

**PERFORMANCE GUIDELINES**  
*for*  
**JUVENILE REPRESENTATION IN DELINQUENCY**  
**PROCEEDINGS**

*Standing Committee on Legal Services to the Poor in Criminal Matters*  
*Adopted by the State Bar Board of Directors*  
*April 21, 2017*

## **PURPOSE AND SCOPE OF THE PERFORMANCE GUIDELINES**

The Guidelines are intended to serve several purposes. First and foremost, the Guidelines seek to encourage attorneys who represent juveniles in delinquency proceedings to perform to a high standard of representation, and to promote professionalism among attorneys who represent juveniles in delinquency proceedings.

The Guidelines are intended to alert counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist counsel in deciding upon the particular actions that must be taken in each case to provide the juvenile client the best representation possible. The Guidelines are also intended to provide a measure by which the performance of individual attorneys may be evaluated and to assist in training and supervising attorneys. Finally, the Guidelines are intended to encourage counsel to provide zealous representation even if there is a culture in counsel's jurisdiction of providing less than zealous representation.

The language of the Guidelines is general, implying flexibility of action appropriate to the particular situation at issue. Encouragement of attorneys' use of judgment in deciding upon a particular course of action is reflected by the phrases "should consider" and "when appropriate." When a particular course of action is appropriate in most circumstances, the Guidelines use the word "should." When a particular action is absolutely essential to providing quality representation, the Guidelines use the words "shall" or "must." In some instances, the Guidelines may call for a departure from local practices or may even seem to conflict with local procedures. In such cases, counsel should consult with lawyers, juvenile justice experts, ethics experts, and/or the commentary to the National Standards for guidance. If counsel determines that it is necessary to depart from a local practice in order to protect a client's rights, preserve error and/or meet his ethical obligation to the client, he must do so.

These Guidelines specifically apply to juvenile defense practice in Texas state court from the time of initial representation in trial-level proceedings—recognizing that the impact of these proceedings may extend far beyond the Texas juvenile justice system—to the exhaustion of direct review before the Texas Supreme Court. In any particular case, the Guidelines begin to apply at the time an attorney-client relationship is formed. The Guidelines require counsel to advise clients of their right to seek federal review in appropriate circumstances, but do not extend to representation of juveniles in federal court.

### **Guideline 1.1 General Obligations of Defense Counsel Representing Juveniles**

- A. The primary and most fundamental obligation of defense counsel is to provide competent, zealous, and diligent representation for the juvenile client throughout the entirety of the juvenile's contact with the juvenile justice system to protect and advance the juvenile's procedural and substantive rights. If personal matters make it impossible for counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the juvenile or to withdraw from representation if counsel has already entered an appearance in the case. Counsel's personal opinion of whether the juvenile committed the alleged offense or of the juvenile's need for rehabilitation is totally irrelevant. The juvenile's financial status is of no significance; indigent juveniles are entitled to the same zealous representation as juveniles whose families are capable of paying for an attorney.
- B. Counsel's role in the juvenile court system is to fully elicit, protect, and advance the juvenile's expressed interest and protect the juvenile's procedural and substantive rights. Counsel may not substitute his own view of the juvenile's best interest for the expressed interest of the juvenile. Counsel represents only the interest of counsel's juvenile client. Counsel does not represent the interest of the juvenile's parents and counsel may not substitute the view of the juvenile's parents for the expressed interest of the juvenile. When counsel believes the juvenile's expressed interest will not achieve the best long-term outcome for the juvenile, counsel must provide juvenile with the necessary additional information for the juvenile to understand the potential outcomes and have the opportunity to fully consider his position. If the juvenile does not change his decision, counsel must continue to represent the juvenile's expressed interest.

- C. Counsel also has an obligation to uphold the ethical standards of the State Bar of Texas and to act in accordance with the rules of the court.
- D. Before agreeing to act as counsel or accepting appointment by a court in a particular matter, counsel has an obligation to confirm that counsel has available sufficient time, resources, knowledge, and the appropriate specialized experience necessary to offer quality representation to a juvenile in that matter. If it later appears that counsel is unable to offer quality representation in the case due to a large caseload or any other reason, counsel should inform the court and move to withdraw.
- E. Counsel must consult with the juvenile and provide representation at the earliest stage possible, continuing until the case is disposed and the deadlines for filing a motion for new trial or appeal have passed. If appointed to represent a juvenile, counsel has a duty to continue representation until the case is terminated, the family retains an attorney, or the court appoints a new attorney to the juvenile's case. When appointed or retained to represent a juvenile client, counsel must make every reasonable effort to meet with the juvenile as soon as possible.
- F. Counsel has the obligation to maintain regular contact with the juvenile and keep the juvenile informed of the progress of the case. Counsel should promptly comply with a juvenile's reasonable requests for information, and reply to client correspondence and telephone calls. If a youth is in custody, counsel must visit on a regular basis. If a youth is out of custody, counsel must arrange out of court, face-to-face meetings.
- G. Upon initial contact, counsel should provide the juvenile with an explanation of the defender's role, the attorney-client privilege, and instructions not to talk to anyone about the facts of the case, including the juvenile's parents and siblings, without first consulting with counsel. Counsel should make it clear to the juvenile and to the juvenile's parents that the attorney-client protection does not extend to conversations that include the parents. Counsel should make clear to the juvenile and the juvenile's parents if present that he is the client and that Counsel does not represent the juvenile's parents/guardians and that being the client means that counsel will represent and advocate for what the juvenile says he wants.
- H. Counsel should work to build a relationship with the client's parent or guardian, as appropriate, and communicate with the parent or guardian throughout counsel's representation of the client, as appropriate.
- I. Counsel should appear timely for all scheduled court appearances in a client's case.
- J. Counsel should spend appropriate time on each case regardless of whether counsel is appointed or retained. Counsel shall not provide preferential treatment to a retained client.
- K. Counsel must be alert to, and advise the client of, all potential and actual conflicts of interest, such as if counsel has previously served as a prosecutor in proceedings against the client or a client's family member.
- L. Counsel generally should not agree to represent co-respondents.
- M. If a conflict develops during the course of representation, counsel has a duty to notify the juvenile and, generally, the court. Notice must be provided to the court without disclosing any confidential information. Counsel has a duty to eliminate the conflict, and if he is unable to do that counsel has a duty to withdraw from the representation.
- N. Though allowed by Texas law, acting as both guardian ad litem and defense attorney to the same juvenile presents a significant risk of a conflict of interest, as the former must ethically represent the best interest of the child and the latter has an ethical obligation to represent a child's expressed

interest. When it is impossible to simultaneously meet both ethical obligations, counsel should refuse to take on both roles. If counsel thinks that the child's best interest and express interest are in conflict, counsel should request the court to appoint a guardian ad litem.

- O. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each case.
- P. If counsel withdraws from representation, counsel has an obligation to obtain the juvenile's permission before delivering all contents of the client's file, including all notes by counsel, to new counsel. Counsel shall timely respond to any reasonable request by new counsel regarding the case.

### **Guideline 1.2 Education, Training and Experience of Defense Counsel Representing Juveniles**

- A. Prior to undertaking the defense of a juvenile accused of delinquency, counsel should have sufficient experience to provide competent, zealous, and diligent representation for the case. To provide competent, zealous, and diligent representation to juveniles requires specialized training, preparation, and education in both criminal law and the unique representation of juvenile clients. Counsel must be familiar with the substantive criminal law, the evidentiary rules of criminal procedure, the juvenile delinquency provisions of the Texas Family Code, and civil procedure and its application in the particular jurisdiction, including changes and developments in the law. Counsel must maintain research capabilities necessary for presentation of relevant issues to the court.
- B. Counsel must also be skilled and experienced in all aspects of defense specific to representing youth. Accordingly, counsel should participate in skills training and education programs in order to maintain and enhance skills. Counsel must be knowledgeable about adolescent development and other research that informs specific legal questions regarding the capacity of juveniles in legal proceedings, amenability to treatment, and culpability. Counsel should recognize when to consult experts. Counsel should be knowledgeable about the special status of youth in the legal system. Counsel should receive training regarding communicating with young clients in a manner that is developmentally appropriate and effective. Counsel should understand the consequences of juvenile adjudication and be familiar with the laws regulating child-serving institutions, including schools, social service providers, and mental health service providers.
- C. Representation of juveniles in any case requires particular expertise, but representation of juveniles in unique circumstances or who face especially serious consequences requires even further expertise. Such cases include those of juveniles with mental health or competency concerns, a developmental disability, or a language impairment, as well as those cases in which the juvenile faces adult certification, a placement or probation sentence of more than one year, a determinate sentence, a life-long registration requirement, or immigration consequences. Counsel should accept such a case only after having had experience or training in less complex delinquency matters. When necessary, counsel should request the appointment of co-counsel.
- D. If representing a juvenile with mental illness, a developmental disability, or a language impairment, counsel should become familiar with the symptoms of the juvenile's disability or impairment and those symptoms' potential impact on the juvenile's culpability in the case and potential use as a mitigating factor during disposition. Counsel should also be familiar with how the juvenile's illness may impact his communication with counsel and the attorney-client relationship. Counsel should also be familiar with the side effects of any medication the juvenile may be taking to treat the juvenile's mental impairment and the impact those side effects may have on the juvenile's culpability in the case or use as a mitigating factor during disposition.
- E. Attorneys who represent juveniles who are at risk of being certified as an adult or are certified as adults should be familiar with the *Performance Guidelines for Non-Capital Criminal Defense Representation* adopted by the Texas State Bar Board of Directors in 2011.

