



STATE BAR *of* TEXAS

PERFORMANCE GUIDELINES  
*for*  
NON-CAPITAL CRIMINAL DEFENSE  
REPRESENTATION

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*Standing Committee on Legal Services to the Poor in Criminal Matters  
Adopted by the State Bar Board of Directors  
January 28, 2011*

# THE NEW PERFORMANCE GUIDELINES IN CRIMINAL CASES: A STEP FORWARD FOR TEXAS CRIMINAL JUSTICE

BY JEFF BLACKBURN AND ANDREA MARSH

The right to counsel is the most basic guarantee of our criminal justice system. Without a good lawyer, innocent citizens may be convicted of crimes they did not commit, defendants may be overcharged for inadequate legal representation, and people who need another chance may never get one.

## The State of Criminal Practice

Criminal defense lawyers face unique challenges. Criminal law and procedure are complex areas of practice with high stakes for clients. Every case presents legal and factual problems that can only be solved through time, effort, and expense. Many, if not most, cases involve indigent clients whose legal fees are paid for by the county at rates far below what they should be. Unlike prosecutors, court-appointed defense attorneys have no easy access to investigators, experts, or witnesses. In many cases, they are not given enough time or money to do a good job. Many court-appointed lawyers feel pressured to back off from aggressively representing their clients out of fear that their efforts will go unpaid or that they will be removed from the list of attorneys doing such cases.

## The Future of Criminal Practice

These problems will get worse in the next few years. State grant funding to counties for indigent defense will decrease by \$8.6 million in the next biennium under the budget that was passed during the regular legislative session.<sup>1</sup> If counties cannot, or will not, replace that funding with local revenue, criminal defense lawyers will be asked to handle even more cases at even lower rates. Texas is headed into a county-by-county funding crisis in indigent defense.

## Performance Guidelines

The State Bar Board of Directors adopted the *Performance Guidelines for Non-Capital Criminal Defense Representation* (the Guidelines) in January 2011. The Guidelines were drafted by the State Bar Committee on Legal Service to the Poor in Criminal Matters to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of citizens accused of crime. They represent an effort to “hold the line” for criminal defense practitioners against a host of financial and political pressures.

The Guidelines are a step-by-step guide to what lawyers should do in criminal cases. They remind attorneys that certain actions, like investigating facts before trial, should be considered in every case regardless of funding issues or local practice. At the same time, they remind judges and county officials that lawyers have work to do and steps to take that have to be paid for no matter how constrained counties feel about their budgets.

## The Guidelines’ Structure

The Guidelines provide a road map of potential courses of action and best practices for every stage of a state criminal proceeding from arrest through direct appeal.

The Guidelines are detailed, but they are not an exercise in micromanagement. They allow defense lawyers great flexibility

to exercise their best professional judgment. While the Guidelines use the words “shall” or “must” on a few occasions when a particular action is essential to providing quality representation, in most instances the use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “when appropriate.”

The Guidelines are not disciplinary rules nor are they black-and-white standards for the judicial evaluation of ineffective assistance. They are, instead, a set of tools to be used by criminal defense lawyers, judges, and county officials to improve our criminal justice system.

## Development of the Guidelines

The Committee on Legal Services to the Poor in Criminal Matters began the drafting process by reviewing similar guidelines developed by national organizations and other states. Guidelines published by the American Bar Association<sup>2</sup> and the National Legal Aid and Defender Association<sup>3</sup> were analyzed, as were state-level guidelines adopted in Georgia,<sup>4</sup> Louisiana,<sup>5</sup> Massachusetts,<sup>6</sup> Montana,<sup>7</sup> Nevada,<sup>8</sup> New Mexico,<sup>9</sup> New York,<sup>10</sup> North Carolina,<sup>11</sup> North Dakota,<sup>12</sup> Oregon,<sup>13</sup> and Virginia.<sup>14</sup> The Committee carefully evaluated how such guidelines have been applied in those jurisdictions.

The Committee borrowed language from these sources, edited it to reflect specific elements of Texas procedure, and drafted new guidelines to address new issues (e.g., the representation of defendants with mental health issues and post-trial representation).

A draft version of the Guidelines was circulated to criminal justice stakeholders across the state in Spring 2010. The committee received hundreds of comments from lawyers, judges, and legal organizations and made every effort to listen to and learn from the many people who took time to contribute to the process. The Committee spent the next six months evaluating this input and editing the draft and presented a final version to the State Bar Board of Directors that was adopted early this year.

These new Guidelines for non-capital cases are a companion to the Guidelines and Standards for Texas Capital Counsel adopted by the Board of Directors in April 2006.

## Potential Application of the Guidelines

The Guidelines can be applied in many ways by both defense lawyers and county officials who want to improve indigent defense in their jurisdiction.

Here are some examples of how defense attorneys can use the Guidelines:

- As a personal checklist that is useful for attorneys at every level of experience. Although some of the items on the checklist will seem very basic to experienced criminal defense lawyers, they can help lawyers revisit practice routines as well as alert lawyers to necessary actions when they accept a type of case they do not normally handle. Checklists of basic process steps have been shown to improve outcomes in other fields,<sup>15</sup> and criminal law is no exception;
- As a tool to assist in the training of new criminal defense attorneys. This is particularly important because defense

lawyers frequently begin their careers as sole practitioners and have less access to formal training and mentoring than do lawyers who start their careers in association with more experienced attorneys;

- As a tool for self-evaluation, both as an individual attorney and, where applicable, as a public defender's office or other group of defense lawyers;
- As an objective tool for the internal evaluation of attorneys in a public defender's office or managed assigned counsel system;
- As a tool for advocating for additional resources for criminal defendants and/or defender offices (e.g., greater access to investigative services). Lawyers have used the previously adopted capital guidelines for this purpose in death penalty cases;<sup>16</sup> and
- As persuasive authority for arguing that a client did not receive effective assistance of counsel at an earlier stage of the proceedings. Although the Guidelines do not create standards that the courts must enforce when evaluating ineffective assistance claims, courts may find that the Guidelines are persuasive in certain cases and may cite them in the same manner as other non-binding authority, such as law review articles. The U.S. Supreme Court has cited similar American Bar Association performance guidelines in support of findings of ineffective assistance in death penalty cases.<sup>17</sup>

Here are some examples of how judges and local officials can use the Guidelines:

- To supplement the experience-based attorney qualifications in county indigent defense plans. The Fair Defense Act (FDA) requires counties to adopt objective qualifications that attorneys must meet in order to be eligible to receive court appointments.<sup>18</sup> All counties have adopted qualifications that focus on attorneys' prior experience, e.g., number of years in criminal law practice and number of jury trials.<sup>19</sup>

The FDA recognizes that these experience-based qualifications alone are insufficient to guarantee high-quality representation, and specifies that attorneys who meet the qualifications also must be approved by a majority of the judges in their jurisdiction.<sup>20</sup> This judicial approval requirement protects defendants by enabling judges to keep experienced attorneys off the appointment list if their current performance on behalf of their clients is inadequate. However, the subjective nature of this approval has left it vulnerable to claims of retaliation.<sup>21</sup> The Guidelines can assist local jurisdictions by providing objective and transparent benchmarks for attorney performance that can be used in the FDA process for attorney review.

