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PERFORMANCE STANDARDS FOR CRIMINAL DEFENSE REPRESENTATION IN INDIGENT CRIMINAL CASES

Introduction to Performance Standards¹

The Standards are intended to serve several purposes, first and foremost to encourage public defenders, assistant public defenders and appointed counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent defendants.

The Standards are intended to alert defense counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions that must be taken in each case to ensure that the client receives the best representation possible. The Standards are also intended to provide a measure of the performance of appointed attorneys and public defenders.

The language of these Standards is general, implying flexibility of action which is appropriate to the situation. Use of judgment in deciding upon a particular course of action is reflected by the phrases "should consider" and "where appropriate". In those instances where a particular action is absolutely essential to providing quality representation, the Standards use the words "should" or "shall". Even where the Standards use the words "should" or "shall", in certain situations the lawyer's best informed professional judgment and discretion may indicate otherwise.

There is an unending variety of circumstances presented by criminal cases, and this variation in combination with changes in criminal law and procedure requires that attorneys approach each new case with a fresh outlook. Therefore, though the Standards are intended to be comprehensive, they are not exhaustive. There may well be additional actions that an attorney should take or should consider taking in order to provide zealous and effective representation.

¹ These Standards are adapted from the Performance Standards for Criminal Defense Representation in Indigent Criminal Cases as developed by the Georgia Public Defender Standards Council.

**Performance Standard 1.1
Obligations of Defense Counsel**

The primary and most fundamental obligation of a criminal defense attorney is to provide zealous and effective representation for his or her clients at all stages of the criminal process. The defense attorney's duty and responsibility is to promote and protect the best interests of the client. If personal matters make it impossible for the defense counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client. Attorneys also have an obligation to maintain high ethical standards.

**Performance Standard 1.2
Training and Experience of Defense Counsel**

(A) In order to provide quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the State of Ohio. Counsel has a continuing obligation to stay abreast of changes and developments in the law.

(B) Prior to agreeing to undertake representation in a criminal matter, counsel should have sufficient experience or training to provide effective representation.

(C) Attorneys who are being considered for appointment to represent individuals who are charged with capital offenses in which the State is seeking death must meet the criteria set forth in Rule 20 of the Rules of Superintendence for the Courts of Ohio.

**Performance Standard 1.3
General Duties of Defense Counsel**

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

(B) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. When 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) If a conflict develops during the course of representation, counsel has a duty to notify the client and the court in accordance with the Ohio Rules of Professional Conduct.

(E) When counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, counsel, if an assistant public defender, shall inform the head of the Public Defender agency or, if counsel was appointed, shall inform the appointing Court. If the Public Defender determines that the caseloads for his entire office are so large that counsel is unable to satisfactorily meet these performance standards, the Public Defender shall inform the court or courts before whom cases are pending.

Performance Standard 2.1
Obligations of Counsel Regarding Pretrial Release

(A) Counsel or a representative of counsel have an obligation to meet with incarcerated defendants within 72 hours of notification of arrest or appointment of counsel, and shall take other prompt action necessary to provide quality representation including:

(1) Counsel shall invoke the protections of appropriate constitutional provisions, federal and state laws, statutory provisions, and court rules on behalf of a client, and revoke any waivers of these protections purportedly given by the client, as soon as practicable via a notice of appearance or other pleading filed with the court.

(2) Where possible, counsel shall represent an incarcerated client at the first appearance/arraignment in order to contest probable cause for a client arrested without an arrest warrant, to seek bail on favorable terms (after taking into consideration the adverse impact, if any, such efforts may have upon exercising the client's right to a full Pretrial Release hearing at a later date), to invoke constitutional and statutory protections on behalf of the client, and otherwise advocate for the interests of the client.

(B) Counsel has an obligation to attempt to secure the pretrial release of the client.

Performance Standard 2.2
Counsel's Initial Interview With Client

(A) Prior to conducting the initial interview the attorney should, where possible:

(1) be familiar with the elements of the offense(s) and the potential punishment(s), 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 bail agencies concerning pretrial release, and law enforcement reports that might be available.

(B) In addition, where the Client is incarcerated, the attorney should:

(1) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

(2) 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; and

(3) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(C) Conducting the Interview:

(1) The purpose of the initial interview is to acquire information from the client concerning the case, the client and pre-trial release, and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, prison and other records as may be pertinent.