### **Guideline 1.3 Additional Obligations of Counsel Representing a Foreign National**

- A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- B. Counsel representing a foreign national should:
  - 1. Immediately determine if the client's ability to communication with counsel, in English, is sufficient to allow counsel and the client to adequately communicate. Counsel must recognize that some foreign nationals speak in dialects with which counsel may be unfamiliar, resulting in unintended miscommunication.
  - 2. If there are any language conflicts, counsel should immediately request the court to appoint an appropriate interpreter to assist the defense in all stages of the proceeding, or counsel may request to withdraw due to language problems.
  - 3. Advise the client of his or her right to communicate with the relevant consular office;
  - 4. Consider whether it would benefit the client to contact the consular office. If counsel determines it could benefit the client, counsel should obtain the consent of the client to contact the consular office and inform it of the client's detention or arrest. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.
- C. Counsel should never act as a language interpreter for the client at a court proceeding. If the client needs a language interpreter, counsel should request an appropriate interpreter from the court.

### **Guideline 2.1 General Obligations of Counsel Pretrial**

- A. When consistent with the juvenile's expressed interest, counsel has an obligation to attempt to secure the prompt release from pretrial detention of the juvenile under the conditions most favorable and least restrictive to the juvenile. Counsel should make every effort to make contact with the juvenile in pretrial detention and to conduct an interview for the purposes of developing a pretrial release plan. If counsel has time to conduct a full initial interview at this stage, he should do so. Refer to Guideline 3.1.
- B. Counsel should be familiar with alternatives to detention and should present those alternatives to the court, as well as a pretrial release plan that complies with the juvenile's expressed interest.
- C. Counsel shall arrange for a full initial interview with the juvenile as soon as practicable after being assigned to the juvenile's case and completing a juvenile's detention hearing. Refer to Guideline 3.1. When necessary, counsel may arrange for a designee to conduct this initial interview. If the initial interview is completed by a designee, counsel shall interview the juvenile personally at the earliest reasonable opportunity.
- D. When representing a juvenile prior to his initial hearing, or in the pretrial period after a juvenile's initial detention hearing, counsel should insist on being present for any interview or questioning between the juvenile and law enforcement, state agents such as probation officers, and the Court to act as the juvenile's observer, record-keeper, and advocate.
- E. When counsel represents the juvenile during a pre-adjudication probation interview, or has the opportunity to prepare the juvenile prior to the interview, counsel must warn the juvenile, using developmentally appropriate language, that anything the juvenile says to the probation officer will likely be shared with the court and may be used for several purposes. Counsel must similarly prepare the juvenile's parents and ask them to express their willingness to support the youth, which is a factor

weighed in intake decisions and often reported to the judge. When possible and appropriate, counsel should make every effort to be present at the probation interview.

## **Guideline 2.2 Obligations of Counsel Regarding Detention Hearings**

- A. If a juvenile is detained, counsel must represent the juvenile at a detention hearing, to be held (at the latest) the second working day after the youth is detained, or the first working day after detention if the youth is detained on a Friday or Saturday. Counsel must be familiar with the factors that the State must demonstrate in order to continue to detain the youth. When appropriate and consistent with the client's expressed interest, counsel must attempt to secure the prompt release of the youth to the youth's family or another close, trusted adult or relative if possible.
- B. Prior to the hearing, counsel should consult with the juvenile and, when appropriate, with the juvenile's parent. Counsel should conduct as much investigation as possible before the hearing to obtain material that can support a request for release. Counsel should review any detention risk assessments and be prepared to challenge the assessment findings if appropriate.
- C. Prior to the hearing, counsel should reach out to the juvenile's family to explain the proceedings, as well as to gauge their ability to support any pretrial release of the juvenile, and to explain to the parents that they must be present at the detention hearing.
- D. Prior to the hearing, when able, counsel should request all relevant material from probation.
- E. Counsel must comply with any order from the court pursuant to the Texas Family Code prohibiting counsel from revealing particular items in the predisposition materials to the juvenile or his parent, guardian, or guardian ad litem.
- F. After conferring with client and clients' parents, counsel should consider whether to request that detention proceedings be recorded. Counsel should consider the possibility of memorializing testimony with a potentially negative impact.
- G. Counsel must be versed in state statutes, case law, detention risk assessment tools, and court practice regarding the use of detention and bail for young people. Counsel should be aware of and able to invoke research on the adverse impacts of detention on youth. Counsel should independently investigate the alternatives to secure detention and review these with the client and present to the court alternatives to detention and a pretrial release plan. Counsel should be familiar with and have visited the jurisdiction's detention facilities.
- H. At the detention hearing, counsel should preserve the juvenile's rights by holding the state to its burden of establishing probable cause that the juvenile has engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation by the juvenile court and that the juvenile should remain detained because the applicable detention criteria has been met.
- I. If the juvenile has any special medical, psychiatric, or security needs, counsel should use those needs to advocate for the juvenile's release. If counsel is unable to obtain pretrial release, and the juvenile remains detained, counsel should alert the court to any special medical, psychiatric, or security needs of the juvenile and request that the court direct the appropriate officials to take steps to meet such special needs. Counsel should consider making any communication to the court that is about a juvenile's special needs and is made outside of the detention hearing in an ex parte communication to the court to protect the client's confidentiality. Counsel should follow up with the juvenile regarding whether medications or treatments are being given in detention, and notify the court or relevant detention facility personnel if any problems arise.
- J. If counsel is appointed after the juvenile's initial detention hearing, counsel should consider requesting a second detention hearing, which must take place within two days of the request.
- K. Counsel should know the procedures for subsequent detention hearings, as well as any rules limiting

the amount of time youth may be detained in pretrial placements.

- L. If counsel is unable to do the appropriate investigation before the juvenile's detention hearing, counsel shall conduct that investigation as soon as possible after the hearing.

### **Guideline 3.1 Initial Interview**

The purpose of the initial interview is both to acquire information from the juvenile concerning pretrial release if the juvenile is detained, and also to provide the juvenile with information concerning the case, the pretrial process, and the charges and possible dispositions. Additionally, counsel should use this interview to begin establishing the trust and rapport necessary to form a good attorney-client relationship.

#### *A. Preparation:*

After being assigned to a case and prior to conducting the initial interview, counsel should:

1. Ensure the interview takes place in a private setting away from the juvenile's parents or any other person who is not a member of the defense team in order to demonstrate privacy and assure the juvenile that the communication is confidential;
2. Be familiar with the elements of the offense and the potential dispositions, if the charges against the client are already known;
3. Make an effort to obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations, and reports made by pretrial services agencies concerning pretrial release, and law enforcement reports; and
4. If representing a client with mental illness, obtain reports from the detention center staff on the client's mental health status at the time of booking into the detention center and the client's current mental health status.

In addition, if the Client is detained, counsel should refer to Guidelines 2.1 and 2.2.

#### *B. The Interview:*

1. At this and all successive interviews and proceedings, counsel should make every effort to overcome barriers to communication, such as the juvenile's age and cognitive development, as well as differences in language or literacy, disability, or different cultural backgrounds. When appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview. Counsel should use developmentally appropriate language and take the time necessary to be sure the juvenile client has understood any exchange. Counsel should use the meeting as an opportunity to build trust.
2. In addition, counsel should obtain from the client, and the client's parent/guardian if necessary, consent and all release forms necessary to obtain the client's medical, psychological, educational, and other records as may be pertinent to the juvenile's case.
3. In some jurisdictions, videoconferencing or teleconferencing is available for meeting with the client from a remote location rather than traveling to the detention center. However, videoconferencing or teleconferencing is not preferred for the initial interview and, because of the unique needs of juvenile clients and communications challenges posed as a consequence of their youth, should be used only as a last resort. Videoconferencing is never recommended for contact with juvenile clients who have a mental illness or developmental disability.

