Future Indigent Defense Leaders

Raising the Criminal Defense Bar in Texas

Performance Guidelines

TIDC
TEXAS INDIGENT DEFENSE COMMISSION

Texas Criminal Defense Lawyers Association

Public Defender's Office
Harris County, Texas

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Acknowledgements

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I. Counsel

1.1 Role of Assigned Counsel

Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Attorneys also have an obligation to uphold the ethical standards of the State Bar of Texas and to act in accordance with the rules of the court.

1.2 Education, Training and Experience

An attorney should provide competent, quality representation, be familiar with the substantive criminal law and the law of criminal procedure and its application, including changes and developments in the law. Where appropriate, consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel. When representing clients with mental illness or mental retardation, become familiar with the symptoms of the client's mental illness and their potential impact on the client's participation in the case, level of culpability, and sentencing options.

1.3 Duties

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

B. Maintain regular contact with the accused and keep the client informed of the progress of the case, where it is possible to do so. Promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls. If a client has abused the privilege (e.g. unnecessary and abusive calls), document the abuse in a letter to the client and provide specific rules about when to call. Whenever a client is particularly difficult, or potentially violent, bring along another person to visit them.

C. Unless case materials are too voluminous, or release would compromise a client's interests, they should be copied for the client upon request. A client who is illiterate, or who refuses written materials, should receive a careful explanation of those documents. Warn the client not to share documents with others who may later use it as a basis to claim the client confessed to them.

D. Make every reasonable effort to contact a client not later than the end of the first working day after the date appointed, in compliance with Code of Criminal Procedure 26.04(j). In making this contact, provide the client with an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with their attorney. Never promise a result without fully researching the issue and having all the necessary facts. If there are contingencies, make them known to the client.

E. Appear on time for all scheduled court hearings in a client's case.

F. Be alert to all potential and actual conflicts of interest that would impair one's ability to represent a client.

G. If a conflict develops during the course of representation, notify the client and the court.

H. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), the attorney shall continue to represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of their duties by the court or replaced by other counsel after a finding of good cause is entered on the record.

1.4 General Obligations Regarding Pretrial Release

Where appropriate, attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

II. Initial Procedures

2.1 Initial Interview

A. Arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within two business days after notice of assignment to the client's case. If the initial interview is completed by a designee, interview the client personally at the earliest reasonable opportunity. Any notes should not be disclosed to third parties absent a court order or an informed waiver by the client.

B. *Preparation*:
After being assigned to a case and prior to conducting the initial interview, where possible, do the following:

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

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

3. When representing client with mental illness, it is also important to review the special needs sheets for the courts, as well as, obtain reports from mental health authority's jail staff on the client's mental health status at the time of booking into the jail, as well as current status.

In addition, when the client is incarcerated:

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

5. Be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the district and county, and whether Pretrial Services is available to act as a custodian for the client's release;

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

7. Be familiar with Code of Criminal Procedure 17.032, which sets forth the procedure by which certain mentally ill defendants may be released on personal bond.

C. *The Interview*

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release if the client is incarcerated, and also to provide the client with information concerning the case. Ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds, can be overcome. If appropriate, file a motion to have a foreign language or sign language interpreter retained by the office, or appointed by the court, and present at the initial interview.

2. In addition, obtain from the client all release forms necessary to obtain client's medical, psychological, educational, military, prison and other records as may be pertinent.

3. Videoconferencing is sometimes available for meeting with clients from a remote location, rather than traveling to the jail. Videoconferencing is not recommended for an initial interview. Videoconferencing is never recommended for contact with mentally ill clients. Only use videoconferencing to relay basic information like dates of court or future meetings, not to discuss disposition of a case.

4. While obtaining the specified information in the initial interview is important to preparation of the defense of a client's case, when working with a mentally ill client, to be aware of symptoms of the client's illness that may make it difficult to obtain some of the information. Make a few visits to the client or obtain it from multiple sources, depending on the client's state of mind and ability to provide counsel with information.

5. 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, citizenship and immigration status, employment record and history;

b. The client's physical and mental health, educational, employment, social security/disability, 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; also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

e. The ability of the client to meet any financial conditions of release;

f. The names of individuals or other sources to contact to verify the

information provided by the client (obtain the permission of the client before contacting these individuals);

g. Any necessary information waivers or releases that will assist the client's defense, including preparation for sentencing; the written releases obtained should include a Health Insurance Portability and Accountability Act (HIPAA) compliant release in case medical records are required; and

h. Any other information that will assist the client's defense, including preparation for sentencing.

6. 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 types 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 any 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;

f. Realistic answers, where possible, to the client's most urgent questions;

g. 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;

h. How and when counsel can be reached; and

i. When counsel intends to see the client next.

D. *Supplemental Information*

Whenever possible, 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; and

5. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

2.2 Initial Appearance before the Magistrate and Pretrial Release Proceedings

A. When possible, preserve the client's rights at the initial appearance on the charges before the magistrate by 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.

B. Request a timely examining trial when the client is entitled to one unless there is a sound tactical reason not to do so.

C. 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.

D. Know the county procedures for surety and pretrial bonds.

E. Adequately inform the defendant of his or her conditions of release after such conditions have been set.

F. Where the client is not able to obtain release under the conditions set by the court, consider pursuing modification of the conditions of release under the procedures available.

G. 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, make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, advise the client and others acting in his or her behalf how to properly post such assets.

H. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation with the client. In the event that it would be in the best interest of the client to testify regarding bond, instruct the client not to answer any questions that do not pertain strictly to the issue of bond.

I. Where the client is incarcerated and unable to obtain pretrial release, 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.

2.3 Examining Trial

A. Prior to conducting an examining trial, make reasonable efforts to secure information in the prosecution's or law enforcement authorities' possession. Where necessary, pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.

B. Where the client is entitled to an examining trial, take steps to see that the examining trial is conducted timely unless there are strategic reasons for not doing so.

C. In preparing for the examining trial, 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 that is available concerning probable cause;

4. The subpoena process for obtaining compulsory attendance of witnesses at an examining trial and the necessary steps to be taken in order to obtain a proper recording of the proceedings;

5. The potential impact on the admissibility of any witness's testimony if he or she is later unavailable at trial;

6. The tactics of calling the defendant as the witness; and

7. The tactics of proceeding without discovery materials.

D. Meet with the client prior to the examining trial. Evaluate and advise the client regarding the consequences of waiving an examining trial and the tactics of full or partial cross-examination.

2.4 Grand Jury

A. Where a client is the subject of a grand jury investigation, consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying, or by providing exculpatory or mitigating evidence in written form. Consider filing a grand jury packet emphasizing lack of proof, potential defenses or mitigation.

B. Upon return of an indictment, determine if proper notice of the proceedings was provided and obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

2.5 Competency to Stand Trial

A. The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea. Counsel is often in the best position to discern whether the client may not be competent to stand trial.

B. Be familiar with Code of Criminal Procedure Article 46B, which governs proceedings surrounding incompetence to stand trial.

C. During the initial interview with the client, check for indications that a mentally ill or mentally retarded client may not be competent to stand trial. Signs include, but are not limited to: inability to communicate with counsel; delusions; psychosis; intellectual inability to comprehend the proceedings; and inability to remember or articulate the circumstances of arrest.

D. Request mental health records from mental health authority, the client's mental health provider and history of psychiatric treatment in the jail, if any.

E. If a client may be incompetent to stand trial, retain an expert or file a motion to have the client examined for competency. The motion to have a client examined for competency may be supported by affidavits setting out the facts on which the suggestion of incompetence is made.

F. If a client may be incompetent to stand trial, and it appears that transporting the client to and from court for routine proceedings where the client's presence is not needed may cause disruption or undue stress for the client, consider requesting that the client not be transported to court unless or until his presence is necessary.

G. If the court finds that there is some evidence that would support a finding of incompetence, the judge is required to stay all other proceedings in the case and order a competency evaluation. Facilitate setting up the competency evaluation as soon as possible. The sooner the evaluation is completed, the sooner the client can receive the mental health treatment that the client may need.

H. Investigate competency restoration treatment options including outpatient or local competency restoration.

I. If client is in custody, communicate with the Sheriff's office regarding when client will be transported to the hospital or treatment program.

J. To the extent it is possible to communicate with client, keep the client informed of when he will be going to the hospital.

K. Provide contact information to the hospital and stay in touch with them regarding the client's status.

L. When the client is returned from the hospital after competency restoration treatment, ensure that the client's case is placed back on the docket as quickly as possible to prevent the

client's condition from worsening upon return to the jail, but before the case can be resolved.

M. Be familiar with all statutory options and mandates concerning return of a client to court either restored to competency, or unrestored.

2.6 Prosecution Requests for Non-Testimonial Evidence

Be familiar with and understand 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.

III. Case Preparation

3.1 Investigation

A. Conduct an independent case review and investigation as promptly as possible. Regardless of the client's wish to admit guilt, ensure that the charges and disposition are factually and legally correct and the client is aware of potential defenses to the charges. Explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction.

B. Sources of review and investigative information may include the following:

1. Arrest warrant, accusation, complaint, information and/or indictment documents, along with any supporting documents used to establish probable cause, should be obtained. The relevant statutes and precedents should be examined to identify:

a. The elements of the offense(s) with which the client is charged;

b. The defenses that may be available, as well as the proper manner and time limits for asserting any available defenses;

c. Any lesser included offenses that may be available; and

d. Any defects in the charging documents, constitutional or statutory.

2. Perform an in-depth interview of the client.

3. Interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the client. Do so in the presence of an investigator or other third person.

4. Utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities.

5. If possible, request and review any tapes or transcripts from previous hearings in the case. Review the client's prior court file(s).

6. Where appropriate, seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

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

8. When possible, attempt to view the scene of the alleged offense as soon as possible under circumstances as similar as possible to those existing at the time of the alleged incident. Consider taking photographs and creating diagrams or charts of the scene of the offense.

9. Consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Know the procedures to obtain such assistance. Secure the assistance of experts where it is necessary or appropriate to:

a. The preparation of the defense;

b. An adequate understanding of the prosecution's case;

c. Rebut the prosecution's case; and

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, identify potential legal issues and the corresponding objections. Consider the tactics of when and how to raise those objections. Consider how best to respond to objections that could be raised by the prosecution.

3.2 Formal and Informal Discovery

A. Pursue as soon as practicable discovery procedures provided by the rules and to pursue such informal discovery methods as may be available.