(2) Information that should be acquired from the client includes, but is not limited to:

(a) the facts surrounding the charges leading to the client's arrest, to the extent the client knows and is willing to discuss these facts;

(b) the client's version of arrest, with or without warrant; whether the client was searched and if anything was seized, with or without warrant or consent; whether the client was interrogated and if so, was a statement given; the client's physical and mental status at the time the statement was given; whether any exemplars were provided and whether any scientific tests were performed on the client's body or body fluids;

(c) the names and custodial status of all co-defendants and the name of counsel for co-defendants (if counsel has been appointed or retained);

(d) the names and locating information of any witnesses to the crime and/or the arrest, regardless of whether these are witnesses for the prosecution or for the defense; the existence of any tangible evidence in the possession of the State (when appropriate, counsel should take steps to insure this evidence is preserved);

(e) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, any prior names or alias used, family relationships, immigration status (if applicable), employment record and history, and social security number;

(f) the client's physical and mental health, educational, vocational and armed services history;

(g) the client's immediate medical needs including the need for detoxification programs and/or substance abuse treatment;

(h) 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 or outstanding warrants from other jurisdictions or agencies and also whether he or she is on probation (including the nature of the probation, such as "first offender") or parole and the client's past or present performance under supervision;

(i) 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);

(j) the ability of the client to meet any financial conditions of release (for clients who are incarcerated); and

(k) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense, including releases from the client for any records for treatment or testing for mental health or mental retardation.

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

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

(b) an explanation of the charges and the potential penalties;

(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; and

(d) the names of any other persons who may be contacting the client on behalf of counsel.

(4) For clients who are incarcerated:

(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) warn the client of the dangers with of the fact that telephone calls, mail, and visitations may be monitored by jail officials.

(D) Counsel must be alert to a potential plea based on client's incompetency, insanity, mental illness or mental retardation. If counsel or the client raises a potential claim based on any of these conditions, counsel should consider seeking an independent psychological evaluation. Counsel should be familiar with the legal criteria for any plea or defense based on the defendant's mental illness or mental retardation, and should become familiar with the procedures related to the evaluation and to subsequent proceedings.

(1) Counsel should be prepared to raise the issue of incompetency during all phases of the proceedings, if counsel's relationship with the client reveals that such a motion is appropriate.

(2) Where appropriate, counsel should advise the client of the potential consequences of a motion of incompetency and the defense of insanity. Prior to any proceeding, counsel should consider interviewing any professional who has evaluated the client, should be familiar with all aspects of the evaluation and should seek additional expert advice where appropriate.

(E) If special conditions of release have been imposed (e.g. random drug screening) or other orders restricting the client's conduct have been entered (e.g., a no contact order), the client should be advised of the legal consequences of failure to comply with such conditions.

Performance Standard 2.3 Counsel's Duty in Pretrial Release Proceedings

(A) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(B) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(C) If the court sets conditions of release which require the posting of a bond, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Counsel shall not post the bond or become an agent in the posting of bond on behalf of a client.

Performance Standard 3.1 Counsel's Duties at Preliminary Hearing

(A) Where the client is entitled to a preliminary hearing, the attorney should avoid waiving the hearing unless there are strategic reasons for 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 for establishing probable cause;
- (3) factual information which is available concerning probable cause; and
- (4) the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing.

Performance Standard 4.1
Duty of Counsel To Conduct Investigation

(A) Counsel has a duty to conduct a prompt investigation of each case. Counsel should, 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.

(B) Sources of investigative information may include the following:

(1) Arrest warrant, accusation and/or indictment documents, and 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 lesser included offenses that may be available; and
- (d) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) Information from the defendant: If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment of counsel. The interview with the client should be used to obtain information as described above under the performance standards applicable to the initial interview of the client. Information relevant to sentencing should also be obtained from the client, when appropriate.

(3) Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses adverse to the accused should be conducted in a manner that permits counsel to effectively impeach the witness with statements made during the interview.

(4) Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, when possible. Where necessary, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain criminal history records for the client and for the prosecution witnesses.

(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. Counsel should examine any such physical evidence.

(6) The scene of the incident: Where appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed. 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) Securing the assistance of experts: 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; or
- (c) rebut the prosecution's case.

Performance Standard 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, at a minimum, of the following items:

- (1) potential exculpatory information;
- (2) potential mitigating information;
- (3) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
- (4) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;

(5) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

(6) all 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 investigative reports by all law enforcement and other agencies involved in the case; and

(10) all records of evidence collected and retained by law enforcement.

**Performance Standard 4.3
Development of a Theory of the Case**

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. Counsel, during the investigatory stages of the case preparation, must understand and develop strategies for advancing the appropriate defenses on behalf of the client.

**Performance Standard 5.1
The Duty to File Pretrial Motions**

(A) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the defendant is entitled to relief which the court has discretion to grant.

