



ATTORNEY PERFORMANCE GUIDELINES IN NON-CAPITAL  
CASES AT THE TRIAL LEVEL

# **ALABAMA OFFICE OF INDIGENT DEFENSE SERVICES**

## **PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES**

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**ALABAMA OFFICE OF INDIGENT DEFENSE SERVICES  
TRIAL COURT PERFORMANCE GUIDELINES**

**Part 1: Duties and Obligations of Defense Counsel**

**Guideline 1.1: Purpose and Scope**

- A. The Office of Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of Act 2011-678—improving legal representation to indigents in Alabama.
- B. The guidelines are intended to serve several purposes, first and foremost to encourage public defenders, assistant public defenders, contract counsel, appointed counsel and retained counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent defendants.
- C. The guidelines are intended to alert defense counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions that must be taken in each case to ensure that the client receives the best representation possible. The standards are also intended to provide a measure by which the performance of individual attorneys and public defender offices may be evaluated, and to assist in training and supervising attorneys.
- D. The language of these guidelines is general, implying flexibility of action which is appropriate to the situation. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. Use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “where appropriate.” In those instances where a particular action is absolutely essential to providing quality representation, the guidelines use the words “should” or “shall.” Even where the guidelines use the words “should” or “shall,” in certain situations the lawyers’ best informed professional judgment and discretion may indicate otherwise.
- E. These 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.

**Guideline 1.2: Role of Defense Counsel**

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 throughout the criminal proceedings. If personal matters make it impossible for the defense counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from

representing the client. Counsel also has an obligation to uphold the ethical standards of the State Bar of Alabama and the Alabama Rules of Professional Conduct.

### **Guideline 1.3: Education, Training and Experience of Defense Counsel**

- A. In order to provide competent, quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in Alabama. Counsel should also be informed of any applicable local rules, as well as the practices of the specific judge before whom a case is pending.
- B. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should participate in skills training and education programs in order to maintain and enhance skills.
- C. Prior to undertaking representation in a criminal matter, counsel should have sufficient experience or training to provide competent, effective representation. 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.

### **Guideline 1.4: General Duties of Defense Counsel**

- A. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer effective representation to a defendant in a particular matter. If it later appears that counsel is unable to offer effective representation in the case, counsel should move to withdraw.
- B. Counsel has an 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 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.
- D. Counsel should appear timely for all scheduled court appearances in a client's case.
- E. Counsel must be alert to all potential and actual conflicts of interest. If a conflict develops during the course of representation, counsel has a duty to notify the client and, generally, the court in accordance with the Alabama Rules of Court and in accordance with the Alabama Rules of Professional Conduct. Where appropriate, counsel may seek an advisory opinion on any potential conflict of interest from the Alabama State Bar. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the client's rights and interests, does not reveal any confidential information, and does not violate counsel's ethical duties to the client.

- F. If counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, counsel shall inform the court or courts before whom counsel's cases are pending. If counsel is employed as a contract attorney, public defender or deputy public defender, additional notice shall be provided to counsel's supervising attorney or the Office of Indigent Defense Services.
- G. If counsel withdraws from representation, counsel has an obligation to deliver all contents of the client's file to new counsel if requested. Counsel shall timely respond to any reasonable request by new counsel regarding the case.

## **Section 2: Investigation and Preparation**

### **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 ten business days after counsel receives notice of assignment to the client's case. If necessary, counsel may arrange for a designee to conduct the initial interview.
- 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 and the potential punishment(s), for each charged offense;
  2. Obtain copies of any relevant documents which are available, including copies of any charging documents, law enforcement reports, and recommendations and reports made by pretrial services agencies concerning pretrial release;

In addition, where the client is incarcerated, the attorney should:

3. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. Be familiar with the different types of pretrial release conditions the court may set and whether any pretrial service or other agency is available to act as a custodian for the client's release; and
5. Be familiar with any procedures available for reviewing the trial judge's setting of bail.

