is not limited to:

(a) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status, employment history;

(b) the client's citizenship status; for clients who are not United States citizens, identify necessary information to determine immigration consequences of possible resolutions (e.g. plea agreement, trial), including, but not limited to country of origin, date and manner of entry into U.S., and current immigration status; when the client is not a citizen the lawyer should obtain information that will permit counsel to determine the immigration consequences of the conviction and sentence, not limited to country of origin, and date and manner of entry into the United States.

(c) the client's physical and mental health, education, and military service;

(d) the client's immediate medical needs;

(e) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

(f) the ability of the client to meet any financial conditions of release;

(g) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

3. Information to be provided the client includes, but is not limited to:

(a) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(b) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(c) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(d) the charges and the potential penalties and consequences of conviction or adjudication;

(e) a general procedural overview of the progression of the case, where possible.

c. Supplemental Information

Whenever possible, counsel should use the interview to gather additional information relevant to preparation of the defense. Such information may include exculpatory and mitigating factors, and 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.

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. Counsel should be familiar with the criminal rules of release of a client, CrR 3.2 and CrRLJ 3.2 and discuss issues likely to be argued at pretrial release motions with the client prior to the hearing. Counsel should be prepared where appropriate to present evidence to the judicial officer at the pretrial release hearing.

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, consistent with confidentiality requirements, alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

Guideline 3.

3.1 Presentment and Arraignment

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

a. Entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;

b. Requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;

c. 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;

d. Preserving the client’s rights to diversion and/or alternative court processing.

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.

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. Counsel shall address issues of probable cause where applicable prior to the prosecution's obtaining of non-testimonial evidence.

Guideline 4.

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.

In all cases, appointed counsel shall inquire into and analyze evidence relevant to the case including the prosecutor's evidence relevant to the legal elements of the charges and additional evidence that might support possible defenses, and counsel shall obtain investigator and/or expert services when necessary for an adequate defense.

b. Sources of investigative information may include the following:

1. Charging documents

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

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

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

(c) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

2. The accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after

appointment or retention of counsel. The interview with the client should be used to:

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

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

(c) collect information relevant to sentencing and the consequences of conviction and adjudication.

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 or consider recording the interview.

4. The police and prosecution

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

5. Physical evidence

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

6. The scene

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

7. Expert assistance

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

(a) the preparation of the defense;

(b) adequate understanding of the prosecution's case;

(c) rebut the prosecution's case.

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 including but not limited to:

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. Electronic posts;

6. Books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

7. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

8. Statements of co-defendants;

9. All 911 tapes, bank videos, commercial establishment videos, police surveillance videos, books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

10. Statements and reports of experts, including data and documents upon which they are based;

11. Inspection of physical evidence;

12. Reports of notes of searches or seizures and the circumstances of any searches or seizures;

13. Law enforcement notes (field notes), investigation notes, and when relevant internal affairs files and investigation records;

14. Client, victim, or witness records, such as school, mental health, and drug and alcohol and criminal records.

4.3 Theory of the Case

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

Guideline 5.

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.

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;

i. the fruits of illegal searches or seizures;

ii. involuntary statements or confessions;

iii. statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;

iv. 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 the motion 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.

5.2 Filing and Arguing Pretrial Motions

a. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

b. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

1. Investigation, discovery and research relevant to the claim advanced;

2. The subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;

3. Full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

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.

5.4 Responding to Prosecution Motion

Counsel should respond to the prosecution’s motions as appropriate.

Guideline 6.

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. 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.

c. Counsel shall 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 shall not accept any plea agreement without the client's express authorization.

e. The existence of ongoing plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

6.2 The Contents of the Negotiations

a. In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:

1. The maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system and parole or sentencing review process and any registration requirements and;

2. the possibility of forfeiture of assets;

3. other consequences of conviction such as the impact of the conviction on non-citizen rights, including deportation and ineligibility for avenues to immigration relief and future immigration benefits, civil disabilities including loss of the right to vote, family rights, firearm rights and the right to serve in the military;

4. any possible and likely sentence enhancements or parole supervision consequences;

5. the possible and likely place and manner of confinement;

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

b. In developing a negotiation strategy, counsel should be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

(a) Not to proceed to trial on the merits of the charges;

(b) To decline from asserting or litigating any particular pretrial motions;

(c) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.