(B) The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of each case.

(C) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights, including later claims of waiver or procedural default.

**Performance Standard 5.2
Preparing, 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) subpoena the production of all helpful evidence, including 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 of having the client testify; and

(4) familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial.

Performance Standard 5.3 Continuing Duty to File 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.

Performance Standard 6.1 Duty of Counsel in Plea Negotiation Process

(A) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial, and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

(B) Counsel should keep the client fully informed of any continued plea discussion and negotiations and promptly convey to the accused any offers made by the prosecution for a negotiated settlement.

(C) Counsel shall not accept any plea agreement without the client's express authorization.

(D) The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.

Performance Standard 6.2
The Process of Plea Negotiations

(A) In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system; and counsel should make the client aware that a guilty plea may have adverse impact upon:

(1) the possibility of forfeiture of assets;

(2) other consequences of conviction including but not limited to deportation, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, and the loss of the right to hold public office;

(3) any possible and likely sentence enhancements or parole consequences.

(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 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; and

(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 diversion program or intervention in lieu of conviction;

(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 pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;

(f) that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, certain information; and

(g) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's release 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.

(3) the position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:

(a) 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;

(b) consider to what extent the alleged victim or victims might be involved in the plea negotiations;

(c) be familiar with any rights afforded the alleged victim or victims under the Victim's Rights Act or other applicable law; and

(d) 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.

(C) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of no contest, a conditional plea of guilty, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*North Carolina v. Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison and parole authorities.

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

Performance Standard 6.3
The Decision to Enter a Plea of Guilty

(A) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages of the potential consequences of the agreement.

(B) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.

(C) If client is a juvenile, consideration should be given to the request that a guardian be appointed to advise the juvenile if an adult family member is not available to act in a surrogate role.

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

Performance Standard 6.4
Entering the Negotiated Plea before the Court

(A) Prior to the entry of the plea, counsel should:

(1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

(2) make certain that the client 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;

(3) explain to the client the nature of the plea hearing and prepare the client for the role that 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 except in the most exceptional circumstances.

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

(C) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Performance Standard 7.1
Counsel's Duty of 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) and counsel should have prepared transcripts of any audio or videotaped witness statements;

(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) where appropriate, consider and list the evidence necessary to support the defense requests for jury instructions:

(15) copies of all relevant statutes and cases; and

(16) outline or draft of closing argument.

(C) Counsel should be fully informed as to the rules of evidence, court rules, 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. Counsel must 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 to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so.

(F) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. If necessary, counsel should file pre-trial motions to insure that the client has appropriate clothing and the court personnel follow appropriate procedures so as not to reveal to jurors that the defendant is incarcerated.

(G) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

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

(I) Counsel shall take necessary steps to insure full official recording of all aspects of the court proceeding.

Performance Standard 7.2

Jury Selection

(A) Preparing for Voir Dire

(1) Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list.

(4) Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:

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

(b) to convey to the panel certain legal principles which are critical to the defense case;

(c) to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

(d) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and

(e) to establish a relationship with the jury.

(5) 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.

(6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. 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.

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

(B) Examination of the Prospective Jurors

(1) Counsel should personally voir dire the panel.

(2) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.

(3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the other jurors and counsel should consider requesting that the court, rather than counsel, conduct the voir dire as to those sensitive questions.

(4) In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

(C) Challenging the Jurors for Cause: 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.

Performance Standard 7.3

Opening Statement

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

(B) Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

(C) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

(D) Counsel's objective in making an opening statement may include the following:

(1) to provide an overview of the defense case;

(2) to identify the weaknesses of the prosecution's case;

(3) to emphasize the prosecution's burden of proof;

(4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

(5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(6) to clarify the jurors' responsibilities;

(7) to state the ultimate inferences which counsel wishes the jury to draw; and

(8) to establish counsel's credibility with the jury.

(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 proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise.

Performance Standard 7.4

Preparation for Challenging 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 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) have prepared a transcript of all audio or videotape recorded statements made by the witness;

(9) where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;

(10) be alert to issues relating to witness credibility, including bias and motive for testifying; and

(11) have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

(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.

Performance Standard 7.5 Presenting the Defendant's 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. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully.

(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) determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
- (4) consider the possible use of character witnesses;
- (5) consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
- (6) review all documentary evidence that must be presented; and
- (7) review all tangible evidence that must be presented.

(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 a judgment of acquittal on each charged count.

Performance Standard 7.6 Preparation of the Closing Argument

(A) Counsel should be familiar with the substantive limits on both prosecution and defense summation.