- As a tool for improving attorney performance, by requiring attorneys to be familiar with and follow the Guidelines as a condition for receiving court appointments. In addition to general concerns about the quality of counsel provided with public funds, defense attorneys' failure to perform certain actions can have a direct impact on the county budget. For example, attorneys' failure to meet promptly with their clients or to file motions for bond reductions in appropriate cases can contribute to county jail overcrowding. Counties can encourage these actions, which are addressed in the Guidelines, by requiring attorneys on the appointment wheel to use the Guidelines in their practice.

Adherence to the Bar's capital guidelines already is required to get on the appointment list for death penalty cases in parts of the state.<sup>22</sup>

- As a reference for setting compensation levels for indigent defense cases. Counties are required to pay lawyers who represent indigent defendants "a reasonable attorney's fee ... based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel."<sup>23</sup> By detailing the many actions required of criminal defense counsel, the Guidelines can provide an important resource as counties review whether their current fee schedules adequately compensate appointed counsel for all of the "labor required" to represent criminal defendants.

## Conclusion

The Performance Guidelines for Non-Capital Criminal Defense Representation are a move ahead for the Texas criminal justice system and the legal profession. Their use will help ensure that people accused of crimes will receive not just a lawyer, but a lawyer who is ready and able to do the job they should do under the law. ✪

## Notes

1. Act of May 31, 2011, 82nd Leg., R.S., ch. \_\_, § \_\_, 2011 Tex. Gen. Laws \_\_. The budget bill, House Bill 1, had not been signed by Gov. Rick Perry at the time of publication. Furthermore, the House and Senate each included \$7.6 million in additional funds for indigent defense in their respective versions of Senate Bill 2 during the first called special session. The Senate had not considered the House amendments to Senate Bill 2 at the time of publication.
2. American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function (3rd ed., 1993), available at [americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_dfunc\\_toc.html](http://americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html).
3. National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation (1997), available at [www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).
4. Georgia Public Defender Standards Council, State of Georgia Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (2004), available at [www.gpdsc.com/docs/cpdsystem-standards-%20performance%20\\_5-21-04\\_.pdf](http://www.gpdsc.com/docs/cpdsystem-standards-%20performance%20_5-21-04_.pdf).
5. Louisiana Public Defender Board, Trial Court Performance Standards (2010), available at [lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/LPDB%20Trial%20Court%20Performance%20Standards.pdf](http://lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/LPDB%20Trial%20Court%20Performance%20Standards.pdf).
6. Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual, Ch. 4 Performance Standards Governing the Representation of Indigent Persons in Criminal cases (2004), available at [http://www.publiccounsel.net/private\\_counsel\\_manual/private\\_counsel\\_manual\\_pdf/chapters/manual\\_chapter\\_4\\_full.pdf](http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_4_full.pdf).
7. Montana Office of the State Public Defender, Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act (2010), available at [publicdefender.mt.gov/forms/pdf/Standards.pdf](http://publicdefender.mt.gov/forms/pdf/Standards.pdf).
8. New Mexico Public Defender Department, Performance Guidelines for Criminal Defense Representation (1998), available at [pdd.state.nm.us/aboutus/guidelinesforcriminaldefense.pdf](http://pdd.state.nm.us/aboutus/guidelinesforcriminaldefense.pdf).
9. New York State Bar Association, Standards for Providing Mandated Representation (2005), available at [nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726](http://nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726); New York State Defenders Association, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), available at [nysda.org/04\\_NYSDAStandards\\_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf](http://nysda.org/04_NYSDAStandards_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf).
10. North Carolina Commission on Indigent Defense Services, Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level (2004), available at [www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf](http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf).

12. North Dakota Commission on Legal Counsel for Indigents, Minimum Attorney Performance Standards, Criminal Matters, *available at* [nd.gov/indigents/docs/performanceStandardsCriminal.pdf](http://nd.gov/indigents/docs/performanceStandardsCriminal.pdf).
13. Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases (1996), *available at* [nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa7914dae4947ae3537e4852566d6000dae23/\\$FILE/Oregon.pdf](http://nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa7914dae4947ae3537e4852566d6000dae23/$FILE/Oregon.pdf)
14. The Virginia Indigent Defense Commission, Standards of Practice for Indigent Defense Counsel (2006), *available at* [indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice.pdf](http://indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice.pdf).
15. See Atul Gawande, *The Checklist*, *The New Yorker*, Dec. 10, 2007.
16. Cf. *Ex parte Van Alstyne*, 239 S.W.3rd 815, 822 n.22 (Tex. Crim. App. 2007) (citing Texas capital guidelines as authority for defense counsel's need for mental health expert to supplement counsel's own observations of client's mental state).
17. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (citing American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as benchmark for what constitutes reasonable performance of counsel in a death penalty case, and finding counsel ineffective for failing to discover all reasonably available mitigating evidence as required by the ABA guidelines).
18. Tex. Code Crim. Proc. art. 26.04(e).
19. See, e.g., Bexar County Criminal District Courts Plan: Standards and Procedures Related to Appointment of Counsel for Indigent Defendants 5.22 (2009), *available at* [tfid.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=26](http://tfid.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=26) (creating five attorney appointment lists based on the seriousness of the offense and stage of the proceedings and specifying experience requirements for each list; e.g., attorneys must have at least one year prior experience in criminal litigation and prior experience as lead or co-counsel in at least three criminal jury trials to be included on the state jail felony list).
20. Tex. Code Crim. Proc. art. 26.04(d).
21. See, e.g., *Davis v. Tarrant County*, 565 F.3d 214, 217–18 (2009) (suit by crimi-

nal defense attorney alleging his application for inclusion on felony court appointment wheel was denied because he did not have good personal relationships with judges; dismissed on immunity grounds).