B. Consider seeking discovery of the following items:

1. All information to which the defendant is entitled under Art. 39.14 of the Texas Code of Criminal Procedure;

2. Potential exculpatory information;

3. Potential mitigating information;

4. The names and addresses of all prosecution witnesses, their prior statements, and criminal records, if any;

5. Any other information that may be used to impeach the testimony of prosecution witnesses;

6. All oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;

7. The prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

8. Statements made by co-defendants;

9. Statements made by other potential witnesses;

10. All official reports by all law enforcement and other agencies involved in the case, including the results of any scientific tests;

11. All records of evidence collected and retained by law enforcement;

12. All video/audio recordings or photographs relevant to the case, as well as all recordings of transmissions by law enforcement officers;

13. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;

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

15. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.

C. Seek prompt compliance and/or sanctions for failure to comply.

D. Timely comply with all of the requirements governing disclosure of information by the defendant and notice of defenses and expert witnesses. Be aware of the possible sanctions for failure to comply with those requirements.

E. Employ Internet resources, such as the district clerk's website, criminal background databases, and legal research resources.

F. Go to the district clerk's office and review the entire file.

3.3 Theory of the Case

During investigation and trial preparation, develop and continually reassess a theory of the case and develop strategies for advancing the appropriate defenses, including those related to mental health, on behalf of the client.

3.4 Arraignment

Preserve the client's rights at arraignment by entering a plea of not guilty in all but the most extraordinary circumstances.

3.5 Resets

Know the paperwork and procedures to reset a case setting, as well as the practices of individual courts.

IV. Motions Practice

4.1 The Decision to File Pretrial Motions

A. Consider filing an appropriate motion whenever a good-faith reason exists to believe that the defendant is entitled to relief and that 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 to consider addressing in a pretrial motion are:

1. A review confinement or conditions of release;

2. The competency of the client;

3. The constitutionality of the implicated statute or statutes;

4. Potential defects in the charging process;

5. The sufficiency of the charging document;

6. Severance of charges or defendants;

7. The discovery obligations of the prosecution;

8. The suppression of evidence gathered as the result of violations of the Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution, or the Texas 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; and

d. Unreliable identification evidence;

9. The suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

10. Change of venue;

11. Access to resources or experts that may be denied to an accused because of his or her indigence;

12. The defendant's right to a speedy trial;

13. The defendant's right to a continuance in order to adequately prepare his or her case;

14. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion; and

15. Matters of trial or courtroom procedure.

C. Withdraw a 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, remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. 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 that could enhance the likelihood that relief ought to be granted; and

3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions.

D. Request a full evidentiary hearing on any pre-trial motion to the extent necessary to preserve the issue adequately for appellate review.

E. Consider the advisability of disqualifying or substituting the presiding judge. The decision to disqualify a judge shall only be made when it is a reasoned strategy decision and in the best interest of the client. The final decision rests with counsel.

F. Requests or agreements to continue a trial date shall not be made without consultation with the client.

G. Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

4.2 Filing and Arguing Pretrial Motions

A. Motions should be filed in a timely manner in accordance with statute and local rule, 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, 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, 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 potential consequences and costs of having the client testify;

4. The assistance of an expert witness where appropriate and necessary;

5. Familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial; and

6. Preparation and submission of a memorandum of law when appropriate.

C. In every case, examine whether it is appropriate to file a motion to suppress evidence or statements.

D. In every case that proceeds to trial, file timely and appropriate motions in limine to exclude any improper evidence or prosecutorial practices.

E. Obtain a clear ruling on any pretrial motion on the record or in writing.

4.3 Subsequent Filing of Pretrial Motions

A. Raise any issue that was not raised pretrial, if the facts supporting the motion were not reasonably available at that time. Further, be prepared, when appropriate, to renew a pretrial motion if new supporting information is disclosed in later proceedings.

B. Where appropriate, file an interlocutory appeal from the denial of a pretrial motion.

C. Consider reserving the right to appeal denial of a pretrial motion when negotiating the entry of a guilty plea.

V. Plea Negotiations

5.1 The Plea Negotiation Process

A. Do not 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.

B. After appropriate investigation and case review, 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 fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

C. Obtain the consent of the client before entering into any plea negotiation.

D. Keep the client fully informed of any continued plea discussions and negotiations and promptly convey to the client any offers made by the prosecution for a negotiated settlement. Do not accept any plea agreement without the client's express authorization.

E. Explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if a client's decisions are not in his or her best interest, attempt to persuade the client to change his or her position.

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

G. Do not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

H. Consider other resolutions that do not require a finding of guilt, such as pretrial diversion. Know the procedures for obtaining such outcomes.

5.2 The Contents of the Negotiations

A. In conducting plea negotiations, attempt to become familiar with any practices and policies which may impact the content and likely results of negotiated plea bargains.

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

1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;

2. If a plea involving supervision is under consideration, the conditions of supervision with which the client must comply in order to avoid revocation or adjudication;

3. If a plea involving deferred adjudication is under consideration, special considerations regarding such a plea, including sentencing alternatives in the event a motion to adjudicate is granted, and the unavailability of a pardon;

4. If a plea of no contest is under consideration, differences between a no contest plea and a guilty plea including the potential collateral uses of such a plea in subsequent judicial proceedings;

5. Other consequences of conviction including, but not limited to, deportation and other possible immigration consequences; forfeiture of and/or future ineligibility for a professional license; ineligibility for various government programs including student loans, public housing, food stamps, and social security/disability; prohibition from carrying a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of the right to vote; loss of the right to hold public office; and potential federal prosecutions;

6. Any registration requirements including sex offender registration and job-specific notification requirements;

7. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

8. The availability of appropriate diversion and rehabilitation programs;

9. Any possible and likely sentence enhancements or parole consequences;

10. The possible and likely place and manner of confinement;

11. 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; and

12. The effect on appellate rights.

C. In developing a negotiation strategy, 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;

e. Admitting identity and waiving challenges to proof or validity of prior conviction record;

f. Foregoing appellate remedies; and

g. Asset forfeiture.