### C. The Interview:

1. The purpose of the initial interview is to acquire information concerning the case, the client and pretrial release, and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. When appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at client interviews.
2. 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.
3. Information that should be acquired from the client, includes, but is not limited to:
  - i. 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);
  - ii. The client's physical and mental health, educational, employment, social security/disability, and armed services records;
  - iii. The client's immediate medical and/or mental health needs;
  - iv. The facts surrounding the charges leading to the client's arrest, to the extent the client knows and is willing to discuss these facts;
  - v. The client's version of arrest, with or without warrant; whether client was searched and if anything was seized, with or without warrant or consent; whether client was interrogated and if so, was a statement given; client's physical and mental status at the time the statement was given; whether any exemplars were provided and whether any scientific tests were performed on client's body or body fluids;
  - vi. The names and custodial status of all co-defendants;
  - vii. The names and locating information of any witnesses to the crime and/or the arrest; regardless of whether these are witnesses for the prosecution or for the defense; the existence of any tangible evidence in the possession of the state (when appropriate, counsel should take steps to insure this evidence is preserved);
  - viii. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court. Counsel should also determine whether the client has any pending charges or outstanding warrants from other jurisdictions or agencies and also whether he or she is on probation or parole, and the client's past or present performance under supervision;
  - viii. 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);

- ix. The ability of the client to meet any conditions of release, including financial conditions; and
  - x. Any other information that will assist the client's defense.
4. Information to be provided to the client, includes, but is not limited to:
- i. A general overview of the procedural progression of the case;
  - ii. 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;
  - iii. An explanation of the charges and the potential penalties;
  - iv. The names of any other persons who may be contacting the client on behalf of counsel;
  - v. If special conditions of release have been imposed (e.g., random drug screening) or other orders restricting client's conduct have been entered (e.g., no contact order), the client should be advised of the legal consequences of failure to comply with such conditions;
  - vi. Realistic answers, when possible, to the client's most urgent questions; and
  - vii. How and when counsel can be reached.
5. For clients who are incarcerated:
- i. An explanation of the procedures that will be pursued in seeking pretrial release;
  - ii. An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency, and an explanation that the client is not required to and should not make statements concerning the offense;
  - iii. Warn the client of the dangers with regard to the search of client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials;
  - iv. Warn the client against discussing the case or any details of it with any other incarcerated individual; and
  - v. Counsel should alert the jail to any special medical or psychiatric and security needs of the client that are known to counsel.

### **Guideline 2.3: Counsel's Duty in Pretrial Release Proceedings**

- A. 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.
- B. Counsel should adequately inform the client of the client's conditions of release after such conditions have been set.
- C. 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.

- D. 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.

#### **Guideline 2.4: Counsel's Duty at Preliminary Hearing**

- A. Counsel should discuss with the client the meaning of probable cause and the procedural aspects surrounding a probable cause determination, and should consider the tactical advantages and disadvantages of having a probable cause hearing.
- B. Counsel ordinarily should not call the client or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.
- C. Before conducting a preliminary hearing counsel should make reasonable efforts to secure and review information in the prosecution's or law enforcement authorities' possession through formal and informal discovery unless there is a sound tactical reason for not doing so.
- D. Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted in a timely fashion unless there are strategic reasons for not doing so.
- E. In preparing for the preliminary hearing, the attorney should become familiar with:
  1. The elements of each of the offenses alleged;
  2. The law of the jurisdiction for establishing probable cause;
  3. Factual information which is available concerning the existence or lack of probable cause;
  4. The subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings; and
  5. The potential impact on the admissibility of any witness's testimony if the witness is later unavailable at trial.

#### **Guideline 2.5: Investigation**

- A. Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client's wish to admit guilt, insure that the charges and disposition are factually and legally correct and the client is aware of potential defenses to the charges.
- B. Sources of investigative information may include the following.
  1. Charging Documents and Statutes:  
All charging documents including the arrest warrant, accusation and/or indictment documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

- i. The elements of the offense(s) with which the client is charged;
  - ii. The defenses, ordinary and affirmative, that may be available;
  - iii. Any lesser included offenses that may be available; and
  - iv. Any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.
2. Information from the Defendant.

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

Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses adverse to the accused should be conducted in a manner that permits counsel to effectively impeach the witness with statements made during the interview, either by having an investigator present or, if that is not possible, by sending the investigator to conduct the interview.
4. The Police and Prosecution Reports and Documents.

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

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.
6. The Scene of the Incident.

When appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed. Counsel should consider the taking of photographs and the creation of diagrams of the actual scene of the offense.
7. 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.
8. Securing the Assistance of Experts.

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

  - i. The preparation of the defense;
  - ii. Adequate understanding of the prosecution's case;

- iii. 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; or
- iv. Rebut the prosecution's case.