22. See, e.g., Standards for the Qualification of Attorneys for Appointment to Death Penalty Cases in the Eighth Administrative Judicial Region of Texas Pursuant to Article 26.052 of the Texas Code of Criminal Procedure (2006), *available at* [tfid.tamu.edu/CountyDocuments/Region8/Standards%20for%20the%20Qualification%20of%20Attorneys%20for%20Appointment%20to%20Death%20Penalty%20Cases.pdf](http://tfid.tamu.edu/CountyDocuments/Region8/Standards%20for%20the%20Qualification%20of%20Attorneys%20for%20Appointment%20to%20Death%20Penalty%20Cases.pdf).
23. Tex. Code Crim. Proc. art. 26.05(a).

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## PURPOSE AND SCOPE OF THE PERFORMANCE GUIDELINES

The Guidelines are intended to serve several purposes. The foremost purposes are to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of indigent defendants.

The Guidelines are intended to alert defense 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 client the best representation possible. The Guidelines also are intended to provide a measure by which the performance of individual attorneys may be evaluated and to assist in training and supervising attorneys.

The language of the Guidelines is general, implying flexibility of action appropriate to the particular situation at issue. 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.” Even when the Guidelines use the words

“should” or “shall,” or “must,” in certain situations the lawyer’s best informed professional judgment and discretion may indicate otherwise. Variations from the Guidelines also may be appropriate to accommodate local court procedures; however, counsel should protect a client’s rights and, when necessary, preserve error when local practices conflict with the client’s rights under state and federal law or counsel’s ethical obligations to the client.

The Guidelines are not criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. The Guidelines may or may not be relevant to such a judicial determination, depending upon all of the circumstances of the individual case.

The Guidelines specifically apply to practice in Texas state court from the time of initial representation in trial-level proceedings to the exhaustion of direct review before the Court of Criminal Appeals. 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 defendants in federal court.

### Guideline 1.1 Role of Defense Counsel

- A. The primary and most fundamental obligation of defense counsel is to provide zealous and effective representation for the client at all stages of the criminal process. Counsel’s role in the criminal justice system is to fully protect and advance the client’s interests and 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 client. Counsel’s personal opinion of the client’s guilt is totally irrelevant. The client’s financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney.
- B. 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.

### Guideline 1.2 Education, Training and Experience of Defense Counsel

- A. To provide competent, quality representation, counsel must be familiar with the substantive criminal law and the law of criminal 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. Counsel should participate in skills training and education programs in order to maintain and enhance skills.

- B. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept more serious and complex criminal cases only after having had experience or training in less complex criminal matters. When appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.
- C. If representing a client with mental illness or a developmental disability, counsel should become familiar with the symptoms of the client’s mental impairment and those symptoms’ potential impact on the client’s culpability in the case and potential use as a mitigating factor during sentencing. Counsel also should be familiar with the side effects of any medication the client may be taking to treat the client’s mental impairment and the impact those side effects may have on the client’s culpability in the case or use as a mitigating factor during sentencing.
- D. Attorneys who represent individuals who are charged with capital offenses in which the prosecution is seeking death must adhere to the *Guidelines and Standards for Texas Capital Counsel* adopted by the State Bar Board of Directors in 2006.

### Guideline 1.3 General Duties of Defense Counsel

- A. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to confirm that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.
- B. Counsel has the obligation to maintain regular contact with the client and keep the client informed of the progress of the case, when it is possible to do so. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.
- C. Counsel should adequately inform the client of the client's legal obligations related to the case, such as conditions of release or sentencing terms, and have the client verbally restate the obligations in order to ascertain the client's understanding of those obligations.
- D. If appointed to represent an indigent client, counsel shall make every reasonable effort to contact the client not later than the end of the first working day after the date on which counsel is appointed, in compliance with Code of Criminal Procedure 26.04(j). In making this contact, counsel should provide the client with an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with counsel.
- E. Counsel should appear timely for all scheduled court appearances in a client's case.
- F. Counsel should spend appropriate time on each case regardless of whether counsel is appointed or retained. Counsel shall not suggest to an appointed client that counsel would provide preferential treatment if counsel were retained or otherwise compensated beyond the fee paid by the court for their work on a case.
- G. Counsel must be alert to all potential and actual conflicts of interest.
- H. If a conflict develops during the course of representation, counsel has a duty to notify the client and, generally, the court. Notice must be provided to the court without disclosing any confidential information.
- I. If counsel's caseload is so large that counsel is unable to satisfactorily meet these performance guidelines, counsel shall inform the court or courts before whom counsel's cases are pending.
- J. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), counsel shall continue to represent the client until charges are dismissed, the client is acquitted, appeals are exhausted, or counsel is relieved of counsel's duties by the court or replaced by other counsel after a finding of good cause is entered on the record.
- K. If counsel withdraws from representation, counsel has an obligation to deliver all contents of the client's file, including notes by counsel, to new counsel if requested. Counsel shall timely respond to any reasonable request by new counsel regarding the case.

### Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

When appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

### Guideline 2.2 Initial Interview

- A. Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. When necessary, counsel may arrange for a designee to conduct the initial interview. If the initial interview is completed by a designee, counsel shall interview the client personally at the earliest reasonable opportunity.
- B. *Preparation:*  
After being assigned to a case and prior to conducting the initial interview, counsel should, when possible, do the following:
  1. Be familiar with the elements of the offense and the potential punishment range, if the charges against the client are already known;
  2. 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
  3. If representing client with mental illness, obtain reports from jail staff on the client's mental health status at the time of booking into the jail and the client's current mental health status.In addition, if the Client is incarcerated, counsel should:
  4. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting pretrial release conditions;
  5. Be familiar with the different types of pretrial release conditions the court may set, any written pretrial release policies of the judicial district, and whether any pretrial service or other agency is available to act as a custodian for the client's release;
  6. Be familiar with any procedures available for reviewing the trial judge's setting of bail; and
  7. Be familiar with Code of Criminal Procedure 17.032, which sets forth the procedure by which certain mentally ill defendants may be released on personal bond.
- C. *The Interview:*
  1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release if the client is incarcerated, and also to provide the client with information concerning the case. At this and all successive interviews and proceedings, counsel should make every effort to overcome barriers to communication, such 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.
  2. In addition, counsel should obtain from the client all release forms necessary to obtain the client's medical,

psychological, education, military, prison, and other records as may be pertinent.