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; and

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.

D. In developing a negotiation strategy, be completely familiar with the position of any alleged victim with respect to conviction and sentencing. In this regard:

1. Consider whether interviewing the alleged victim or victims is appropriate and, if so, who is the best person to do so and under what circumstances;

2. Consider to what extent the alleged victim or victims might be involved in the plea negotiations;

3. Be familiar with any rights afforded the alleged victim or victims under the Victim's Rights Act or other applicable law; and

4. Be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.

E. In conducting plea negotiations, be familiar with:

1. The various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a plea involving deferred adjudication, or a plea of not guilty by reason of insanity;

2. The advantages and disadvantages of each available plea according to the circumstances of the case, including whether or not the client is mentally, physically, and financially capable of fulfilling requirements of the plea negotiated;

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

4. Possibilities of pre-trial diversion; and

5. Any recent changes in the applicable statutes or court rules and the effective dates of these changes.

6. In conducting plea negotiations, attempt to become familiar with the practices and policies of the particular judge and prosecuting authority.

5.3 The Decision to Enter a Plea of Guilty

A. Make it clear to the client that the client must make the ultimate decision whether to plead guilty. Investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses (if

known), relevant concessions and benefits subject to negotiation, and possible consequences of a conviction after trial. Do not base a recommendation of a plea of guilty solely on the client's acknowledgment of guilt or solely on a favorable disposition offer.

B. Inform the client of any tentative negotiated agreement reached with the prosecution, and explain the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement. Never allow a prosecutor, law enforcement officer, or other representative of the government, to discuss any contested issue in client's case in their presence.

C. The decision to enter a plea of guilty rests solely with the client. Where a rejection of a plea offer is in the best interest of the client, advise the client of the benefits and risks of that course of action. Similarly, where a plea offer is in the best interest of the client, advise the client of the benefits and consequences of that course of action.

D. A negotiated plea should be committed to writing whenever possible.

E. Whenever possible, obtain a written plea offer from the prosecution. If the prosecutor does not provide a written plea offer, document in writing all the terms of the plea agreement offered to and accepted by the client.

F. Where the client verbally rejects a fully explained and detailed plea offer, if appropriate, ask the client to sign a written rejection of plea offer statement.

5.4 Entry of the Plea before the Court

A. Prior to the entry of the plea:

1. Make certain that the client understands the rights he or she will waive by entering the plea and that the decision to waive those rights is knowing, voluntary and intelligent;

2. Make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions and collateral consequences the client will be exposed to by entering a plea, including whether the plea agreement is binding on the court and whether the court, having accepted the guilty plea, can impose a sentence greater than that agreed upon;

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; and

4. Make certain that if the plea is a non-negotiated plea, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.

B. Become familiar with the consequences of a plea or a finding of guilty in state court upon any current or future federal prosecution.

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

D. After entry of the plea, be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, 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, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing. Subsequent to the acceptance of the plea, make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

VI. Trial

6.1 General Trial Preparation

A. Throughout preparation and trial, consider the theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

B. The decision to seek to proceed with or without a jury during both the guilt and punishment phases of the trial rests solely with the client after consultation with counsel. Discuss the relevant strategic considerations of this decision with the client, including the availability of different sentencing options depending on whether sentence is assessed by a judge or jury and the need to obtain the prosecution's consent to proceed without a jury on guilt. Maintain a record of the advice provided to the client, as well as the client's decision concerning trial. Advise the court of the client's decision in a timely manner.

C. Complete investigation, discovery, and research in advance of trial, such that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

1. Subpoenaing and interviewing all potentially helpful witnesses;

2. Subpoenaing all potentially helpful physical or documentary evidence;

3. Obtaining funds and arranging for defense experts to consult and/or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);

4. Obtaining and reading transcripts of prior proceedings in the case or related proceedings;

5. Obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information which may assist the fact finder in understanding the defense; and

6. Obtaining and reviewing the court file of any co-defendant(s) and contacting co-defendant(s)' counsel to obtain information about the co-defendant(s)' case.

D. Where appropriate, an attorney 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;

4. Return of copies of defense subpoenas;

5. Voir dire topics, plans, or questions;

6. Outline of opening statement;

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

8. Direct examination plans for all prospective defense witnesses;

9. Copies of defense subpoenas;

10. Prior statements of all prosecution witnesses;

11. Prior statements of all defense witnesses;

12. Reports from defense experts;

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

14. Originals and copies of all documentary exhibits;

15. Proposed jury instructions with supporting case citations;

16. Copies of all relevant statutes and cases; and

17. Outline of closing argument.

E. Where a party will seek to introduce an audio or video tape or a DVD of a police interview or any other event, consider whether a transcript of the recording should be prepared, and how the relevant portions of the recording will be reflected in the appellate record.

F. Be familiar with the rules of evidence, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise in the trial.

G. Decide if it is beneficial to secure an advance ruling on issues likely to arise at trial and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

H. Throughout the trial process, establish a proper record for appellate review. Be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should ensure that a sufficient record is made. Request that all trial proceedings be recorded.

I. Advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated,

be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. Ensure that the client is not seen by the jury in any form of physical restraint.