(d) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

(a) That the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(b) To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(c) That the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(d) 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;

(e) 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.

(f) 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 supervision 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.

(g) That the negotiated settlement MAY minimize the impact of the conviction on consequences that are an integral part of the penalty, including immigration, military service, registration, housing, employment, driving rights and familial rights.

c. In conducting plea negotiations, counsel should be familiar with:

1. The various types of pleas that may be agreed to, including a plea of guilty, a conditional plea of guilty, and a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea);

2. The advantages and disadvantages of each available plea according to the circumstances of the case;

3. Whether the plea agreement is binding on the court and prison and parole supervision authorities.

d. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

6.3 The Decision to Enter a Plea of Guilty

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

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

6.4 Entry of the Plea Before the Court

a. 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, including but not limited to those listed in Guideline 8.2, the accused will be exposed to by entering a plea;

3. Explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

b. When entering the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

c. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing.

d. 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.

e. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Guideline 7.

7.1 General Trial Preparation

a. The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

b. Where appropriate, counsel should have the following materials available at the time of trial:

1. Copies of all relevant documents filed in the case;

2. Relevant documents prepared by investigators;

3. Voir dire questions;

4. Outline or draft of opening statement;

5. Cross-examination plans for all possible prosecution witnesses;

6. Direct examination plans for all prospective defense witnesses;

7. Copies of defense subpoenas;

8. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

9. Prior statements of all defense witnesses;

10. Reports from defense experts;

11. A list of all defense exhibits, and the witnesses through whom they will be introduced;

12. Originals and copies of all documentary exhibits;

13. Proposed jury instructions with supporting case citations;

14. Copies of all relevant statutes and cases;

15. Outline or draft of closing argument.

16. Copies of investigator notes, if prepared, or transcripts and copies of recordings, interviews with the state's witnesses, if interviews are recorded.

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. 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 or in shackles or restraints.

f. 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.

g. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

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 court 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 may develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. This includes confidential questionnaires.

5. The primary purpose of voir dire is to obtain information for the intelligent exercise of challenges. Voir dire questions may be designed to accomplish the following:

(a) To elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

(b) To outline and expose the panel to certain legal principles which are relevant to the defense case;

(c) To preview the case 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 in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

(e) To establish credibility with the jury

6. Counsel should be familiar with the law concerning 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.

8. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

9. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

b. Examining the Prospective Jurors

1. Counsel should 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.

c. Challenges

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.

7.3 Opening Statement

a. Prior to delivering an opening statement, counsel should ask for exclusion of witnesses from the courtroom, 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 not waive or defer opening statement and should provide the jury with the defense theory of the case, so the jury is able to view the evidence from the defense viewpoint. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement. In rare instances, counsel may

consider a strategic advantage of deferring the opening statement until the beginning of the defense case, but this should be weighed against the significant disadvantage of the jury viewing the prosecution evidence without benefit of the defense theory.

d. Counsel's objective in making an opening statement is to inform the jury of the defense theory of the case and to provide an overview of the expected evidence. Opening statement may be designed to accomplish the following:

1. to identify the weaknesses of the prosecution's case;

2. to emphasize the prosecution's burden of proof;

3. to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

4. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

5. to clarify the jurors' responsibilities;

6. to state the ultimate inferences which counsel wishes the jury to draw.

e. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

f. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

1. The significance of the prosecutor's error;

2. The possibility that an objection might enhance the significance of the information in the jury's mind;

3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

7.4 Confronting the Prosecution's Case

a. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

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

c. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

d. In preparing for cross-examination, counsel should:

1. Consider the need to integrate cross-examination, the theory of the defense and closing argument;

2. Consider whether cross-examination of each individual witness is likely to generate helpful information;

3. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;