3. In some jurisdictions, videoconferencing or teleconferencing is available for meeting with the client from a remote location, rather than traveling to the jail. Videoconferencing or teleconferencing is not preferred for the initial interview. Videoconferencing or teleconferencing is never recommended for contact with mentally ill clients or clients who have a developmental disability.
4. While obtaining the information specified in item 5 below during the initial interview is important to preparation of the defense of the client's case, if working with a mentally ill or developmentally disabled client, counsel should be aware of symptoms of the client's mental impairment that may make it difficult to obtain some of the information. Counsel may need to make a few visits to the client to obtain the specified information or obtain the information from multiple sources, depending on the client's state of mind and ability to provide counsel with information.
5. Information that should be acquired includes, but is not limited to:
  - a. The client's ties to the community, including the length of time the client has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);
  - b. The client's physical and mental health, educational, employment, social security/disability, and armed services records;
  - c. The client's immediate medical needs;
  - d. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;
  - e. The ability of the client to meet any conditions of release, including financial conditions;
  - f. The names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;
  - g. Any necessary information waivers or releases that will assist in the client's defense, including preparation for sentencing; the written releases obtained should include a HIPAA (Health Insurance Portability and Accountability Act) compliant release in case medical records are required; and
  - h. Any other information that will assist the client's defense, including mitigation information for use in preparation for sentencing.
6. Information to be provided to the client includes, but is not limited to:
  - a. An explanation of the procedures that will be followed in setting the conditions of pretrial release;
  - b. An explanation of the types of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that

the client should not make statements concerning the offense;

- c. An explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with counsel;
  - d. The charges and the potential penalties;
  - e. A general procedural overview of the progression of the case, when possible;
  - f. Realistic answers, when possible, to the client's most urgent questions;
  - g. What arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers;
  - h. How and when counsel can be reached; and
  - i. When counsel intends to see the client next.
- D. *Supplemental Information*
- Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:
1. The facts surrounding the charges against the client;
  2. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
  3. Any possible witnesses who should be located;
  4. Any evidence that should be preserved; and
  5. When appropriate, evidence of the client's competence to stand trial or mental state at the time of the offense.

### **Guideline 3.1 Initial Appearance before the Magistrate and Pretrial Release Proceedings**

- A. At the initial appearance on the charges before the magistrate, counsel should preserve the client's rights by seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges.
- B. Counsel should request a timely examining trial if the client is entitled to one unless there is a sound tactical reason not to do so.
- C. When appearing at a bond hearing, counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, when appropriate, to make a proposal concerning conditions of release.
- D. Counsel should adequately inform the client of the client's conditions of release after such conditions have been set.
- E. If the client is unable to fulfill the conditions of release set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.
- F. If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should inform the client of the available options and the procedures that must be followed in posting such assets. When appropriate, counsel should advise the client and others acting on the client's behalf how to properly post such assets.
- G. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation

between counsel and the client. In the event that the client and counsel decide that it would be in the best interest of the client to testify regarding bond, counsel should instruct the client not to answer any questions that do not pertain strictly to the issue of bond.

- H. If the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical, psychiatric, or security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs. Counsel should follow up with the client regarding whether medications or treatments are being given in jail, and notify the court or relevant jail management personnel if any problems arise.

### Guideline 3.2 Examining Trial

- A. Before conducting an examining trial, counsel should make reasonable efforts to secure and review information in the prosecution's or law enforcement authorities' possession. When necessary, counsel should pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.
- B. If the client is entitled to an examining trial, counsel should take steps to see that the examining trial is conducted timely unless there are strategic reasons for not doing so.
- C. In preparing for the examining trial, counsel should become familiar with:
1. The elements of each of the offenses alleged;
  2. The law of the jurisdiction for establishing probable cause;
  3. Factual information that is available concerning probable cause;
  4. The subpoena process for obtaining compulsory attendance of witnesses at an examining trial and the necessary steps to be taken in order to obtain a proper record of the proceedings;
  5. The potential impact on the admissibility of any witness's testimony if the witness is later unavailable at trial;
  6. The tactics of calling the client as the witness; and
  7. The tactics of proceeding without discovery materials.
- D. Counsel should meet with the client prior to the examining trial. Counsel must evaluate and advise the client regarding the consequences of waiving an examining trial and the tactics of full or partial cross-examination.
- E. If counsel becomes aware that the client is the subject of a grand jury investigation, counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Texas law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

### Guideline 3.3 Competency to Stand Trial

- A. The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea. Counsel is often in the best position to discern whether the client may not be competent to stand trial.
- B. Counsel should be familiar with Code of Criminal Procedure Article 46B, which governs proceedings surrounding incompetence to stand trial.
- C. During the initial interview with the client, counsel should note signs that a mentally ill or developmentally disabled client may not be competent to stand trial. Signs include, but are not limited to: inability to communicate with counsel; delusions; psychosis; intellectual inability to comprehend the proceedings; and inability to remember or articulate the circumstances of arrest.
- D. Counsel should request mental health records from the client's mental health provider and history of psychiatric treatment in the jail, if any.
- E. If counsel believes the client may be incompetent to stand trial, counsel should file a motion to have the client examined for competency. The motion to have a client examined for competency may be supported by affidavits setting out the facts on which the suggestion of incompetence is made.
- F. If counsel has determined that the client may be incompetent to stand trial, and it appears that transporting the client to and from court for routine proceedings at which the client's presence is not needed may cause disruption or undue stress for the client, counsel should consider requesting that the client not be transported to court unless or until the client's presence is necessary.
- G. If the court finds that there is some evidence that would support a finding of incompetence, the judge is required to stay all other proceedings in the case and order a competency evaluation. Counsel should facilitate setting up the competency evaluation as soon as possible. The sooner the evaluation is completed, the sooner the client can receive the mental health treatment that the client may need. Courts often have a list of professionals who have been approved to provide these evaluations.
- H. Counsel should investigate competency restoration treatment options including outpatient or community competency restoration.
- I. If client is in custody while awaiting competency restoration, counsel should communicate with the Sheriff's office regarding when the client will be transported to the hospital or treatment program.
- J. To the extent it is possible to communicate with the client, counsel should keep the client informed of when the client will be going to the hospital.
- K. Counsel should provide contact information to the social workers at the hospital and stay in touch with the social workers regarding the client's status.
- L. When the client is returned from the hospital after competency restoration treatment, counsel should request that the client's case be placed back on the docket as quickly as possible to prevent the client from decompen-sating upon return to the jail, but before the case can be resolved.

### 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, regardless of the client's wish to admit guilt, determine whether the charges and disposition 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 merits and to the penalty in the event of conviction. In no case should counsel delay a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed.