J. Plan with the client the most convenient system for conferring throughout the trial. Where necessary, seek a court order to have the client available for conferences.

K. If, during the trial, it appears that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.

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

6.2 Jury Selection

A. *Preparation*

1. Be familiar with the procedures by which both petit and grand jury venires are selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venires.

2. 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, seek to obtain a prospective juror list and the standard jury questionnaire where feasible, and seek access to and retain the juror questionnaires that have been completed by potential jurors. Consider requesting use of a separate questionnaire that is tailored to the client's case. Determine the court's method for tracking juror seating and selection.

4. Where appropriate, develop and file written voir dire questions in advance of trial. Tailor voir dire questions to the specific case. Among the purposes for voir dire questions are the following:

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

b. To determine jurors' attitudes toward legal principles that are critical to the defense, including, where appropriate, the client's decision not to testify;

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; and

e. To establish a relationship with the jury, when the voir dire is conducted by an attorney.

5. 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. Be familiar with the law concerning challenges for cause and peremptory strikes. 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.

7. Where appropriate, consider whether to seek expert assistance in the jury selection process.

8. Consider seeking assistance from others in the office to record venire panel responses and to observe venire panel reactions. Communicate with the client regarding the client's venire panel preferences.

B. *Examining the Prospective Jurors*

1. 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, and insanity defenses.

2. Consider seeking permission to personally voir dire the panel. If the court conducts voir dire, consider submitting proposed questions to be incorporated into the court's voir dire.

3. Take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.

4. If the voir dire questions may elicit sensitive answers, 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.

5. In a group voir dire, avoid asking questions that may elicit responses which are likely to prejudice other prospective jurors.

6. Be familiar with case law regarding the client's right to be present during individual voir dire. Fully discuss the risks and benefits of asserting this right with the client.

C. *Challenges*

1. 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. When challenges for cause are not granted, consider exercising peremptory challenges to eliminate such jurors.

3. In exercising challenges for cause or peremptory strikes, consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

4. Make every effort to consult with the client in exercising challenges.

5. Be alert to prosecutorial misuse of peremptory challenges and seek appropriate remedial measures.

6. Object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecution.

6.3 Opening Statement

A. Prior to delivering an opening statement, ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

B. Be familiar with the law, the practice of your county, and the individual trial judge's rules, regarding the permissible content of an opening statement.

C. Consider the strategic advantages and disadvantages of disclosure of particular information during opening statement. In rare cases, consider deferring the opening statement until the beginning of the defense case. Opening statement should introduce the case theory and theme using storytelling techniques. Opening statement also may incorporate these objectives:

1. To provide an overview of the defense case;

2. To identify the weaknesses of the prosecution's case;

3. To identify and 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 establish counsel's credibility with the jury;

8. To prepare the jury for the client's testimony or failure to testify; and

9. To state the ultimate inferences which counsel wishes the jury to draw.

D. Consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his or her opening statement.

E. Whenever the prosecutor oversteps the bounds of a proper opening statement, 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; and

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

6.4 Confronting the Prosecution's Case

A. Research and be fully familiar with all of the elements of each charged offense and attempt to anticipate weaknesses in the prosecution's case.

B. Attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.

C. Consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

D. In preparing for cross-examination, 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, be prepared to question witnesses as to the existence of prior statements that they may have made or adopted, and consider doing so outside the presence of the jury.

E. In preparing for cross-examination:

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, and avoid asking unnecessary questions or questions which may hurt the defense case;

3. File a motion requesting the names and addresses of 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 or variations in a witness's testimony;

6. Be alert to possible variations between different witnesses' testimony;

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

8. Where appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;

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

10. Have prepared a transcript of all audio or video tape-recorded statements made by witnesses;

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

12. Have prepared, all documents intended for use during cross-examination, including certified copies of records such as prior convictions of witnesses and prior sworn testimony of witnesses.

F. 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. Be aware of the applicable law concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

G. Prior to trial, ascertain whether the prosecutor has provided copies of all prior statements of the witnesses it intends to call at trial. If disclosure is not timely made, prepare and argue motions for:

1. Adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

2. Exclusion of the witness's testimony and all evidence affected by that testimony;

3. A mistrial; and

4. Dismissal of the case.

H. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, move for an instructed verdict of acquittal on each count charged. 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.

6.5 Presenting the Defense Case

A. Develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, 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. Discuss with the client all of the considerations relevant to the client's decision to testify. Be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

C. The decision to testify rests solely with the client, and do not attempt to unduly influence that decision. Where testifying is in the best interest of the client, advise the client of the benefits and risks of that course of action.

D. Be aware of the elements and tactical considerations 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.

E. In preparing for presentation of a defense case, where appropriate, do the following:

1. Consider all potential evidence which could corroborate the defense case, and the import of any evidence that is missing;

2. After discussion with the client, make the decision whether to call any witnesses;

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

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

5. Consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;

6. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;

7. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;

8. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;

9. Review all documentary evidence that must be presented;

10. Review all tangible evidence that must be presented; and

11. Be fully familiar with statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

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

G. Prepare all witnesses for direct and possible cross-examination. Advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. Where appropriate, advise witnesses of suitable courtroom dress and demeanor.