4. Consider a cross-examination plan for each of the anticipated witnesses;

5. Be alert to inconsistencies in a witness' testimony;

6. Be alert to possible variations in witnesses' testimony;

7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

8. Where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

9. Be alert to issues relating to witness credibility, including bias and motive for testifying.

e. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction

concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

f. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

g. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

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. As with choosing whether to go forward with a jury, the decision to testify is solely that of the client. Counsel's obligation is to provide the client with all of the advice necessary for the client to make an informed decision on whether to testify.

c. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

d. In preparing for presentation of a defense case, counsel should, where appropriate:

1. Develop a plan for direct examination of each potential defense witness;

2. Determine the implications that the order of witnesses may have on the defense case;

3. Consider the possible benefits and risks of use of character witnesses;

4. Consider the need for expert witnesses.

e. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

f. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

g. Counsel should conduct redirect examination as appropriate.

h. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

7.6 Closing Argument

a. Counsel should be familiar with the substantive limits on both prosecution and defense summation.

b. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

c. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

1. Highlighting weaknesses in the prosecution's case;

2. Describing favorable inferences to be drawn from the evidence;

3. Incorporating into the argument:

(a) helpful testimony from direct and cross-examinations;

(b) verbatim instructions drawn from the jury charge;

(c) responses to anticipated prosecution arguments;

(d) the effects of the defense argument on the prosecutor's rebuttal argument.

4. 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:

(a) Whether counsel believes that the case will result in a favorable verdict for the client;

(b) The need to preserve the objection for a double jeopardy motion;

(c) The possibility that an objection might enhance the significance of the information in the jury's mind.

(d) The need to preserve the objection for appeal.

7.7 Jury Instructions

a. Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

b. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions.

c. Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

d. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.

e. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

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

Guideline 8.

8.1 Obligations of Counsel in Sentencing

Among counsel's obligations in the sentencing process are:

a. 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 and other consequences of the conviction, including the impact upon citizenship and residency rights, civil rights including the loss of the right to vote, and familial rights;

b. 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;

c. To provide affirmative advice with respect to the consequences of the conviction on the citizenship and or residency status of the client;

d. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;

e. 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;

f. 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;

g. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

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 or the availability of alternative resolutions, including suspended sentences and specialty courts;

3. Vacation of conviction 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 the consequences of the sentence and judgment, including:

1. credit for pre-trial detention;

2. post confinement supervision;

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 and the right to possess a firearm;

11. impact of a fine or restitution and any resulting civil liability;

12. restrictions on or loss of license;

13. the impact of the conviction on the rights of a non-citizen;

14. other consequences of the conviction, such as immigration rights, military service, registration, housing, employment, driving, and familial rights.

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. Sentencing structure to preserve the rights of non-citizen clients;

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; the prosecution's or probation department'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 and prosecution or defense witnesses may have in the sentencing proceedings.

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, citizenship and immigration status if the

client is not a citizen of the United States, 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 or immigration or citizenship proceedings, including forfeiture or restitution proceedings;

8. Inform the client of the sentence or range of sentences and options available under the law and confer with the client about the sentencing plan and advocate for the client's position;

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.

8.4 The Official Presentence Report

a. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

1. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;

2. Provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;

3. Review the completed report;

4. Take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

5. Take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:

(a) the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

(b) the prosecution fails to prove an allegation;

(c) the court finds an allegation not proved.

b. 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 officials.

c. Counsel should review the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

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 review 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 correctional officials.

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;

8. Where appropriate, counsel should engage an expert to assist in preparing the sentence memorandum;

9. A complete memorandum may require counsel to conduct an independent investigation regarding mitigating evidence and why particular proposals are appropriate.

8.7 The Sentencing Process

a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

e. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, eligibility for supervised release, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation of the defendant.

f. Where appropriate, counsel should prepare the client to personally address the court.

Guideline 9.

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 to 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.

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 the attorney shall 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.

b. Counsel’s advice to the defendant should include an explanation of the right to appeal the judgment of guilty and the right to appeal the sentence imposed by the court and have counsel appointed at state expense, and that

the substantially prevailing party may be entitled to recover the costs of appeal pursuant to statute or court rule.

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

9.3 Bail Pending Appeal

a. Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

b. Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

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.

9.5 Sentence Reduction

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

9.6 Vacation or Sealing of Record of Conviction

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