(B) Counsel should be familiar with the court rules, applicable statutes and law, 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; and

(c) responses to anticipated prosecution arguments;

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

(D) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

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

(2) the need to preserve the objection for appellate review; or

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

Performance Standard 7.7

Jury Instructions

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

(B) Counsel should always submit proposed jury instructions in writing.

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

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

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

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

(G) Upon the completion of charging the jury by the Court, counsel shall renew any objections to the jury instructions prior to the jury deliberating the case.

(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, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

Performance Standard 8.1
Obligations of Counsel at Sentencing Hearing

(A) Among counsel's obligations in the sentencing process are:

(1) where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial and collateral implications;

(2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

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

(4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the pre-sentence investigation report before distribution of the report; and

(6) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

Performance Standard 8.2
Sentencing Options, Consequences and Procedures

(A) Counsel should be familiar with the sentencing provisions and options applicable to the case, including;

- (1) deferred sentence, judgment without a finding, and diversionary programs;
- (2) expungement and sealing of records;
- (3) probation or suspension of sentence and permissible conditions of probation;
- (4) fines, associated fees and court costs;
- (5) victim restitution;
- (6) reimbursement of attorneys' fees;
- (7) imprisonment including any mandatory minimum requirements;
- (8) the effect of "not guilty by reason of insanity" plea; and
- (9) civil forfeiture implications of a guilty plea.

(B) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

- (1) credit for pre-trial detention;
- (2) post release control and consequences of violating post release control (if applicable);
- (3) eligibility for correctional and educational programs;
- (4) availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;
- (5) deportation and other immigration consequences;
- (6) loss of civil rights;
- (7) impact of a fine or restitution and any resulting civil liability;
- (8) possible revocation of probation, possible revocation of parole status if client is serving a prior sentence on a parole status;

(9) suspension of a motor vehicle operator's permit;

(10) prohibition of carrying a firearm; and

(11) or other consequences of conviction including but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, registration as a sex offender, loss of public housing and the loss of the right to hold public office.

(C) Counsel should be familiar with the sentencing procedures, including:

(1) the effect that plea negotiations may have upon sentencing;

(2) the availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;

(3) the use of "victim impact" evidence at any sentencing hearing;

(4) the right of the defendant to speak prior to being sentenced; and

(5) any discovery rules and reciprocal discovery rules that apply to sentencing hearings.

(D) Where the Court uses a pre-sentence report, counsel should be familiar with:

(1) the practices of the officials who prepare the pre-sentence report and the defendant's rights in that process;

(2) the access to the pre-sentence report by counsel and the defendant;

(3) the prosecution's practice in preparing a memorandum on punishment; and

(4) the use of a sentencing memorandum by the defense.

Performance Standard 8.3 Preparation for Sentencing

(A) In preparing for sentencing, counsel should consider the need to:

(1) inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

(2) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(3) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, family obligations, and obtain from the client sources through which the information provided can be corroborated;

(4) 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;

(5) 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;

(6) prepare the client to be interviewed by the official preparing the pre-sentence report; and ensure the client has adequate time to examine the pre-sentence report, if one is utilized by the court;

(7) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences; and

(8) 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.

Performance Standard 8.4 The Prosecution's Sentencing Position

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.

Performance Standard 8.5 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, probation or suspension of part or all of the sentence, psychiatric treatment or drug rehabilitation.

(F) Where appropriate, counsel should prepare the client to personally address the court.

Performance Standard 9.1 **Motion for a New Trial**

(A) Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

(B) When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

(1) the likelihood of success of the motion, given the nature of the error or errors that can be raised; and

(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.

Performance Standard 9.2 **The Defendant's Right to an Appeal**

(A) Following conviction at trial, 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.

(B) Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel (where new counsel is handling the appeal) concerning the proceedings in the trial court.

Performance Standard 10.1
Children Prosecuted as Adults

(A) Counsel representing a child being prosecuted as an adult should be familiar with the law and procedure covering children prosecuted as adults and the law and procedure of the juvenile courts. Counsel should, where possible, have received specialized training in the defense of children in the adult and juvenile courts.

(B) When representing a child who the State is attempting to prosecute as an adult, counsel should contest the bindover proceedings and try to keep the child in the jurisdiction of the juvenile court.

(C) Developing issues of competency, developmental disability, Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder should be explored.

(D) The Juvenile Courts have, unlike the adult courts, treatment resources for children. Counsel should be familiar with Juvenile Court and its resources and policies regarding treatment programs and funding.

(E) Counsel should, whenever a child is eligible, pursue expungement of the child's criminal record.