4. Information that counsel should acquire from the client during the interview includes, but is not limited to:
  - a. The client's ties to the community, including length of time the client has lived at current and former residences, relationships with family, family history, education history and length of time at current school, any employment record and history, and immigration status if applicable;
  - b. The client's physical and mental health, educational, employment, and social security/disability records;
  - c. Any necessary information waivers or releases that will assist in the client's defense and preparation for disposition, including HIPAA (Health Insurance Portability and Accountability Act) compliant release in case medical records are required;
  - d. The client's immediate medical needs;
  - e. The client's prior arrests or delinquency findings, as well as any pending charges or outstanding probation terms;
  - f. The ability of the client and the client's family to meet any conditions of pretrial release;
  - g. The names and contact information for individuals who can verify the client's statements, and/or testify to the client's strengths, as well as permission from the client to make contact; and
  - h. Any other information that will assist counsel in his representation, including preparation for investigation, subsequent detention hearings, adjudication, and disposition.
5. While obtaining the information specified in item 4 above during the initial interview is important to preparation of the defense, counsel should recognize that depending on the juvenile's maturity and mental state at the time of the initial interview, and the fact that they have not yet developed a trusting relationship, it may be difficult to obtain some of this information. Counsel will likely need to conduct more than one interview to gather this information. Counsel should obtain information from multiple sources.

*C. Supplemental Information*

Whenever possible, counsel should use the initial interview to gather supplemental information, which should include, but is not limited to:

1. The facts surrounding the client's arrest, including any photographs of excessive force or injury;
2. The client's understanding of, and initial response to, the allegations being made;
3. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
4. Any possible witnesses who should be located, including witnesses who may be relevant to detention, pretrial motions, fact, and disposition;
5. Any evidence that should be preserved; and
6. When appropriate, evidence of the client's competence to stand trial or mental state at the time of the

offense.

### **Guideline 3.2 Role of Counsel with respect to Youth Fitness to Proceed**

- A. Counsel must learn to recognize when a client's ability to participate in his own defense may be compromised due to developmental immaturity, mental health disorders, or developmental/intellectual disabilities.
- B. Counsel must assess whether the client's level of functioning limits his ability to communicate effectively with counsel, as well as his ability to have a factual and rational understanding of the proceedings.
- C. When counsel has reason to doubt the client's fitness to proceed, counsel must gather additional information and consider filing a pre-adjudication motion requesting a hearing for a determination of unfitness to proceed;
- D. Counsel must be versed in the rules, statutes, and case law governing juvenile fitness to proceed.
- E. Counsel must become familiar with experts qualified to assess fitness to proceed and learn the mechanisms for requesting a determination.
- F. Counsel must learn the procedures for a hearing on the issue of fitness to proceed in his jurisdiction and fully comprehend the ramifications if the client is determined unfit to proceed.
- G. Counsel must carefully weigh the consequences of moving forward with the case against the likely consequences of a finding of unfitness to proceed, and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
- H. If counsel decides to proceed with a hearing on the issue of fitness to proceed, counsel must secure a qualified, independent expert to evaluate the client's competence. Counsel must then advise the client in developmentally appropriate language about the evaluation and proceedings, analyze the results of the evaluation, prepare the expert for testimony, and prepare his case substantively and procedurally for the hearing. Counsel must advise the client about the content of the hearing and assist the client in navigating the complexities of the proceedings.

### **Guideline 3.3 Role of Counsel with respect to Certification Hearings**

- A. Counsel must know under what conditions prosecutors can seek to certify or transfer youth to adult court.
- B. Counsel must, consistent with the client's expressed interest, try to prevent adult prosecution of the client.
- C. Counsel must receive the certification report, including the diagnostic study, social evaluation, and other reports requested by the court prior to the certification hearing or request a continuance for time to receive and review the report.
- D. Counsel must comply with any order from the court pursuant to the Texas Family Code prohibiting counsel from revealing particular items in the certification materials to the juvenile or his parent, guardian, or guardian ad litem.
- E. If the prosecutor ultimately files a petition with the juvenile court to transfer the case to adult court, counsel must insist on a certification hearing and must insist that the hearing is recorded to protect the client's due process rights.

- F. Counsel must seek to obtain and review any probation report developed prior to the certification hearing.
- G. At the certification hearing, counsel must:
  - 1. Present all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court, including the client's actual age, maturity, role in the alleged crime, any history of mental illness or trauma, and amenability to treatment, as well as the seriousness of the offense and the availability of youth-specific treatment options in juvenile court;
  - 2. Consider the use of expert witnesses to raise the client's capacity to proceed in adult court, the client's amenability to rehabilitation in juvenile court, and any related developmental issues, and request that the court appoint such an expert;
  - 3. Seek a determination of whether the prosecutor has probable cause to believe the juvenile committed the offense;
  - 4. Challenge any defect in the charges that would deprive the adult court of jurisdiction;
  - 5. Raise any credible facial or "as applied" state or federal challenges to adult prosecution;
  - 6. Hold the state to its burden to demonstrate that certification is appropriate; and
  - 7. Insist the court state a basis for its finding in a written order and that the court consider the statutory factors when making that determination.
- H. In the case where the client is a person charged in juvenile court who is over 18 years old and the prosecution is seeking transfer to adult court for a crime alleged to have occurred before the client's 17th birthday, counsel must hold the prosecution to its burden to demonstrate that there was reason beyond the control of the state not to bring charges or complete the proceedings before the client's 18th birthday.

### **Guideline 3.4 Prosecution Requests for Non-Testimonial Evidence**

Counsel should be familiar with and understand the law governing the prosecution's power to require a client to provide non-testimonial evidence, such as handwriting exemplars and physical specimens, the circumstances in which a client may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

### **Guideline 4.1 Investigation**

- A. Counsel has a duty to conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. Counsel should be familiar with laws and guidelines governing discovery. See Guideline 4.2. Counsel should, regardless of the client's wish to enter a plea of true, determine whether the charges are factually and legally correct and inform the client of potential defenses to the charges. Counsel should explore all avenues leading to facts relevant both to the adjudication and to the disposition in the event of a delinquency finding. In no case should counsel delay a disposition phase investigation based on the belief that the client will not be adjudicated delinquent or that the charges against the client will otherwise be dismissed.
- B. Sources of review and investigative information should include the following:
  - 1. *Allegation documents, statutes, and case law*

The directive to apprehend, allegations, and offense report, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific allegations that have been brought against the client. The relevant statutes and precedents should be examined to identify:

- a. The elements of the offense with which the client is charged;
- b. The defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses;
- c. Any lesser included offenses that may be available;
- d. Any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy; and
- e. Whether the allegations requires determinate disposition and the applicable disposition options for the particular allegations.

2. *The client*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to obtain information relevant to the client's social history as described above in Guideline 3.1. Information relevant to disposition also should be obtained from the client. To that end, counsel will usually need to conduct multiple interviews with the client.

3. *Potential witnesses*

Counsel should interview all potential witnesses, including any complaining witnesses, others adverse to the client, and witnesses favorable to the client. If counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.

4. *The police and prosecution*

Counsel should utilize available discovery procedures to secure information related to the client's case in the possession of the prosecution or law enforcement authorities, including police reports.

5. *The courts*

Counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel should also review the client's prior court file(s).

6. *Information in the possession of third parties*

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

7. *Physical Evidence*

Counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or disposition, regardless of whether the prosecutor has tendered such reports, and should examine any such physical evidence. Upon completion of the inspection of the physical evidence, counsel should determine whether independent analysis or testing of the evidence is appropriate and, if so, seek the services of a qualified expert to complete such analysis or testing.

8. *The scene*

Counsel or an investigator should view the scene of the alleged offense, making an effort to do so as soon as possible after counsel is appointed or retained. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense.

9. *Expert Assistance*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize ex parte and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:

- a. Prepare the defense;
- b. Adequately understand the prosecution's case;
- c. Rebut the prosecution's case or provide evidence to establish any available defense;
- d. Investigate the client's fitness to proceed, mental state at the time of the offense, or capacity to make a knowing and intelligent waiver of constitutional rights; and
- e. Mitigate any punishment that may be assessed after a verdict or plea of true to the alleged offense.

10. *Mental Health Records*

If representing a client with mental illness or a developmental disability, counsel should seek available mental health records (e.g., records of previous court cases in which mental health issues may have been raised; mental health treatment records, whether institutional or in the community; school records). Counsel should consider obtaining these records using a HIPAA (Health Insurance and Portability Act) release instead of a subpoena in order to maintain client confidentiality. Where an agency refuses to release protected or sensitive information without a subpoena, counsel should request the court to order the response to be submitted directly to counsel.