H. Systematically analyze all potential defense evidence for evidentiary problems. Research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

I. Conduct redirect examination as appropriate.

J. If an objection is sustained, make appropriate efforts to re-phrase the question or make an offer of proof.

K. Guard against improper cross-examination by the prosecutor.

L. At the close of the defense case, renew the motion for an instructed verdict of acquittal on each charged count.

M. Keep a record of all exhibits identified or admitted.

6.6 Closing Argument

A. Before argument, obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the court's rulings.

B. Be familiar with the substantive limits on both prosecution and defense summation.

C. 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.

D. In developing closing argument, review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, 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 the theme of the case;

b. Helpful testimony from direct and cross-examination;

c. Verbatim instructions drawn from the jury charge;

d. Responses to anticipated prosecution arguments; and

e. Visual aids and exhibits; and

4. The effects of the defense argument on the prosecutor's rebuttal argument.

E. Consider incorporating in argument summation the promises of proof the prosecutor made to the jury during his or her opening.

F. Whenever the prosecutor exceeds the scope of permissible argument, 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 the case will result in a favorable verdict for the client;

2. The need to preserve the objection for appellate review; and

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

6.7 Jury Instructions

A. File proposed or requested jury instructions before closing argument.

B. 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.

C. Submit proposed jury instructions in writing.

D. Where appropriate, submit modifications to 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, provide case law in support of the proposed instructions.

E. Object to and argue against improper instructions proposed by the prosecution.

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

G. During delivery of the charge, 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.

H. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, request that the judge state the proposed charge to counsel before it is delivered to the jury. Object to any additional instructions given to the jurors after the jurors have begun their deliberations.

I. Reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.

J. Ensure that any jury notes or responses to jury notes regarding substantive matters are discussed in open court and on the record, and that the actual notes and responses are made part of the record for appellate purposes.

VII. Sentencing

7.1 Obligations at Sentencing

A. Where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications;

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

D. To develop a plan that 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;

E. To ensure all information presented to the court that may harm the client and that 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;

F. To consider the need for and availability of sentencing experts, and to seek the assistance of such experts whenever possible and warranted; and

G. To identify and preserve legal and constitutional issues for appeal.

7.2 Sentencing Options, Consequences and Procedures

A. Be familiar with 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. Mandatory minimum and statutory maximum sentences;

3. Deferred adjudication, judgment without a finding, and diversionary programs;

4. Expungement and sealing of records;

5. Probation or suspension of sentence and permissible conditions of probation;

6. The potential for recidivist sentencing;

7. Restitution;

8. Mandatory registration programs: sex offender, DNA, etc.;

9. Fines;

10. Court costs;

11. Confinement in mental institution and the effects of a not guilty by reason of insanity (NGRI) plea; and

12. Civil forfeiture implications of a guilty plea.

B. 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 if applicable;

3. Effect of good-time credits and mandatory release on the client's release date and how those 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, health care and other treatment programs;

8. Deportation and other immigration consequences;

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. Possible revocation of probation or parole;

13. Whether the sentence will run concurrently or consecutively to any past, current, or future (state or federal), sentence;

14. Suspension of a motor vehicle operator's permit;

15. Prohibition from carrying a firearm;

16. Other consequences of conviction, including but not limited to, forfeiture of and future ineligibility for a professional license; ineligibility for various government programs including student loans, public housing, food stamps, and social security/disability; suspension of a motor vehicle operator's license; civil monetary penalties; loss of the right to vote; and loss of the right to hold public office; and

17. Potential federal consequences.

C. 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 the applicable sentencing system, including concurrent and consecutive sentencing;

3. The practices of those who prepare the presentence report, and the defendant's rights in that process;

4. Access to the presentence report by counsel and the defendant;

5. The defense sentencing presentation and sentencing memorandum;

6. The opportunity to challenge information presented to the court for sentencing purposes;

7. The availability of an evidentiary hearing to challenge information, and the applicable rules and burdens of proof at such a hearing; and

8. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

7.3 Preparation for Sentencing

A. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

B. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

C. Obtain from the client and other sources 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;

D. 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 upon an appeal, subsequent retrial, or trial on other offenses;

E. 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;

F. Prepare the client to be interviewed by the official preparing the presentence report and ensure the client has adequate time to examine the pre-sentence report, if one is utilized by the court;

G. Inform the client of the sentence or range of sentences the court will consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, inform the client of his or her right to speak personally for a particular sentence or sentences; and

H. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, request the opportunity to present tangible and testimonial evidence and use subpoenas to ensure the availability of relevant documents and witnesses.

7.4 The Official Presentence Report

A. Be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition:

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

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

D. Attend any interview of the client;

E. Review the completed report;

F. Take appropriate steps to ensure that erroneous or misleading information is deleted from the report;

G. Take appropriate steps to preserve and protect the client's interests if:

1. The court refuses to hold a hearing on a disputed allegation adverse to the defendant;

2. The prosecution fails to prove an allegation; or

3. The court finds an allegation not proved.

H. 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.

7.5 The Prosecution's Sentencing Position

A. Attempt to determine 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, request to see the memorandum and verify that the information presented is accurate. If the memorandum contains erroneous or misleading information, take appropriate steps to correct the information.

C. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

7.6 The Defense Sentencing Memorandum

Prepare and present a defense sentencing memorandum when there is a strategic reason for doing so. Among the topics to include in the memorandum are:

A. Challenges to incorrect or incomplete information in the official presentence report or any prosecution sentencing memorandum;

B. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report or any prosecution sentencing memorandum;

C. Information contrary to that before the court which is supported by affidavits, letters, and public records;

D. Information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record, education, and family and financial status;

E. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

F. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and

G. Presentation of a sentencing proposal.

7.7 The Sentencing Process

A. 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. 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, consider requesting an evidentiary hearing. Where a sentencing hearing will be held, be prepared to present evidence, including testimony of witnesses.