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

1. *Charging documents, statutes, and case law*

The arrest warrant, accusation, complaint, and information or indictment documents, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific charges 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. The applicable punishment range for the charged offense and all potential lesser included offenses.

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 as described above under the performance guideline applicable to the initial interview of the client. Information relevant to sentencing also should be obtained from the client when appropriate.

3. *Potential witnesses*

Counsel should consider whether to interview 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 in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so.

5. *The courts*

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

6. *Information in the possession of third parties*

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

7. *Physical evidence*

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

When appropriate, counsel or an investigator should attempt to view the scene of the alleged offense 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 experts and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:

- a. The preparation of the defense;
- b. Adequate understanding of the prosecution's case;
- c. Rebut the prosecution's case or provide evidence to establish any available defense;
- d. Investigate the client's competence 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 guilty 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). 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.

- C. During case preparation and throughout trial, 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 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.
- B. Counsel should consider seeking discovery of the following items:
1. All information to which the client is entitled under Art. 39.14 of the Texas Code of Criminal Procedure;
  2. Potential exculpatory information;
  3. Potential mitigating information;
  4. Potential favorable information;
  5. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  6. Any other information that may be used to impeach the testimony of prosecution witnesses;
  7. All oral or written statements by the client, and the details of the circumstances under which the statements were made;
  8. The prior criminal record of the client and any evidence of other misconduct that the government may intend to use against the client;
  9. Statements made by co-defendants;
  10. Statements made by other potential witnesses;
  11. All official reports by all law enforcement and other agencies involved in the case, e.g., police, arson, hospital, results of any scientific test(s);
  12. All records of evidence collected and retained by law enforcement;
  13. 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;
  14. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;
  15. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof; and
  16. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.

- C. If counsel has made formal discovery demands, counsel should seek prompt compliance 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 and develop strategies for advancing appropriate defenses and mitigating factors, including those related to mental health, on behalf of the client.

### **Guideline 5.1 Arraignment**

Counsel should preserve the client's rights at arraignment by:

- A. Entering a plea of not guilty in all but the most extraordinary circumstances when a sound tactical reason exists for not doing so; and
- B. Requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury.

### **Guideline 5.2 The Decision to File Pretrial Motions**

- A. Counsel should consider filing an appropriate pretrial motion whenever a good-faith reason exists to believe that the client is entitled to relief that the court has discretion to grant.
- B. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues 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 defendants;
  7. The discovery obligations of the prosecution;
  8. The suppression of evidence gathered as the result of violations of the Fourth, Fifth, Sixth, or Fourteenth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions and statutes, including:
    - a. The fruits of illegal searches or seizures;
    - b. Involuntary statements or confessions;
    - c. Statements or confessions obtained involuntarily or in violation of the client's right to counsel, or privilege against self-incrimination; and
    - d. Unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification.
  9. The suppression of evidence gathered in violation of any right, duty, or privilege arising out of state or local law;
  10. Change of venue;
  11. Access to resources that or experts who may be denied to the client because of the client's indigence;

12. The client's right to a speedy trial;
  13. The client's right to a continuance in order to adequately prepare or present the client's case;
  14. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion; and
  15. Matters of trial or courtroom procedure.
- C. Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the 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 thus should consider whether:
1. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
  2. Changes in the governing law might occur after the filing deadline that could enhance the likelihood that relief ought to be granted; and
  3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions.
- D. Counsel should request a full evidentiary hearing on any pretrial motion to the extent necessary to preserve the issue adequately for appellate review.
- E. Counsel should consider the advisability of disqualifying or substituting the presiding judge. This consideration should include any information about the judge's history in aligning with the prosecution on bail issues or 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 in the best interest of the client. The final decision rests with counsel.
- F. Requests or agreements to continue a trial date should be discussed with the client before they are made.
- G. Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

### **Guideline 5.3 Filing and Arguing Pretrial Motions**

- A. Motions should be filed in a timely manner in accordance with statute and local rule, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect the filing might have upon the client's speedy trial rights.
- B. 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.
- C. In every case, counsel should examine whether it is appropriate to file a motion to suppress evidence or statements.
- D. In every case that proceeds to trial, counsel should file timely and appropriate motions in limine to prohibit improper prosecutorial practices and to shield the jury 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 obtain a clear ruling on any pretrial motion on the record or in writing.

### **Guideline 5.4 Subsequent Filing of Pretrial Motions**

- A. Counsel has a continuing duty to raise any issue that was not raised before trial, 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.
- B. When appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.
- C. When negotiating the entry of a guilty plea, 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. Under no circumstances should counsel recommend to the client acceptance of a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial. The amount of appropriate investigation will vary by case.
- B. After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial, and in doing so counsel should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
- C. 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.
- D. 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.
- E. 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 plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel also should explain to the client the impact of the decision to enter a

guilty plea on the client's right to appeal. Although the decision to enter a guilty plea ultimately rests with the client, if counsel believes the client's decisions are not in the client's best interest, counsel should attempt to persuade the client to change the client's position.

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

### Guideline 6.2 The Contents of the Negotiations

A. In conducting plea negotiations, counsel should attempt to 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 make the client fully aware of:

1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;
2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;
3. If a plea involving community supervision or deferred adjudication community supervision is under consideration, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;
4. If a plea involving deferred adjudication community supervision is under consideration, special considerations regarding such a plea including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;
5. If a plea of no contest is under consideration, differences between a no contest plea and a guilty plea including the potential collateral uses of such a plea in subsequent judicial proceedings;
6. Any registration requirements including sex offender registration and job-specific notification requirements;
7. The availability of appropriate diversion and rehabilitation programs;
8. The possible and likely place and manner of confinement;
9. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
10. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
11. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence on a parole status;

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

13. Deportation and other possible immigration consequences that may result from the plea;

14. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions;

15. The effect on appellate rights; and

16. That plea bargains are not binding on the court.

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

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

- a. Not to proceed to trial on the merits of the charges;
- b. To decline from asserting or litigating any particular pretrial motions;
- c. An agreement to fulfill specified restitution conditions or to participate in community work or service programs, or in rehabilitation or other programs;
- d. Providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;
- e. Admitting identity and waiving challenges to proof or validity of a prior conviction record;
- f. Foregoing appellate remedies; and
- g. Asset forfeiture.

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

- a. That the prosecution will not oppose the client's release on bail pending sentencing or appeal;
- b. That the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
- c. To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
- d. That the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
- e. That the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
- f. That the prosecution will take, or refrain from taking, at the time of sentencing or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;
- g. That the prosecution will not present, at the time of sentencing or in communications with the preparer of the official presentence report, certain information; and
- h. That the client will receive, or the prosecution will recommend, specific benefits concerning the client's

place or manner of confinement or release on parole and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from incarceration.