- C. During case preparation and throughout adjudication, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel also should consider how best to respond to objections that could be raised by the prosecution.

**Guideline 4.2 Formal and Informal Discovery**

- A. Counsel has a duty to pursue formal discovery procedures provided by the rules of the jurisdiction and such informal discovery methods as may be available. Counsel should pursue formal and informal discovery as soon as practicable and to the extent reasonably necessary to zealously and effectively represent the client. Counsel should file a request for discovery in compliance with statutory discovery requirements as soon as practicable upon beginning representation of the client.
- B. Counsel should seek discovery of the following items, if they exist:
1. Potential exculpatory information;
  2. Potential mitigating information;
  3. Potential favorable information;

4. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  5. Any other information that may be used to impeach the testimony of prosecution witnesses;
  6. All oral or written statements by the client, and the details of the circumstances under which the statements were made;
  7. The prior juvenile record of the client and any evidence of other misconduct that the government may intend to use against the client;
  8. Statements made by co-respondents;
  9. Statements made by other potential witnesses;
  10. All official reports by all law enforcement and other agencies involved in the case, e.g., police, school, arson, hospital, results of any scientific test(s);
  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, including radio and computer transmissions;
  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;
  15. All physical and forensic lab evidence in custody of law enforcement, including samples of evidence that has the potential to dissipate; and
  16. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.
- C. Counsel should seek prompt compliance with all formal discovery requests and sanctions for failure to comply.
- D. Counsel should timely comply with all of the requirements governing disclosure of evidence by the client and notice of defenses and expert witnesses. Counsel should be aware of the possible sanctions for failure to comply with those requirements.

### **Guideline 4.3 Theory of the Case**

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case from which to organize the facts and legal basis of the defense, create a strategy, and determine subsequent actions. Similarly, counsel should also develop strategies for advancing appropriate defenses and mitigating factors, including those related to mental health, on behalf of the client.

## **Guideline 5.1 Deciding Whether to File Pretrial Motions**

- A. Counsel must consider filing all appropriate pretrial motions whenever a good faith reason exists to believe that the client is entitled to relief that the court has discretion to grant. Counsel should consider whether pursuing a particular pretrial motion is necessary to protect the client's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel should thus consider whether:
1. The 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;
  3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions; and
  4. Whether a pretrial motion is a good opportunity to introduce the court to issues, such as adolescent brain development, that impact a child's actions.
- B. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:
1. The pretrial custody of the client and the filing of a motion to review conditions of release;
  2. The competency of the client;
  3. The constitutionality of the relevant statute or statutes;
  4. Potential defects in the charging process;
  5. The sufficiency of the charging document;
  6. Severance of charges or respondents;
  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 corresponding or additional state constitutional provisions and statutes, including:
    - a. The fruits of illegal searches or seizures;
    - b. Any statements that do not comply with the requirements of the Texas Family Code;
    - c. Involuntary statements;
    - d. Statements obtained unreliably or in violation of the client's right to counsel or privilege against self-incrimination; and
    - e. Unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification.

9. Change of venue;
  10. Access to resources or experts that may be denied to the client because of the client's indigence;
  11. The client's right to a speedy trial;
  12. The client's right to a continuance in order to adequately prepare or present the client's case;
  13. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion; and
  14. Matters of trial or courtroom procedure.
- C. Counsel should request a full evidentiary hearing on any pretrial motion to preserve the issue adequately for appellate review, and must prepare for a motions hearing as he would for trial, including preparing the presentation of evidence and examination of witnesses.
- D. Counsel should consider the advisability of filing a motion to disqualify or substitute the presiding judge. This consideration should include any information about the judge's history in aligning with the prosecution on motion rulings, any routine refusals of plea bargains, the client's experience with the judge, and any specific dislike of counsel, other defense counsel, or defense counsel in general. The decision to disqualify a judge shall only be made when it is a reasoned strategy decision and will benefit the client. The final decision rests with counsel.
- E. Any motions that contain requests or agreements to continue a trial date should be discussed with the client and client's parent or guardian before they are made.
- F. Motions and writs should include citations to applicable state and federal law in order to protect the record for collateral review in federal courts.

### **Guideline 5.2 Filing and Arguing Pretrial Motions**

- A. Counsel should file any and all appropriate pretrial motions. 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, counsel should be aware of the effect the filing might have upon the client's speedy trial rights.
- B. Prior to any pretrial hearing at which the client is present, counsel must communicate to the client in developmentally appropriate language what is likely to happen before, during, and after the hearing. Counsel should provide the client with clear instructions about courtroom attire and conduct. Counsel should determine whether the proceedings should be public or private and request private proceedings if appropriate.
- C. If a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
1. Investigation, discovery, and research relevant to the claim advanced;
  2. The subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
  3. Full understanding of the burdens of proof, evidentiary principles, and trial court procedures applicable to the hearing, including the benefits and potential consequences and costs of having

- the client testify;
4. The assistance of an expert witness when 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.
- D. In every case that proceeds to adjudication, counsel should file timely and appropriate motions in limine to prohibit improper prosecutorial practices and to shield the jury or the judge from potentially improper evidence. Counsel should remain aware that the granting of a motion in limine alone will not preserve error on appeal.
- E. Counsel should request that any pretrial hearing, argument, or ruling is on the record or in writing.
- F. Counsel has a continuing duty to raise any issue that was not raised before adjudication, because the facts supporting the motion were not reasonably available at that time. Further, counsel shall be prepared, when appropriate, to renew a pretrial motion if new supporting information is disclosed in later proceedings.
- G. When appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.
- H. When negotiating the entry of a plea of true, counsel should consider reserving the right to appeal the denial of a pretrial motion.

#### **Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel**

- A. The ultimate decision as to whether or not to accept a negotiated plea of true lies with the client.
- B. Counsel should obtain the consent of the client before entering into any plea negotiation. Exploratory inquiries of the prosecution prior to obtaining client consent are permitted.
- C. Prior to advising the client on whether to accept a plea agreement, counsel must have conducted appropriate investigation and completed an assessment of the strength of the state's case, as well as possible defenses, including an analysis of controlling law and the evidence likely to be introduced at trial. See Guideline 4.1.
- D. After appropriate investigation and case review, counsel should explore with the client in developmentally appropriate language the possibility and desirability of pursuing a plea rather than proceeding to trial. Counsel should 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 enter a plea of true or not true, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should ensure the client understands all the consequences of a decision to accept a plea agreement and all the rights that decision waives. Counsel should also explain to the client the impact of the decision to enter a plea of true on the client's right to appeal. Counsel shall at all times render candid advice.
- E. Counsel should 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. Counsel may not accept any plea agreement without the client's express authorization.
- F. Counsel should explain to the client's parents any role they would play in a plea agreement and the subsequent disposition, while respecting the duty of confidentiality the attorney owes the juvenile.

- G. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to prepare a defense.
- H. Counsel should confirm that all conditions and promises comprising a plea agreement between the prosecution and defense are included in writing or in the transcript of the plea.
- I. In developing a negotiation strategy, counsel should try to discern the position of any alleged victim with respect to adjudication and disposition. In this regard, counsel should:
  - 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, as well as limitations; and
  - 4. Be familiar with the practice of the prosecutor or victim-witness advocate working with the prosecutor and to what extent, if any, the prosecution defers to the wishes of the alleged victim.
- J. In conducting plea negotiations, counsel should be familiar with:
  - 1. The various types of pleas that may be agreed to, including a plea of true;
  - 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 detention authorities;
  - 4. Possibilities of pretrial diversion, deferred prosecution and specialty courts; and
  - 5. Any recent changes in the applicable statutes or court rules and the effective dates of those changes.