D. Where information favorable to the defendant will be disputed or challenged, 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, 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 or exclusion of the defendant.

F. Where appropriate, prepare the client to personally address the court.

7.8 Self-Surrender

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

VIII. Post-Trial

8.1 Expunction, Nondisclosure or Sealing of Record

After sentencing, inform the client of any procedures available for requesting that the record of conviction be expunged or sealed and, if such procedures may be available in the client's case, when and under what conditions the client may pursue expunction or sealing of the record.

8.2 Duties in Post-Trial Proceedings

A. A defendant's right to counsel does not terminate upon conviction, imposition of sentence, or order of deferred adjudication.

B. Regardless of whether appointed or retained, and irrespective of the terms of any contract or legal services agreement, representation of the client must continue until counsel has been formally granted permission to withdraw. Continue to represent the defendant until appeals are exhausted, including in motion for new trial proceedings.

C. If the defendant wishes to pursue post-trial remedies, do the following prior to seeking to withdraw as counsel for post-trial proceedings:

1. Attempt to arrange for the defendant's post-trial representation in advance of the verdict in order to ensure the defendant's continuous access to counsel;

2. Notify the trial court in advance if the defendant will submit an affidavit of indigency and may require immediate appointment of post-trial counsel on the day of sentencing or entry of an order of deferred adjudication community supervision; and

3. If arrangements have not been made for new counsel by the day of sentencing or entry of an order for deferred adjudication, assist the defendant in filing a written notice of appeal and in requesting prompt appointment of post-trial counsel and providing any financial or other information necessary to establish the defendant's right to appointed counsel.

8.3 Education, Training and Experience in Post-Trial Proceedings

In order to provide competent and quality representation in post-trial proceedings, be familiar with the Texas Rules of Appellate Procedure, article 11.07 of the Texas Code of Criminal Procedure and any local rules of the courts of appeal or the Texas Court of Criminal Appeals. Attend at least fifteen (15) hours of continuing legal education every year in criminal law, criminal appellate law, or another area of law that is relevant to Texas criminal appellate practice. Make every effort to become familiar with recent opinions in criminal cases that are issued by the Texas Court of Criminal Appeals, the courts of appeal, and the federal appellate courts, including the United States Supreme Court.

8.4 Motion for a New Trial

A. Be familiar with the procedures applicable to a motion requesting a new trial including:

1. The time period for filing such a motion;

2. The effect it has upon the time to file a notice of appeal;

3. The grounds that can be raised;

4. The evidentiary rules applicable to hearings on motions for new trial, including the requirement that factual allegations in the motion, or affidavits in support of such factual allegations, must be sworn to;

5. The requirement that a motion for new trial be timely presented to the trial court in conformance with Rule of Appellate Procedure 21.6 in order to obtain a specific hearing date and preserve for appeal a claim that a request for a hearing was erroneously denied;

6. The time period for receiving a ruling on a motion for new trial, after which the motion is overruled by operation of law; and

7. The requirement that a trial court make written findings if a motion for new trial is granted.

B. When a judgment of guilty has been entered against the defendant after trial, 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, consider:

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;

3. The effect the filing of a motion for new trial will have on the time period for perfecting an appeal; and

4. Whether, after explaining to the defendant his rights to submit a motion for new trial, the defendant desires that such a motion be filed.

C. The decision to file a motion for new trial should be made after considering the applicable law in light of the circumstances of each case. Among the issues to consider addressing in a

motion for new trial are:

1. Denial of defendant's right to counsel or right to be present during trial;

2. Fundamentally defective jury charge;

3. Jury misconduct;

4. Intentional suppression of witness testimony or other evidence tending to show the defendant's innocence, preventing its production at trial;

5. Denial of a continuance based upon a critical missing witness;

6. Sufficiency of the evidence;

7. Ineffective assistance of counsel; and

8. Any claim that would require a new trial in the interest of justice.

D. In the event that a motion for new trial is granted, be prepared to draft and timely file a reply brief in opposition to any appeal of that decision filed by the prosecution.

IX. Appeal

9.1 Protecting the Right to Appeal

A. Following trial, 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. Advice to the defendant should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court.

B. In circumstances where the defendant wants to file an appeal and trial counsel will not be handling the appeal, formally withdraw from the client's case, but only after taking all steps necessary to preserve the right to appeal. These steps include:

1. Assisting the defendant in filing written notice of appeal in accordance with the rules of the court;

2. Ordering transcripts of the trial proceedings; and

3. If the defendant is indigent for purposes of appeal, assisting the defendant in requesting prompt appointment of appellate counsel and providing any financial or other information necessary to establish the defendant's right to appointed counsel.

C. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), continue to represent the defendant until appeals are exhausted, or relieved of duties by the court or replaced by other counsel after a finding of good cause is entered on the record. If relieved of duties by the court, assist the defendant in taking all steps necessary to preserve the right to appeal.