- D. In developing a negotiation strategy, counsel should be familiar with the position of any alleged victim with respect to conviction and sentencing. 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; 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.
- E. In conducting plea negotiations, counsel should be familiar with:
1. The various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, and a plea in which the client is not required to personally acknowledge guilt;
  2. The advantages and disadvantages of each available plea according to the circumstances of the case, including whether or not the client is mentally, physically, and financially capable of fulfilling requirements of the plea negotiated;
  3. Whether the plea agreement is binding on the court and prison and parole authorities;
  4. Possibilities of pretrial diversion; and
  5. Any recent changes in the applicable statutes or court rules and the effective dates of those changes.

### **Guideline 6.3 The Decision to Enter a Plea of Guilty**

- A. Counsel shall make it clear to the client that the client must make the ultimate decision whether to plead guilty. Counsel should investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses (if known), relevant concessions and benefits subject to negotiation, and possible consequences of a conviction after trial. Counsel should not base a recommendation of a plea of guilty solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- B. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential direct and collateral consequences of the agreement. Counsel shall advise the client if the agreement carries a risk that the client will be deported.
- C. The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision. If counsel reasonably believes that rejection of a plea offer is in the best interest of the client,

counsel should advise the client of the benefits and risks of that course of action. Similarly, if counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.

- D. A negotiated plea should be committed to writing whenever possible.
- E. Counsel should, whenever possible, obtain a written plea offer from the prosecution. If the prosecution does not provide counsel with a written plea offer, counsel should document in writing all the terms of the plea agreement offered to and accepted by the client.
- F. When the client verbally rejects a fully explained and detailed plea offer, counsel may ask the client to sign a written rejection of plea offer statement.

### **Guideline 6.4 Entry of the Plea before the Court**

- A. Prior to the entry of the plea, counsel should:
1. Make certain that the client understands the rights the client will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
  2. Provide the client a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea, including whether the plea agreement is binding on the court and whether the court, having accepted the guilty plea, can impose a sentence greater than that agreed upon;
  3. Explain to the client the nature of the plea hearing and prepare the client for the role the client will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and
  4. 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 sentence has been pronounced by the court.
- B. Counsel should investigate and inform the client of the consequences of a plea or a finding of guilty in state court for any current or future federal prosecution.
- C. 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.
- D. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. If the client has been released pending trial, 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 on bail pending sentencing.
- E. Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

### **Guideline 7.1 General Trial Preparation**

- A. Throughout preparation and trial, 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 guilt and punishment phases of the trial rests solely with the client after consultation with counsel. Counsel should discuss the strategic considerations relevant to this decision with the client, including the availability of different sentencing options depending on whether sentence is assessed by a judge or jury and the need to obtain the prosecution's consent to proceed without a jury on guilt. Counsel should maintain a record of the advice provided to the client, as well as the client's decision concerning trial. Counsel has an obligation to advise the court of the client's decision in a timely manner.
- C. Counsel should complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
1. Subpoenaing and interviewing all potentially helpful witnesses;
  2. Subpoenaing all potentially helpful physical or documentary evidence;
  3. Obtaining funds and arranging for defense experts to consult or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);
  4. Obtaining and reading transcripts of prior proceedings in the case or related proceedings;
  5. Obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may assist the fact finder in understanding the defense; and
  6. Obtaining and reviewing the court file of any co-defendant(s) and contacting co-defendant's counsel to obtain information about the co-defendant's case and ascertain, to the extent possible, what the co-defendant's strategy was or will be, and whether the outcome of the client's case will be affected thereby.
- D. When appropriate, counsel should have the following materials available at the time of trial:
1. Copies of all relevant documents filed in the case;
  2. Relevant documents prepared by investigators;
  3. 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);
  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.
- E. If counsel or the prosecution will seek to introduce an audio or video tape or a DVD of a police interview or 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, when necessary, by stipulating those matters with the prosecution.
- F. Counsel should be familiar with the rules of evidence, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise at trial.
- G. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, when appropriate, counsel should prepare motions and memoranda for such advance rulings.
- H. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and 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.
- I. If appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. 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 incarcerated. Counsel should attempt to prevent the client from being seen by the jury in any form of physical restraint.
- J. Counsel should plan with the client the most convenient system for conferring throughout the trial. When necessary, counsel should seek a court order to have the client available for conferences.
- K. 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 before they are made.
- L. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

## 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 trial 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.

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. 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 the court to ask jurors. 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. 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 voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
  6. Counsel should be familiar with the law concerning challenges for cause, peremptory strikes, and requests for additional strikes. Counsel also should be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause that have been denied.
  7. When appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
  8. 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 also should 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, when appropriate, 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 prej-

dice 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 asserting this right with the client.

**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 Statement**

- A. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- B. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
- C. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case. Counsel's opening statement also may incorporate these objectives:
  1. To provide an overview of the defense case;
  2. To identify the weaknesses of the prosecution's case;
  3. To identify and emphasize the prosecution's burden of proof;
  4. To summarize the testimony of witnesses, and the role of each witness in relationship to the entire case;
  5. To describe the exhibits that will be introduced and the role of each exhibit in relationship to the entire case;
  6. To clarify the jurors' responsibilities;
  7. To establish counsel's credibility with the jury;
  8. To prepare the jury for the client's testimony or failure to testify; and
  9. To state the ultimate inferences that counsel wishes the jury to draw.
- D. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecution makes to the jury during its opening statement.
- E. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should consider object-

ing, 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:

1. The significance of the prosecution's error;
2. The possibility that an objection might enhance the significance of the information in the jury's mind; and
3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

#### **Guideline 7.4 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 attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.
- 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 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.
- E. In preparing for cross-examination, counsel should:
  1. Consider the need to integrate cross-examination, the theory of the defense, and closing argument;
  2. Consider whether cross-examination of each individual witness is likely to generate helpful information, 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. Consider a cross-examination plan for each of the anticipated witnesses;
  5. Be alert to inconsistencies or variations in a witness's testimony;
  6. Be alert to possible variations between different witnesses' testimony;
  7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  8. When appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;
  9. When appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
  10. Have prepared a transcript of all audio or video tape-recorded statements made by witnesses;
  11. Be alert to issues relating to witness credibility, including bias and motive for testifying; and
  12. Have prepared, 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.