### **Guideline 6.2 The Contents of the Negotiations**

- A. In conducting plea negotiations, counsel should become familiar with any practices and policies of the particular jurisdiction, judge, and prosecution that may impact the content and likely results of a negotiated plea agreement.
- B. In order to develop an overall negotiation plan, counsel should be fully aware of, and review with the client in developmentally appropriate language, all short- and long-term consequences of accepting the plea, including:
  - 1. Whether the charges carry the possibility of a determinate disposition and the length of any determinate disposition, as well as any fines or restitution that may be ordered;
  - 2. The potential for recidivist disposition, including habitual offender statutes and disposition enhancements, and all other applicable disposition statutes or case law;
  - 3. If a plea involving juvenile probation is under consideration, the permissible conditions of probation with which the client must comply in order to avoid probation modification;

4. Any registration requirements including sex offender registration and any collateral consequences of that registration;
  5. The availability of appropriate diversion and rehabilitation programs;
  6. The possible and likely place and manner of confinement;
  7. Deportation and other possible immigration consequences that may result from the plea;
  8. Other potential consequences of a delinquency finding including, but not limited to: consequences at the juvenile's school including suspension or expulsion, suspension of a motor vehicle operator's license, denial of federal student loan eligibility, conditions associated with a sex offense, enhancements in future adjudications in juvenile court or criminal prosecutions in adult court, and potential federal prosecutions;
  9. The effect on appellate rights; and
  10. That plea bargains are not binding on the court.
- C. Counsel should proactively discuss with the client whether immigration consequences are a concern, investigate the immigration consequences of potential pleas, and request the court appoint an immigration expert to advise the client if appropriate.
- D. In developing a negotiation strategy, counsel should be completely familiar with:
1. Concessions that the defense might offer the prosecution as part of a negotiated settlement, including, but not limited to:
    - a. Declining to assert or litigate any particular pretrial motions;
    - b. Agreeing to fulfill specified restitution conditions or to participate in community work or service programs, or in rehabilitation or other programs;
    - c. Providing the prosecution with assistance in prosecuting or investigating the present case or other alleged delinquent behavior; and
    - d. Foregoing appellate remedies.
  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 from detention pending disposition or appeals;
    - b. That the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of an adjudication;
    - 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 client will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct related to the case at hand;
    - e. That the client will receive, with the agreement of the court, a specified disposition or sanction

or a disposition or sanction within a specified range;

- f. That the prosecution will take, or refrain from taking, at the time of disposition or in communications with the preparer of the official predisposition 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 disposition or in communications with the preparer of the official predisposition report, information specified by counsel; and
- h. That the client will receive, or the prosecution will recommend, specific benefits concerning the client's placement or manner of confinement or release and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from detention.

- 3. The client's and the client's parents' ability to comply with the court's conditions and the consequences of failing to do so.

E. Counsel should ensure that the client has sufficient time to fully consider any proposed plea.

### **Guideline 6.3 Counsel's Obligations to Client Considering a Plea Agreement**

Counsel shall make it clear to the client in developmentally appropriate language that the client must make the ultimate decision of whether to enter a plea of true. Counsel should investigate and explain to the client in developmentally appropriate language 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 delinquency finding after adjudication. Counsel should not base a recommendation of a plea of true solely on the client's acknowledgement of committing an offense or solely on a favorable disposition offer. The decision to enter a plea of true rests solely with the client, and counsel should not attempt to unduly influence that decision. However, counsel should advise the client of the benefits and risks of each course of action. If the client's expressed interest as to the plea decision conflicts with counsel's belief, counsel shall nonetheless advocate for the client's expressed interest. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client in developmentally appropriate language the full content of the agreement, as well as the advantages and disadvantages and potential direct and collateral consequences of the agreement. Counsel shall advise the client if the agreement carries a risk that the client will be deported and the extent of that risk if it is clear. Counsel shall ensure that client's acceptance of any plea is knowing, intelligent, and voluntary.

### **Guideline 6.4 Entering the Plea Agreement**

- A. Prior to entering the plea agreement, counsel must:
  - 1. Advise the client in developmentally appropriate language that nothing heard by the judge regarding the plea can be heard in any other hearing in the case if the judge rejects the agreed plea;
  - 2. Prepare the client for the role the client will play in the hearing, including answering questions from the judge and providing a statement concerning the offense;
  - 3. If the plea is a non-negotiated plea, inform the client that once the plea has been accepted by the court, it may not be withdrawn after the disposition has been pronounced by the court; and
  - 4. Advise the juvenile of his right to have the records sealed.

- B. When entering the plea, counsel should confirm that the full content and conditions of the plea agreement are placed on the record before the court.
- C. If, during the plea colloquy, it becomes clear to counsel that the client does not understand the proceedings, counsel must request a recess or a continuance to talk to the client.
- D. After entry of the plea, counsel should be prepared to address the issue of release pending disposition if disposition is set for a different day. If the client has been released pending adjudication, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. If the client is in custody prior to the entry of the plea, counsel should, when practicable, advocate for and present to the court all reasons warranting the client's release pending disposition.
- E. Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the proceedings with the client in developmentally appropriate language and to respond to any client questions and concerns.

### **Guideline 7.1 General Preparation for Adjudication**

- A. Throughout preparation and adjudication, counsel should consider the theory of the defense and make decisions and act in a manner consistent with that theory.
- B. The decision to seek to proceed with or without a jury during both the adjudication phase of the trial rests solely with the client after consultation with counsel. Counsel should discuss in developmentally appropriate language the strategic considerations relevant to this decision with the client, including the availability of different disposition options depending on whether disposition is assessed by a judge or jury. Counsel has an obligation to advise the court of the client's decision in a timely manner.
- C. Counsel should have completed investigation, discovery, and research in advance of adjudication such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. Refer to Guidelines 4.1 and 4.2.
- D. Counsel should have prepared all potential witnesses prior to adjudication, and subpoenaed all necessary witnesses before adjudication, if appropriate.
- E. When appropriate, counsel should prepare the following materials to be available at the time of trial:
  1. Copies of all relevant documents filed in the case;
  2. Relevant documents prepared by investigators;
  3. Relevant documents provided by the prosecution;
  4. Reports, test results, and other materials subject to disclosure;
  5. Voir dire topics, plans, or questions;
  6. An outline or draft of counsel's 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 and defense subpoena returns;

10. Prior statements of all prosecution witnesses (e.g., transcripts, police reports, investigator memos);
  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 if available;
  16. A list of the evidence necessary to support defense requests for jury instructions;
  17. Copies of all relevant statutes and cases; and
  18. An outline or draft of counsel's closing argument, which will evolve over the course of the trial.
- F. If counsel or the prosecution will seek to introduce an audio or video tape or a DVD of a police interview or of any other event, counsel should 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 by stipulating those matters with the prosecution.
  - G. Counsel should be familiar with the rules of evidence, the law relating to all stages of the adjudication process, and any legal and evidentiary issues that can be reasonably anticipated to arise at adjudication.
  - H. Counsel should decide if it is beneficial to secure an advance ruling on evidentiary issues likely to arise during adjudication (e.g., use of prior adjudications to impeach the juvenile) and, when appropriate, counsel should prepare motions and memoranda for such advance rulings.
  - I. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements that they may have made or adopted, and should consider doing so outside the presence of the jury
  - J. Counsel should be aware of the right to request a district judge in a county where the assigned judge is not elected and not an attorney, and enforce that right when appropriate.
  - K. Throughout the adjudication process, counsel should endeavor to establish a proper record for appellate review. To prepare, counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and make a record sufficient to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. As part of this effort, counsel should request, whenever necessary, that all trial proceedings, including voir dire, be recorded.
  - L. Prior to trial, counsel should fully explain the trial process, beginning with jury selection, to the client. Counsel should advise the client as to suitable courtroom dress and demeanor, making sure the client knows that the jury/judge will always be paying attention to his actions. If the client is detained, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in detention facility clothing. When necessary, counsel should file pretrial motions seeking appropriate clothing for the client and that court personnel follow appropriate procedures so as not to reveal to jurors that the client is detained. Counsel should attempt to prevent the client from enduring any form

of physical restraint, such as shackling, during the adjudication process.

- M. Counsel should plan with the client the most convenient system for conferring throughout the trial. Counsel should supply the client with pen and paper to take and write notes during the trial. In instances where client is detained, counsel should seek a court order to have the client available for conferences.
- N. If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions should be discussed with the client in developmentally appropriate language before they are made.
- O. Counsel should be familiar with direct and collateral consequences of adjudication, including short-term and long-term consequences, such as:
  - 1. The possible and likely place and manner of confinement;
  - 2. Any possible consequences for clients involved in the child welfare system;
  - 3. Any registration requirements, including sex offender registration, and any collateral consequences of that registration;
  - 4. The possibility that an adjudication or admission of the offense could be used for cross-examination or advanced consequences in the event of future delinquency cases or criminal cases in adult court;
  - 5. Deportation and other possible immigration consequences that may result from the adjudication; and
  - 6. Other potential consequences of a delinquency finding including, but not limited to: consequences at the juvenile's school including suspension or expulsion; suspension of a motor vehicle operator's license; denial of federal student loan eligibility; conditions associated with a sex offense; use in future adjudications in juvenile court or possible enhancements in criminal prosecutions in adult court; and potential federal prosecutions.