**Guideline 2.6: Formal and Informal Discovery**

- A. Counsel has a duty to pursue as soon as practicable, discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available. 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, at a minimum, of the following items:
  - 1. All information to which the client is entitled under Rule 16.1 of the Alabama Rules of Criminal Procedure
  - 2. Potential exculpatory information;
  - 3. Potential mitigating information;
  - 4. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  - 5. The prior criminal record of the client and any evidence of other misconduct that the government may intend to use against the client;
  - 6. Statements made by other potential witnesses;
  - 7. All video/audio recordings or photographs relevant to the case;
  - 8. All investigative reports by all law enforcement and other agencies involved in the case;
  - 9. All records of evidence collected and retained by law enforcement.
- C. Counsel should timely comply with all of the requirements governing disclosure of evidence by the defense and notice of defense and expert witnesses.

**Guideline 2.7: 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 on behalf of the client.

### **Part 3: Pretrial Motions**

#### **Guideline 3.1: 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 considering the applicable law in light of the known circumstances of each case, as well as the need to preserve issues for appellate review.
- C. Among the issues that counsel should consider addressing in a pretrial motion are:
  - 1. The pretrial custody of the client;
  - 2. The competency of the client;
  - 3. The constitutionality of the relevant statute or statutes;
  - 4. The potential defects in the charging process;
  - 5. The sufficiency of the charging document;
  - 6. The severance of charges or defendants;
  - 7. The discovery obligations of the prosecution;
  - 8. The suppression of evidence gathered as a result of violations of the Fourth, Fifth, Sixth, or Fourteenth Amendments to the United States Constitution, or corresponding state constitutional provisions, including:
    - a. The fruits of illegal searches or seizures;
    - b. Statements or confessions obtained involuntarily or in violation of the accused's right to counsel or privilege against self-incrimination; and
    - c. Unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification;
  - 9. 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 necessary support or investigative resources or experts;
  - 12. The defendant's right to a speedy trial;
  - 13. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
  - 14. Dismissal of a charge on double jeopardy grounds; and
  - 15. Matters of trial or courtroom procedure.
- D. Counsel should 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, including later claims of waiver or procedural default. In making this decision, counsel should remember that a motion has many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
  - 1. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

2. Changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted; and
  3. Later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions
- E. Counsel should request a full evidentiary hearing on any pretrial motion to the extent necessary to preserve the issue adequately for appellate review.
- F. Requests or agreements to continue a trial date should be discussed with the client before they are made.

### **Guideline 3.2: Filing and Arguing Pretrial Motions**

- A. Motions should be filed in a timely manner in accordance with statute and local rule, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon.
- 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 burden of proof, evidentiary principles, and trial court procedures applicable to the hearing; and
  4. Preparation and submission of a memorandum of law when appropriate.
- C. 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.

### **Guideline 3.3: Continuing Duty to File Pretrial Motions**

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.

## **Part 4: Disposition Without Trial**

### **Guideline 4.1: Duty of Counsel in Plea Negotiation Process**

- A. 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 a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
- B. Counsel should keep the client fully informed of any continued plea negotiations and promptly convey to the accused any offers made by the prosecution for a negotiated

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

- C. Counsel should explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal, and specifically explain that the client will waive his or her right to an appeal unless he or she has specifically reserved the right to appeal a particular issue or issues.
- D. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.
- E. 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 4.2: The Process of Plea Negotiations**

- A. 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 or sentencing guideline system, and possible 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 deferred adjudication is under consideration, the conditions of supervision, treatment, monitoring and monetary payment;
  4. Any registration requirements including sex offender registration;
  5. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
  6. Possible revocation of probation or parole status;
  7. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;
  8. Deportation and other possible immigration consequences that may result from the plea; and
  9. Other consequences of conviction including, but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the potential loss of entitlement program benefits, including social security disability, public and assisted housing and veteran benefits, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, and the loss of the right to hold public office.
- B. In developing a negotiation strategy, counsel should be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
  - i. Not to proceed to trial on merits of the charges;
  - ii. To decline from asserting or litigating any particular pretrial motions;
  - iii. An agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
  - iv. Providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;
2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
  - i. That the prosecution will not oppose the client's release on bail pending sentencing or appeal;
  - ii. That the client may enter a conditional plea to participate in a Drug Court, Mental Health Court or other similar program for which, upon completion, the plea may be set aside or modified;
  - iii. To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
  - iv. That the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
  - v. 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;
  - vi. That the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;
  - vii. That the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, certain information; and
  - viii. That the client will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration;
3. The position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:
  - i. 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;
  - ii. Consider to what extent the alleged victim or victims might be involved in the plea negotiations;
  - iii. Be familiar with any rights afforded the alleged victim or victims under the Crime Victim's Rights Act (Alabama Code Section 15-23-60, et seq.),