- F. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the 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.
- G. 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. A cautionary instruction;
  2. Adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess when necessary;
  3. Exclusion of the witness's testimony and all evidence affected by that testimony;
  4. A mistrial;
  5. Dismissal of the case; and
  6. Any other sanctions counsel believes would remedy the violation.
- H. If appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, 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 Presenting the Defense Case**

- A. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- B. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel also should be familiar with the ethical responsibilities that may be applicable if the client insists on testifying untruthfully. 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.
- C. The decision to testify rests solely with the client, and counsel should not attempt to unduly influence that decision. When counsel reasonably believes that testifying is in the best interest of the client, counsel should advise the client of the benefits and risks of that course of action. Similarly, when counsel reasonably believes that not testifying is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.
- D. 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.

- E. In preparing for presentation of a defense case, counsel should, when appropriate, do the following:
1. Consider all potential evidence that could corroborate the defense case, and the import of any evidence that is missing;
  2. After discussion with the client, make the decision whether to call any witnesses;
  3. Develop a plan for direct examination of each potential defense witness;
  4. Determine the implications that the order of witnesses may have on the defense case;
  5. Consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  6. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  7. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  8. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  9. Review all documentary evidence that may be presented;
  10. Review all tangible evidence that may be presented; and
  11. Be fully familiar with statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.
- F. In developing and presenting the defense case, counsel should consider the implications the defense case may have for a rebuttal by the prosecution.
- G. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel shall advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. When appropriate, counsel also should 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 appropriate.
- J. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and make an offer of proof.
- K. Counsel should guard against improper cross-examination by the prosecution.
- L. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.
- M. Counsel should keep a record of all exhibits identified or admitted.

### Guideline 7.6 Closing Argument

- 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. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, when appropriate, should consider:
  1. Highlighting weaknesses in the prosecution's case;
  2. Describing favorable inferences to be drawn from the evidence;
  3. Incorporating into the argument:
    - a. The theory and 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; and
    - e. Visual aids and exhibits; and
  4. The effects of the defense argument on the prosecution's rebuttal argument.
- E. Counsel should consider incorporating into counsel's closing argument summation of the promises of proof the prosecution made to the jury during its opening.
- F. Whenever the prosecution exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking a cautionary instruction unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
  1. Whether counsel believes that the case will result in a favorable verdict for the client;
  2. The need to preserve the objection for appellate review; and
  3. The possibility that an objection might enhance the significance of the information in the jury's mind.

### Guideline 7.7 Jury Instructions

- A. Counsel should file proposed or requested jury instructions 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 always should 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. When possible, counsel should provide case law in support of the proposed instructions.
- E. When appropriate, 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, when appropriate, 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 Obligations of Counsel in Sentencing

Among counsel's obligations in the sentencing process are:

- A. When a client chooses not to proceed to trial, to negotiate the plea agreement with consideration of the sentencing, correctional, financial, and collateral implications;
- B. To object and preserve error so that the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
- C. To seek and present to the court all reasonably available mitigating and favorable information that is likely to benefit the client;
- D. To seek the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
- E. To object to all information presented to the court that may harm the client and that is not shown to be accurate and truthful or is otherwise improper, and to seek to strike such information from the text of the presentence investigation report before distribution of the report;
- F. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted; and
- G. To identify and preserve legal and constitutional issues for appeal.

### Guideline 8.2 Sentencing Options, Consequences and Procedures

- A. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
  - 1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;
  - 2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;
  - 3. If a sentence involving community supervision or deferred adjudication community supervision is possible, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;
  - 4. If a sentence involving deferred adjudication community supervision is possible, special considerations

- regarding such a sentence including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;
- 5. The availability of appropriate diversion and rehabilitation programs; and
- 6. Applicable court costs.
- B. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
  - 1. The possible and likely place and manner of confinement;
  - 2. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
  - 3. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
  - 4. Any registration requirements, including sex offender registration and job-specific notification requirements;
  - 5. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence;
  - 6. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;
  - 7. Deportation and other possible immigration consequences that may result from the plea; and
  - 8. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions.
- C. Counsel should be familiar with the sentencing procedures, including:
  - 1. The effect that plea negotiations may have upon the sentencing discretion of the court;
  - 2. The procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;
  - 3. The practices of those who prepare the sentencing services plan or presentence report, and the client's rights in that process;
  - 4. Access to the sentencing services plan or presentence report by counsel and the client;
  - 5. The defense sentencing presentation and sentencing memorandum;
  - 6. The opportunity to challenge information presented to the court for sentencing purposes;
  - 7. The availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and
  - 8. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

### Guideline 8.3 Preparation for Sentencing

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

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

- B. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
- C. Obtain from the client and other sources relevant information concerning such subjects as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
- D. Inform the client of the client's right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial, or trial on other offenses;
- E. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
- F. Prepare the client to be interviewed by the official preparing the presentence report and seek adequate time for the client to examine the presentence report, if one is utilized by the court;
- G. Inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of the client's right to speak personally for a particular sentence or sentences; and
- H. Collect documents and affidavits to support the defense position and, when relevant, prepare witnesses to testify at the sentencing hearing; when necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence and use subpoenas to secure relevant documents and witnesses.

#### **Guideline 8.4 The Official Presentence Report**

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

- A. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; if preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
- B. 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;
- C. Attend any interview of the client by an agency presentence investigator, if there is a significant risk that information damaging to the client will be obtained unless counsel intervenes;
- D. Review the completed report;
- E. 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 parole officials, when the defense challenges information in the presentence 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; and
- F. When appropriate counsel should request permission to see copies of the report to be distributed in order to verify that challenged information actually has been removed from the report.

#### **Guideline 8.5 The Prosecution's Sentencing Position**

- A. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.
- B. If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
- C. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the memorandum by the court and to prevent distribution of the memorandum to parole and correctional officials.

#### **Guideline 8.6 The Defense Sentencing Memorandum**

Counsel should prepare and present to the court a defense sentencing memorandum when there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

- A. Challenges to incorrect or incomplete information in the official presentence report or any prosecution sentencing memorandum;
- B. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report or any prosecution sentencing memorandum;
- C. Information contrary to that before the court and that is supported by affidavits, letters, and public records;
- D. Information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;
- E. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
- F. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and
- G. Presentation of a sentencing proposal.

#### **Guideline 8.7 The Sentencing Process**

- A. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- B. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

- C. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. If a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the client.
- D. When information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- E. If the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, and against deportation/exclusion of the client.
- F. When appropriate, counsel should prepare the client to personally address the court.