## **Guideline 7.2 Voir Dire and Jury Selection**

### *A. Preparation*

- 1. Counsel should 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. Counsel should be familiar with local practices and the individual judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to those procedures. 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.
- 3. Prior to jury selection, counsel should seek to obtain a prospective juror list and the standard jury questionnaire if feasible, and counsel should seek access to and retain the juror questionnaires that have been completed by potential jurors, as well as criminal history checks or other information relating to the prospective jurors in the State's possession. Counsel should also consider requesting use of a separate questionnaire that is tailored to the client's case and should determine the court's method for tracking juror seating and selection.

4. Counsel should tailor voir dire questions to the specific case. If appropriate, counsel should develop and file in advance of trial written voir dire questions that counsel would like asked in open court. 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 client about peremptory strikes and challenges for cause;
  - b. To determine jurors' attitudes toward legal principles that are critical to the defense, including, when appropriate, the client's decision not to testify;
  - c. When permitted, to preview the case for the jurors so as to lessen the impact of damaging information that 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 prosecution; and
  - e. To establish a relationship with the jury when the voir dire is conducted by counsel.
5. Counsel should be familiar with the law concerning challenges for cause, peremptory strikes, and requests for additional strikes. Counsel should also be aware of state and federal law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause that have been denied:
6. When appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
7. Counsel should consider seeking assistance from a colleague or a defense team member to record venire panel responses and to observe venire panel reactions. Counsel should also communicate with the client regarding the client's venire panel preferences.

#### *B. Examining the Prospective Jurors*

1. Counsel should take all steps necessary to protect the voir dire record for appeal, including filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.
2. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors.
3. In a group voir dire, counsel should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors or be prepared to examine such prejudices with the panel and address them appropriately.
4. Counsel should be familiar with case law regarding the client's right to be present during individual voir dire. Counsel should fully discuss the risks and benefits of waiving this right with the client. Where anything occurs outside of the client's presence, counsel should request the opportunity to explain what happened to the client.
5. Every part of jury selection should be on the record, including in-chambers discussions. Where something occurs outside of the record, counsel must put an account on the record at the earliest possible opportunity.

#### *C. Challenges*

1. Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.
2. If challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
6. Counsel should object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecution.
7. Counsel should make every effort to preserve error in voir dire by urging proper objection or instruction.

### **Guideline 7.3 Opening Statements**

#### **A. Defense Counsel's Opening Statement**

1. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
2. 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.
3. Counsel should consider the strategic advantages and disadvantages of disclosing particular information during the opening statement or, in special circumstances, of deferring the opening statement until the beginning of the defense case. Counsel's opening statement may also incorporate these objectives:
  - a. To provide an overview of the defense case;
  - b. To identify the weaknesses of the prosecution's case;
  - c. To educate the judge and jury about the juvenile brain and developmental science if appropriate;
  - d. To identify and emphasize the prosecution's burden of proof;
  - e. To summarize the testimony of witnesses, and the role of each witness in relationship to the entire case;
  - f. To describe the exhibits that will be introduced and the role of each exhibit in relationship to the entire case;
  - g. To clarify the jurors' responsibilities;
  - h. To establish counsel's credibility with the jury;

- i. To prepare the jury for the client's testimony or failure to testify; and
  - j. To state the ultimate inferences that counsel wishes the jury to draw.
4. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecution makes to the jury during its opening statement.

**B. Defense Counsel's Obligations During the Prosecution's Opening Statement**

1. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking a cautionary instruction unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
  - a. The significance of the prosecution's error;
  - b. The possibility that an objection might enhance the significance of the information in the jury's mind; and
  - c. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

**Guideline 7.4 Preparing to Confront and Confronting the Prosecution's Case**

- A. Counsel should research and be fully familiar with all of the elements of each charged offense and should attempt to anticipate weaknesses in the prosecution's case.
- B. Counsel should anticipate weaknesses in the prosecution's proof and should research and consider preparing corresponding written motions for a directed verdict in advance of trial.
- C. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- D. In preparing for cross-examination, counsel should:
  1. Integrate the 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 that may hurt the defense case;
  3. File a motion requesting the names and addresses of witnesses the prosecution might call in its case-in-chief or in rebuttal;
  4. Formulate a cross-examination plan for each of the anticipated witnesses;
  5. Have prepared a transcript of all audio or video tape-recorded statements made by witnesses;
  6. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  7. Be alert to inconsistencies or variations in a witness's testimony;
  8. Be alert to possible variations between different witnesses' testimony;

9. When appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;
  10. When appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
  11. Be alert to issues relating to witness credibility, including bias and motive for testifying; and
  12. Have prepared, for introduction into evidence, all documents that counsel intends to use during cross-examination, including certified copies of records such as prior convictions of witnesses and prior sworn testimony of witnesses.
- E. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including children or expert witnesses whom the prosecution 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. Prior to trial, counsel should ascertain whether the prosecution has provided copies of all prior statements of the witnesses it intends to call at trial. If disclosure is not timely made after the witness has testified, counsel should prepare and argue (a) motion(s) for:
1. Exclusion of the witness's testimony and all evidence affected by that testimony;
  2. A mistrial;
  3. Dismissal of the case;
  4. Adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess when necessary;
  5. A cautionary instruction; or
  6. Any other sanction counsel believes would remedy the violation.
- G. If appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for an adjudication of not delinquent. Counsel should request, if necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

#### **Guideline 7.5 Preparing and Presenting the Defense Case**

- A. Counsel should develop, in advance of trial and in consultation with the client, an overall defense strategy. Counsel should reassess the strategy after the state has closed its case.
- B. Counsel should discuss with the client in developmentally appropriate language all of the considerations relevant to the client's decision to testify, including that the right to testify is the client's constitutional right. Counsel should also be familiar with the ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should advise the client in developmentally appropriate language of the advantages and disadvantages of testifying, as well as the rules regarding testifying under oath and the possible consequences for speaking untruthfully while under oath. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify. If the client does not follow counsel's advice, counsel should

consider having the client acknowledge in writing the advice provided by counsel. The decision to testify rests solely with the client, and counsel should not attempt to unduly influence that decision. If the client does decide to testify, counsel must advise the client against making false statements and prepare the client for cross-examination by the state. Counsel must be aware of the laws regarding the admissibility of prior bad acts by juveniles.

- C. Counsel should 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.
- D. In preparing for presentation of a defense case, counsel should do the following:
  - 1. Consider all potential evidence that could corroborate the defense case, and the import of any evidence that is missing, and organize all evidence and witnesses selected for trial;
  - 2. After thorough investigation and consultation with the client, make the decision of which witnesses to call;
  - 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 may be presented by the state;
  - 10. Review all tangible evidence that may be presented by the state; 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, counsel should consider the elements/areas of the defense case that may be susceptible to a rebuttal by the prosecution.
- G. Counsel should prepare all defense witnesses for direct and cross-examination. Counsel shall advise all witnesses about the sequestration of witnesses, the purpose of that rule, and the consequences of disregarding it. Counsel should also advise witnesses of suitable courtroom dress and demeanor.
- H. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- I. Counsel should conduct redirect examination as needed.
- J. If an objection by the state to defense evidence or testimony is sustained, counsel should make

appropriate efforts to re-phrase the question(s) and make an offer of proof.

- K. Counsel should make objections to improper cross-examination by the prosecution.
- L. Counsel should keep a record of all exhibits identified and/or admitted.
- M. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

### **Guideline 7.6 Closing Arguments**

- A. Before argument, counsel should file and seek to obtain rulings on all requests for jury instructions in order to tailor or restrict the argument properly in compliance with the court's rulings.
- B. Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- C. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- D. Counsel should develop closing prior to hearing but be prepared to adjust depending on development in the case or courtroom.
- E. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and should consider:
  - 1. Highlighting weaknesses in the prosecution's case;
  - 2. Describing favorable inferences to be drawn from the evidence;
  - 3. Incorporating into the argument:
    - a. The theory and the theme(s) 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;
    - e. Visual aids and exhibits; and
  - 4. The effects of the defense argument on the prosecution's rebuttal argument.
- F. Counsel should consider incorporating into the closing argument a summation of the promises of proof the prosecution made to the jury during its opening.
- G. Whenever the prosecution exceeds the scope of permissible argument, counsel should object, request a mistrial, or seek a cautionary instruction, unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
  - 1. Whether the argument is harmful (e.g., a fact that is not in evidence that is nevertheless fairly innocuous);

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.