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

9.2 Initial Duties in Direct Appeal Proceedings

A. Upon being notified of appointment to represent a criminal defendant in the direct appeal of that person's conviction and sentence, or other appealable order, as soon as possible, through inspection of the papers from the trial court's file:

1. Confirm that a written notice of appeal has been filed with the clerk of the trial court. If such notice has not been filed, and the time for filing such notice has not expired, counsel must file the notice of appeal immediately (*See* Texas Rules of Appellate Procedure 25 and 26);

2. Confirm that the Certification of the Defendant's Right to Appeal has been properly completed, signed by the defendant, and filed with the clerk of the trial court (*See* Texas Rule of Appellate Procedure 25);

3. Gather all of the information necessary to complete the docketing statement to be

filed with the court of appeals (*See* Texas Rule of Appellate Procedure 32);

4. Determine whether the defendant is entitled to be released to bail on appeal (*See* Texas Code of Criminal Procedure, art. 44.04). If the defendant is entitled to bail, and the trial court has not set an appeal bond amount, ask the trial court to set bail in the lowest amount that the trial court will consider.

B. Upon being notified that he has been appointed to represent a criminal defendant in the direct appeal of that person's conviction and sentence, or other appealable order, within three (3) business days of such appointment, personally meet with the client, if the client is in custody or otherwise resides in your county. If meeting the client in person, provide the client with an initial client letter, which contains information explaining criminal appeals in general, eligibility for bail and the time periods that apply to each phase of the appellate process. If the Texas Department of Criminal Justice-Institutional Division or another jail or prison authority has already taken possession of the client, then ascertain the client's whereabouts, mail him the initial client letter, and make arrangements to either visit the client in person or interview him by telephone.

C. Following initial appointment to a direct appeal, at the earliest practical time:

1. Contact trial counsel to obtain background information on the client, the nature of the issues presented in the trial court, and to determine whether filing a motion for new trial, if available, 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;

2. File a docketing statement with the court of appeals (*See* Texas Rule of Appellate Procedure 32);

3. Request in writing that the clerk of the court prepare a clerk's record (Texas Rule of Appellate Procedure 34.5(b)), and that the court reporter prepare the reporter's record (Texas Rule of Appellate Procedure 34.6).

9.3 Bail Pending Appeal

A. Where a client indicates a desire to appeal the judgment or sentence of the court, 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, cooperate with appellate counsel in providing information to pursue the request for bail.

9.4 Direct Appeal

A. Ensure that the clerk's and reporter's records are true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial or appellate courts in order to obtain corrections or hearings to ensure the reliability of the record.

B. Fully review the appellate record for all reviewable errors, prepare a well-researched and drafted appellate brief, ensure that the brief is filed in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure and any local rules, and notify the court of counsel's desire to present oral argument in the case, if appropriate.

C. Be prepared to draft and timely file a reply brief in opposition to any brief filed by the prosecution.

D. Be prepared to draft and timely file a motion for rehearing should the conviction be affirmed. A public defender should be prepared to timely defend against the prosecution's motion for rehearing should the court reverse the conviction on original submission.

9.5 Petition for Discretionary Review

A. In the event that the intermediate appellate court's decision is unfavorable to the defendant, advise the defendant in writing of the defendant's right to file a petition for discretionary review and the action that must be taken to properly file such a petition. In advising the defendant of the right to file a petition for discretionary review, explain that:

1. Review by the Court of Criminal Appeals is discretionary and not a matter of right, and that the Court of Criminal Appeals may refuse to review the defendant's case without providing any reason for doing so;

2. If the defendant is indigent, defendant does not have the right to court-appointed counsel for purposes of filing a petition for discretionary review but that, upon request, the appropriate authority may appoint counsel at its discretion for purposes of filing a petition for discretionary review; and

3. However, if the defendant is indigent and if the petition for discretionary review is granted, defendant does have the right to court-appointed counsel for further proceedings on the merits before the Court of Criminal Appeals.

B. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), continue to represent the defendant until appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel after a finding of good cause is entered on the record. If relieved of duties by the court, assist the defendant in taking all steps necessary to preserve the right to file a petition for discretionary review.

C. When the court of appeals issues an opinion in a case, within five (5) days of the opinion being issued, send a copy of the opinion and judgment, as well as notification of the client's right to file to file a *pro se* petition for discretionary review under Texas Rule of Appellate Procedure 68. Such notification to the client shall include an explanation of what a petition for discretionary review is, and shall include a copy of Texas Rules of Appellate Procedure 66-70. The opinion and accompanying notification letter shall be sent to the client by certified mail, return receipt requested. A letter certifying compliance with the above procedures shall be sent to the court of appeals, along with a copy of the return receipt. *See* Texas Rule of Appellate Procedure 48.4.

D. If the conviction is reversed at the court of appeals, a public defender should immediately

take all necessary steps to secure bail for the client pending the filing of a petition for discretionary review by the State. *See* Texas Code of Criminal Procedure, article 44.04(h).

9.6 Right to File a Petition for Certiorari to the United States Supreme Court

In the event that the Court of Criminal Appeals either summarily denies a petition for discretionary review or denies relief after reviewing the defendant's case on the merits, advise the defendant in writing by certified mail of the defendant's right to file a petition for certiorari before the United States Supreme Court and the action that must be taken to properly file such a petition. In advising the defendant of the right to file a petition for certiorari, explain that:

A. Review by the United States Supreme Court is discretionary and not a matter of right, and that the United State Supreme Court may refuse to review the defendant's case without providing any reason for doing so;

B. If the defendant is indigent, defendant does not have the right to court-appointed counsel for purposes of filing a petition for certiorari;

C. If the petition is without merit, seek leave to withdraw from the case from the court from which review is sought, after explaining to the client the procedures and deadlines of seeking such review; and

D. If the defendant is indigent and if the petition for certiorari is granted, defendant may request the appointment of counsel for further proceedings on the merits before the United States Supreme Court.

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