Alabama Crime Victim's Compensation Act (Alabama Code Section 15-23-1, et seq.) or other applicable law; and

- iv. Be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor as to what extent, if any, they defer to the wishes of the alleged victim.
- C. In conducting plea negotiations, counsel should be familiar with:
- 1. The various types of pleas that may be agreed to, including but not limited to a plea of guilty, not guilty by reason of insanity, a conditional plea of guilty, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*North Carolina v. Alford* plea);
  - 2. The advantages and disadvantages of each available plea according to the circumstances of the case;
  - 3. Whether the plea agreement is binding on the court, prison or parole authorities.
  - 4. The possibility of pretrial diversion; and
  - 5. Any recent changes in the applicable statutes or court rules and the effective date of those changes.

**Guidelines 4.3: 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 conviction after trial.
- 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 of the potential 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.
- 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 4.4: Entry of the Plea before the Court**

- A. Prior to 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 he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and
  4. Make certain that if the plea is a non-negotiated plea, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.
- B. When entering the plea, counsel should confirm that the full content and conditions of the plea agreement are placed on the record before the court.
- C. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

## **Part 5: Trial**

### **Guideline 5.1: Counsel's Duty of Trial Preparation**

- A. The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client. Counsel should maintain a record of the advice provided to the client, as well as the client's decision concerning trial.
- B. 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.
- C. Where appropriate, counsel should have the following materials available at the time of trial:
  1. Copies of all relevant documents filed in the case;
  2. Relevant documents prepared by investigators;
  3. Voir dire topics, plans, or questions;
  4. Outline or draft of opening statement;
  5. Cross-examination plans for all possible prosecution witnesses;
  6. Direct examination plans for all prospective defense witnesses;
  7. Copies of defense subpoenas and defense subpoena results;
  8. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

9. Prior statements of all defense witnesses;
  10. Reports from defense experts;
  11. A list of all defense exhibits, and the witnesses through whom they will be introduced;
  12. Originals and copies of all documentary exhibits;
  13. Proposed jury instructions with supporting case citations;
  14. A list of the evidence necessary to support defense requests for jury instructions;
  15. Copies of all relevant statutes and cases; and
  16. Outline or draft of closing argument.
- D. Counsel should be familiar with the rules of evidence, court rules, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise at trial.
  - E. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
  - F. Throughout the trial process counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so.
  - G. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. If necessary, counsel should file pre-trial motions to insure that the client has appropriate clothing and the court personnel follow appropriate procedures so as not to reveal to jurors that the defendant is incarcerated.
  - H. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.
  - I. 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.
  - J. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.
  - K. Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding.

### **Guideline 5.2: Voir Dire and Jury Selection**

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

2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, counsel should seek to obtain a prospective juror list.
4. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
  - i. To elicit information about the attitudes of individual jurors, which will inform counsel and defendant about peremptory strikes and challenges for cause;
  - ii. To convey to the panel certain legal principles which are critical to the defense case;
  - iii. To preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
  - iv. To present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and
  - v. To establish a relationship with the jury.
5. Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
7. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
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.

#### B. Examining the Prospective Jurors

1. Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.
2. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the other jurors.

#### 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. In exercising challenges for cause and peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
3. Counsel should make every effort to consult with the client in exercising challenges.
4. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
5. Counsel should object to and preserve all issues related to the unconstitutional exclusion of jurors by the prosecution.