### **Guideline 7.6 Jury Instructions**

- A. Counsel should file proposed or requested jury instructions after the close of evidence and before closing argument.
- B. Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.
- C. Counsel should always submit proposed jury instructions in writing.
- D. When appropriate, counsel should 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. Counsel should provide case law or other authority in support of the proposed instructions.
- E. Counsel should 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, counsel should 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, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, when 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, 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.
- I. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.
- J. Counsel should move to discuss any jury notes or responses to jury notes regarding substantive matters in open court and on the record, and to include the actual notes and responses in the record for appellate purposes.

### **Guideline 8.1 Preparation for Disposition**

Counsel should have prepared for disposition alongside his preparations for adjudication.

- A. Counsel should be familiar with the disposition provisions of the Texas Family Code and the specific options available in the particular case, including:
  1. Whether there is a possibility of a determinate disposition.
  2. The potential for impact on future adjudications and dispositions within the juvenile justice system and disposition enhancements, as well as all other applicable disposition statutes or case law;

3. If a disposition involving juvenile probation is possible, the permissible conditions of probation with which the client must comply in order to avoid probation modification;
  4. The availability of appropriate diversion and rehabilitation programs; and
  5. Applicable court costs.
- B. In preparation for disposition, counsel should be aware of, and have visited, example potential out-of-home placement options, including group homes, foster care, residential programs, and treatment facilities.
  - C. Counsel should have obtained from the client and other sources any information or documentation, including affidavits, to support the client's disposition plan, as well as preparing witnesses to testify at the disposition hearing when appropriate.
  - D. Counsel should prepare the client for any interview conducted by the official preparing the predisposition report.
  - E. Counsel should discuss with the client, in developmentally appropriate terms, the array of options for disposition and identify the client's preferences for disposition.
  - F. Counsel should consider the need for and availability of disposition specialists prior to disposition, and seek the assistance of such specialists whenever possible and appropriate.
  - G. Counsel should actively advise probation on their preparation of a disposition plan. If counsel finds that probation is not responsive, counsel should consider preparing a disposition plan separate from probation's plan.
  - H. Counsel must comply with any order from the court pursuant to the Texas Family Code prohibiting counsel from revealing particular items in the disposition materials to the juvenile or his parent, guardian, or guardian ad litem.
  - I. Counsel should be familiar with the procedures for disposition hearings, including the rules of evidence and burden of proof at such hearings, and the effect that plea negotiations may have upon the discretion of the court.
  - J. Counsel should inform the client of the client's right to speak at the disposition proceeding and assist the client in preparing the statement, if any, to be made to the court, making clear the possible consequences that any admission may have upon an appeal, subsequent retrial, or trial on other offenses.
  - K. Counsel should inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings.
  - L. Counsel should maintain regular contact with the juvenile if the adjudication hearing and disposition hearing are set for different days.
  - M. Prior to disposition, counsel should confer with the client's parents, when appropriate, to explain the disposition process and to determine the parents' willingness to support the client's proposed disposition. Counsel must ensure parents know their role in the process.

## **Guideline 8.2 The Social History or Predisposition Report**

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

- A. Determine whether a social history report will be prepared and submitted to the court prior to disposition; if preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
- B. Discuss the importance of the social history report with the client and prepare the client to participate;
- C. Provide to the official preparing the report relevant information favorable to the client, including, when appropriate, the client's version of the offense, and supporting evidence;
- D. Attend any interview of the client by an investigator;
- E. Review the completed report and advise probation on any suggested changes prior to the disposition hearing;
- F. Take appropriate steps to preserve and protect the client's interests, including requesting that a new report be prepared with the challenged or unproved information deleted before the report is distributed to correctional and probation officials, when the defense challenges information in the social history report as being erroneous or misleading and:
  1. The court refuses to hold a hearing on a disputed allegation adverse to the client;
  2. The prosecution fails to prove an allegation; or
  3. The court finds an allegation not proved.
- G. Counsel should ensure that there is no error in the report that could result in a misclassification of a sanction level after disposition.
- H. Counsel should request to see copies of the report to be distributed in order to verify that challenged information actually has been removed from the report.
- I. If counsel attempts to work with probation to develop the social history report and finds that probation is unresponsive, and counsel feels that a separate disposition report is necessary, counsel should develop a defense disposition memorandum to distribute. Counsel should request his own expert to develop a defense predisposition report when appropriate. Among the items counsel should consider including in the memorandum are:
  1. Presentation of an individualized disposition proposal that takes into account the client's expressed interest;
  2. Information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, any mental health concerns, extracurricular activities, social strengths, employment record and opportunities, educational background, and family and financial status;
  3. Information concerning the availability and appropriateness of community-based treatment programs, community treatment facilities, and community service work opportunities;
  4. Information that would support a disposition other than out-of-home placement, such as the

potential for rehabilitation, the nonviolent nature of the offense, and the availability of the clients' parents to support the client through completing any terms of probation;

5. Challenges to incorrect or incomplete information in the official predisposition report or any prosecution disposition memorandum;
6. Challenges to improperly drawn inferences and inappropriate characterizations in the official predisposition report or any prosecution disposition memorandum; and
7. Information contrary to that before the court and that is supported by affidavits, letters, and public records.

### **Guideline 8.3 The Disposition Hearing**

- A. Counsel should be prepared at the disposition hearing to take the steps necessary to advocate fully for the requested disposition 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 disposition.
- C. Counsel must ensure that the facts the court considers in reaching its disposition decision are made part of the record, as well as counsel's objections to the disposition plan and any disputed findings of fact that serve as a basis for the court's decision.
- D. Counsel must identify and preserve legal and constitutional issues for appeal.
- E. When the state disputes or challenges information favorable to the client, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- F. Counsel should request specific orders or recommendations from the court concerning the place of confinement, psychiatric treatment or drug rehabilitation, and against deportation/exclusion of the client.

### **Guideline 8.4 Obligations to Client Awaiting Placement**

Counsel has continuing obligations to a client who is awaiting placement pursuant to a disposition order. Counsel should pursue efforts to keep the client in the least restrictive environment prior to placement if necessary, appropriate, and within the client's expressed interest.

### **Guideline 8.5 Sealing, Restriction, and/or Expunction of Record**

After final disposition of the case, counsel should inform the client whether the client's records in the case will be automatically sealed or restricted. If the client's record will not be automatically sealed or restricted, counsel should inform the client of any procedures available for requesting that the client's records be sealed, restricted, and/or expunged and, if such procedures may be available in the client's case, when and under what conditions the client may pursue a sealing, restriction, or expunction. If appropriate, counsel should inform the client's family as well.

### **Guideline 9.1 Duties of Defense Counsel after Disposition**

- A. A client’s right to counsel, and counsel’s responsibilities to the client, do not terminate upon a finding of delinquency, or imposition of disposition.
- B. Regardless of whether appointed or retained, and irrespective of the terms of any contract or legal services agreement, counsel must continue representation of the client until counsel has been formally granted permission to withdraw as counsel of record. Counsel shall continue to represent the client until the case has completed, including in motion for new trial proceedings when appropriate, or until new counsel has been appointed or retained.
- C. If the client wishes to pursue post-adjudication remedies, counsel should do the following prior to seeking to withdraw as counsel for post-adjudication proceedings:
  - 1. Notify the juvenile court in advance if the client will request appointed counsel and may require the immediate assistance of post-adjudication counsel; and
  - 2. If arrangements have not been made for new counsel by the date of the verdict, assist the juvenile in filing a written notice of appeal and in requesting prompt appointment of post-adjudication counsel.
- D. Counsel should not represent any client on appeal that counsel represented in the adjudication proceedings, unless new appellate counsel is not available.

### **Guideline 9.2 Education, Training, and Experience of Defense Counsel in Post-Adjudication Proceedings**

To provide competent, quality representation in post-adjudication proceedings, counsel must possess the education, training, and experience specified in Guideline 1.2 and in addition be familiar with the Rules of Appellate Procedure and any local rules of the courts of appeal.

### **Guideline 9.3 Motion for a New Trial**

- A. Counsel should recognize that juvenile appeals, including motions for a new trial, are governed predominately by the rules that govern civil appeals. Counsel must be familiar with the timelines and rules that govern civil appeals.
- B. Counsel should 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, which are differ somewhat from the grounds that can be raised on appeal in the criminal context;
  - 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.
- C. If a finding of delinquency has been entered against the client after adjudication, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;
  2. The effect that such a motion might have upon the client's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion because of the opportunity to establish facts not in the trial record;
  3. The effect filing a motion for new trial will have on the time period for perfecting an appeal;
  4. Whether, after explaining to the client in developmentally appropriate language the client's right to submit a motion for new trial, the client desires that such a motion be filed; and
  5. The effect filing a motion for new trial may have on the availability of other post-trial remedies.
- D. 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 that counsel should consider addressing in a motion for new trial are:
1. Denial of pre-trial motions;
  2. Denial of the client's right to counsel or right to be present during trial;
  3. Improper admission or exclusion of evidence;
  4. A fundamentally defective jury charge;
  5. Jury misconduct;
  6. Intentional suppression by the State of witness testimony or other evidence tending to show the client's innocence, preventing its production at trial;
  7. Denial of a continuance based upon a critical missing witness or delayed discovery;
  8. Sufficiency of the evidence; and
  9. Any claim that would require a new trial in the interest of justice.
- E. In the event that a motion for new trial is granted, counsel should be prepared to draft and timely file a reply brief in opposition to any appeal of that decision filed by the prosecution.