### **Guideline 8.8 Self-Surrender**

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

### **Guideline 8.9 Expungement of Record**

After final disposition of the case, counsel should inform the client of any procedures available for requesting that the client's records in the case be expunged and, if such procedures may be available in the client's case, when and under what conditions the client may pursue an expunction.

### **Guideline 9.1 Duties of Defense Counsel in Post-Trial Proceedings**

- A. A client's right to counsel, and counsel's responsibilities to the client, do not terminate upon conviction, imposition of sentence, or order of deferred adjudication community supervision.
- 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 appeals are exhausted, including in motion for new trial proceedings.
- C. If the client wishes to pursue post-trial remedies, counsel should do the following prior to seeking to withdraw as counsel for post-trial proceedings:
  - 1. Notify the trial court in advance if the client will submit an affidavit of indigency and may require immediate appointment of post-trial counsel; and
  - 2. If arrangements have not been made for new counsel by the day of the verdict, assist the client in filing a written notice of appeal and in requesting prompt appointment of post-trial counsel.

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

To provide competent, quality representation in post-trial 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 be familiar with the procedures applicable to a motion requesting a new trial including:
  - 1. The time period for filing such a motion;
  - 2. The effect it has upon the time to file a notice of appeal;
  - 3. The grounds that can be raised;
  - 4. The evidentiary rules applicable to hearings on motions for new trial, including the requirement that factual allegations in the motion, or affidavits in support of such factual allegations, must be sworn to;
  - 5. The requirement that a motion for new trial be timely "presented" to the trial court in conformance with Rule of Appellate Procedure 21.6 in order to obtain a specific hearing date and preserve for appeal a claim that a request for a hearing was erroneously denied;
  - 6. The time period for receiving a ruling on a motion for new trial, after which the motion is overruled by operation of law; and
  - 7. The requirement that a trial court make written findings if a motion for new trial is granted.
- B. If a judgment of guilty has been entered against the client after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
  - 1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;
  - 2. The effect that such a motion might have upon the 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 the client's rights 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.
- C. The decision to file a motion for new trial should be made after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a motion for new trial are:
  - 1. Denial of the client's right to counsel or right to be present during trial;
  - 2. A fundamentally defective jury charge;
  - 3. Jury misconduct;
  - 4. Intentional suppression of witness testimony or other evidence tending to show the client's innocence, preventing its production at trial;
  - 5. Denial of a continuance based upon a critical missing witness;

- 6. Sufficiency of the evidence; and
  - 7. Any claim that would require a new trial in the interest of justice.
- D. In the event that a motion for new trial is granted, 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 the Right to Appeal**

- A. Following trial, counsel shall inform the client of the client's right to appeal the judgment of the court and the action that must be taken to perfect an appeal. Counsel's advice to the client should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court.
- B. If the client wants to file an appeal and trial counsel will not be handling the appeal, counsel shall formally withdraw from the client's case in conformance with Guideline 9.1, but only after taking all steps necessary to preserve the right to appeal. These steps include:
- 1. Assisting the client in filing written notice of appeal in accordance with the rules of the court;
  - 2. Assisting in the preparation and filing of a motion for new trial, if any; and
  - 3. If the client is indigent, assisting the client in requesting prompt appointment of appellate counsel.
- C. If the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court. If an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

#### **Guideline 9.5 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 sentence of the court, counsel should inform the client of any opportunity that may exist to be released on bail pending the disposition of the appeal and, if the client desires to pursue release pending appeal, file a motion requesting same including affidavits supporting such motion, and seek a hearing before the trial court.
- D. Counsel should immediately contact trial counsel to obtain background information on the client, information on the nature of the issues presented, and 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 Rules of Appellate Procedure.

- F. 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.
- G. 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 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.
- H. 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 9.6 Right to File a Petition for Discretionary Review**

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

- A. Review by the Court of Criminal Appeals is discretionary and not a matter of right, and that the Court of Criminal Appeals may refuse to review the 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 discretionary review but that, upon request, counsel may be appointed for this purpose; and
- C. If the client is indigent and if the petition for discretionary review is granted, the client does have the right to court-appointed counsel for further proceedings on the merits before the Court of Criminal Appeals.

#### **Guideline 9.7 Petition for Discretionary Review**

- A. Counsel representing a client on a petition for discretionary 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.
- B. If an intermediate appellate court has issued a decision unfavorable to the client, counsel should consider whether it is appropriate to file a petition for discretionary review with the Court of Criminal Appeals.
- C. The decision to file a petition for discretionary 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 Rules of Appellate Procedure. Reasons for review that counsel should consider presenting in a petition for discretionary 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 Court of Criminal Appeals;
  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 Court of Criminal Appeals 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 Court of Criminal Appeals' power of supervision.
- D. In preparing a petition for discretionary 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 Court of Criminal Appeals grant review on one or more issues presented in the petition, 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 Court of Criminal Appeals deny relief after granting a petition for discretionary 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 conviction.
- H. If the Court of Criminal Appeals summarily denies a petition for discretionary 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.

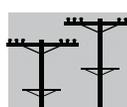
### **Guideline 9.8 Right to File a Petition for Certiorari to the United States Supreme Court**

- A. In the event that the Court of Criminal Appeals either summarily denies a petition for discretionary 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. In

advising 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, client does not have the right to court-appointed counsel for the purpose of filing a petition for certiorari; and
  3. 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 Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decision of another state court of last resort or federal court of appeals; or
  2. The Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, or has decided an important federal question in a way that conflicts with decision of the United States Supreme Court. ❖

## **SAVE THE DATE!**



**STATE BAR OF TEXAS**  
**Public Utility Law Section**  
**Annual Meeting and Seminar**  
**Friday, August 12, 2011**

**AT&T EXECUTIVE EDUCATION AND CONFERENCE CENTER**  
**THE UNIVERSITY OF TEXAS AT AUSTIN**  
1900 University Avenue • Austin, Texas

The Public Utility Law Section's annual seminar is the premiere utility law conference in the state. This year's seminar will cover the latest developments from the 2011 sunset review of the Texas PUC and ERCOT; a discussion on the "lessons learned" from the February 2nd energy emergency event in ERCOT; a discussion on the various entities reviewing the February 2nd event; a discussion of developments in the SPP; a review of eminent domain issues for utility transmission lines and pipelines; an update on telecommunications and water utility issues; and more. Confirmed speakers include PUC Commissioners Donna Nelson and Kenneth Anderson. CLE credit will be provided and a post-seminar reception is included. Do not miss it!

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