#### **Guideline 9.4 Protecting Client's Right to Appeal**

- A. At the conclusion of each phase of the case, counsel must advise the client of the client's right to appeal the adjudication, disposition, and modifications of disposition decisions.
- B. If the client expresses desire to appeal, counsel shall file a notice of appeal and inform the juvenile court whether counsel intends to represent the client on appeal.

#### **Guideline 9.5 Duty to Facilitate Work of Successor Counsel**

- A. In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:
  - 1. Maintaining the records of the case in a manner that will inform the successor counsel of all significant developments relevant to the litigation;
  - 2. With the client's permission, or if ordered by the court, providing the client's files, as well as information regarding all aspects of the representation to successor counsel;
  - 3. Sharing potential further areas of legal and factual research with successor counsel; and
  - 4. Cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.
- B. After transferring the client's files to successor counsel, counsel should send a letter to the client advising the client of the file transfer.

#### **Guideline 9.6 Direct Appeal**

- A. Counsel representing a client on direct appeal should be familiar with the procedures applicable to an appeal, including the rules specifying the time period for filing an appeal and the requirements for submission of the clerk's and reporter's records.
- B. Counsel should, upon being contacted by the court or client concerning representation for an appeal, immediately consult with the trial court to ascertain relevant information concerning the perfection of the appeal and relevant filing deadlines, in order to confirm that counsel's acceptance of the case permits the maximum opportunity for proper representation.
- C. When a client indicates a desire to appeal the judgment or disposition of the court, counsel has a duty to submit a notice of appeal on behalf of the client even if counsel does not want to represent the client on appeal.
- D. New counsel should immediately contact trial counsel to obtain background information on the client and information on the nature of the issues presented, as well as to determine whether filing a motion for new trial, if available, is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion.
- E. Retained counsel should, upon acceptance of appellate representation, immediately inform the court and the prosecution of the representation by filing the appropriate designation of counsel with the court, and all counsel, both retained and appointed, must submit the proper designations of the clerk's and reporter's records as mandated by the Texas Rules of Appellate Procedure.
- F. Counsel should meet with the client as soon as possible after retention/appointment and well before

filing the appellate brief.

- G. Counsel must review the clerk's and reporter's records to determine whether they 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 necessary to protect the reliability of the record.
- H. Counsel should fully review the appellate record for all reviewable errors, prepare a well-researched and drafted appellate brief, file the brief in a timely manner and in accordance with all other requirements in the Texas Rules of Appellate Procedure and any local rules, and notify the court of counsel's desire to present oral argument in the case, when appropriate.
- I. Counsel should consider preparing and filing a reply brief or a motion for rehearing if, under the circumstances, such is needed or required, particularly in order to make the court of appeals aware of legal or factual matters that may have been overlooked or mischaracterized or that may have newly developed.

### **Guideline 9.7 Right to File a Petition for Review**

In the event that the intermediate appellate court's decision is unfavorable to the client, counsel must advise the client in person or by phone and in writing by hand delivery or certified mail of the court's decision and the client's right to file a petition for review and the action that must be taken to properly file such a petition. In advising the client of the right to file a petition for review, counsel should explain that:

- A. Review by the Supreme Court of Texas is discretionary and not a matter of right, and that the Supreme Court of Texas may refuse to review the client's case without providing any reason for doing so;
- B. If the client is indigent, the client does not have the right to appointed counsel for the purpose of filing a petition for review but that, upon request, counsel may be appointed for this purpose; and
- C. If the client is indigent and if the petition for review is granted, the client does not have the right to court-appointed counsel for further proceedings on the merits before the Supreme Court of Texas, but that upon request, counsel may be appointed.

### **Guideline 9.8 Petition for Review**

- A. If an intermediate appellate court has issued a decision unfavorable to the client, counsel should advise the client of his right to file a petition for review with the Supreme Court of Texas and discuss with the client whether it may be appropriate to file such a petition in the client's case.
- B. Counsel representing a client on a petition for review should be familiar with the procedures applicable to such a petition, including the rules specifying the time period for filing a petition; the organization of a petition; the page limits for a petition and the procedure for requesting an expansion of the petition for good cause; and appendices and copies required for filing a petition.
- C. The decision to file a petition for review should be made after considering the applicable law in light of the circumstances of each case and the reasons for granting review specified in the Texas Rules of Appellate Procedure. Reasons for review that counsel should consider presenting in a petition for review include:
  - 1. Whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;
  - 2. Whether a court of appeals has decided an important question of state or federal law that has not

been, but should be, settled by the Supreme Court of Texas;

3. Whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Supreme Court of Texas or the United States Supreme Court;
  4. Whether a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued a statute, rule, regulation, or ordinance;
  5. Whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and
  6. Whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court of Texas's power of supervision.
- D. In preparing a petition for review, counsel should fully review the appellate opinion for all reviewable errors, prepare a well-researched and drafted petition, file the petition in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure, and notify the court of counsel's desire to present oral argument in the case, when appropriate.
- E. Should the Supreme Court of Texas request a brief on the merits, counsel should notify the client and prepare and timely file a brief on the merits in support of the grant of review.
- F. Counsel should be prepared to draft and timely file a reply brief in opposition to any brief filed by the prosecution.
- G. Counsel should be prepared to draft and timely file a motion for rehearing should the Supreme Court of Texas deny relief after granting a petition for review and reviewing the case on the merits. Counsel should be prepared to timely defend against the prosecution's motion for rehearing should the court reverse the adjudication findings.
- H. If the Supreme Court of Texas summarily denies a petition for review, counsel should be prepared to draft and timely file a motion for rehearing if, in conformance with Rule of Appellate Procedure 79.2, there are substantial intervening circumstances justifying further review.

#### **Guideline 9.9 Right to File a Petition for Certiorari to the United States Supreme Court**

- A. In the event that the Supreme Court of Texas either summarily denies a petition for review or denies relief after reviewing the client's case on the merits, counsel should advise the client in writing by certified mail of the client'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, including the strict deadline. In informing the client of the right to file a petition for certiorari, counsel should explain that:
1. Review by the United States Supreme Court is discretionary and not a matter of right, and that the United States Supreme Court may refuse to review the client's case without providing any reason for doing so;
  2. If the client is indigent, the client does not have the right to court-appointed counsel for the purpose of filing a petition for certiorari;
  3. The date by which a petition must be filed; and
  4. If the client is indigent and if the petition for certiorari is granted, the client may request the

appointment of counsel for further proceedings on the merits before the United States Supreme Court.

- B. Considerations relevant to filing a petition for certiorari may include but are not limited to:
  - 1. The Supreme Court of Texas has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort or federal court of appeals; or
  - 2. The Supreme Court of Texas has decided an important question of federal law in a way that has not been, but should be settled by the United States Supreme Court, or has decided an important question of federal law in a way that conflicts with a decision of the United States Supreme Court.

#### **Guideline 9.10 Role at Probation Modification Hearings**

Counsel should receive notice and represent the client at probation modification or violation hearings.

- A. Counsel should be proficient in applicable statutes regarding probation hearings, including the jurisdiction's standard of proof for a violation and the procedural requirements for revocation.
- B. Counsel should investigate the client's alleged failure to abide by conditions of the probation order, including whether the probation officer and designated social service providers have met their obligations to the client, and advocate accordingly:
  - 1. When counsel's investigation reveals that the client's probation officer, service providers, or family have not complied with the court's plan, counsel should either request that the court enforce its existing order or propose appropriate changes to the plan; and
  - 2. When the basis of a client's probation violation is a new charge, counsel may consider asking the court to delay the hearing pending the outcome of the new case.
- C. Counsel must offer mitigation evidence to explain the client's failure to abide by the probation contract.
- D. Counsel must provide zealous representation at probation violation hearings, with the same duty of care, level of preparation, investigation, and adherence to the principles governing representation, as counsel would provide for any other proceeding.