**Guideline 5.3: 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.
- D. Counsel's objective in making an opening statement may include the following:
  1. To provide an overview of the defense case;
  2. To identify the weaknesses of the prosecution's case;
  3. To emphasize the prosecution's burden of proof;
  4. To summarize the testimony of witnesses, and the role of each in relationship to the entire case;
  5. To describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  6. To clarify the jurors' responsibilities;
  7. To state the ultimate inferences which counsel wishes the jury to draw; and
  8. To establish counsel's credibility with the jury.
- E. Counsel should record and consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during opening statement.
- F. Whenever the prosecutor oversteps the bounds of proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
  1. The significance of the prosecutor's error;
  2. The possibility that an objection might enhance the significance of the information in the jury's mind; and
  3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

**Guideline 5.4: Confronting the Prosecutor'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 consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- C. Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper state evidence, and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence is admissible only for a limited purpose, counsel should consider requesting an appropriate limiting instruction.
- D. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- 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;
  3. Anticipate those 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 and variations in a witness' testimony;
  6. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  7. Have prepared a transcript of all audio or video tape recorded statements made by the witness;
  8. Where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;
  9. Be alert to issues relating to witness credibility, including bias and motive for testifying; and
  10. Have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.
- F. 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.
- H. Prior to cross examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct

examination, counsel should request adequate time to review these documents before commencing cross-examination.

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

### **Guideline 5.5: 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, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- C. The decision to testify rests solely with the client, and 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. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully.
- 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, where appropriate:
  1. Develop a plan for direct examination of each potential defense witness;
  2. Determine the implications that the order of witnesses may have on the defense case;
  3. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  4. Consider the possible use and careful preparation of character witnesses;
  5. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  6. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  7. Review all documentary evidence that must be presented; and
  8. Review all tangible evidence that must be presented.
- F. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

- G. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- H. Counsel should conduct redirect examination as appropriate.
- I. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and make an offer of proof.
- J. Counsel should keep a record of all exhibits identified or admitted;
- K. At the close of the defense case, counsel should renew the motion for a directed verdict of acquittal on each charged count.

### **Guideline 5.6: 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 court rules, applicable statutes and law, and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- D. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
  - 1. Highlighting weaknesses in the prosecution's case;
  - 2. Describing favorable inferences to be drawn from the evidence;
  - 3. Incorporating into the argument:
    - i. Helpful testimony from direct and cross-examinations;
    - ii. Verbatim instructions drawn from the jury charge;
    - iii. Responses to anticipated prosecution arguments;
    - iv. Visual aids and exhibits; and
  - 4. The effects of the defense argument on prosecutor's rebuttal argument.
- E. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
  - 1. Whether counsel believes that the case will result in a favorable verdict for the client;
  - 2. The need to preserve the objection for appellate review; or
  - 3. The possibility that an objection might enhance the significance of the information in the jury's mind.

**Guideline 5.7: Jury Instructions**

- A. Counsel should file proposed or requested jury instructions before closing argument.
- B. Counsel should be familiar with the Alabama Rules of Court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- C. Counsel should always submit proposed jury instructions in writing.
- D. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide citations to case law in support of the proposed instructions.
- E. Where 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, where appropriate, filing a written copy of proposed instructions.
- H. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary request additional or curative instructions.
- I. 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.
- 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.

**Part 6: Sentencing****Guideline 6.1: Obligations of Counsel at Sentencing Hearing**

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, which is likely to benefit the client;

- D. To seek the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
- E. To 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; and
- F. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted

### **Guideline 6.2: 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, applicability of voluntary sentencing standards, presumptive sentencing standards, and all other applicable sentencing statutes or case law;
  3. The availability of appropriate diversion and rehabilitation programs;
  4. If a sentence involving deferred adjudication is possible, the permissible conditions of supervision with which the client must comply in order to avoid revocation or adjudication;
  5. Probation or suspension of sentence and permissible conditions of probation;
  6. Fines, associated fees and court costs; and
  7. Reimbursement of attorneys' fees;
- B. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
  1. Credit for pre-trial detention;
  2. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
  3. Parole eligibility and applicable parole release ranges (if applicable);
  4. Place of confinement and level of security and classification criteria used by Department of Corrections (if known);
  5. Eligibility for correctional and educational programs;
  6. Availability of drug rehabilitation programs, community corrections placement, psychiatric treatment, health care, and other treatment programs;
  7. Any registration requirements, including sex offender registration;
  8. Deportation and other immigration consequences;

9. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if client is serving a prior sentence on a parole status;
10. Suspension of a motor vehicle operator's permit;
11. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; civil monetary penalties; potential collateral consequences in administrative proceedings involving the IRS or bankruptcy court; 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 availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;
3. The use of "victim impact" evidence at any sentencing hearing;
4. The right of the defendant to speak prior to being sentenced;
5. Any discovery rules and reciprocal discovery rules that apply to sentencing hearings; and
6. The use of any sentencing guidelines.

D. Where the court uses a pre-sentence report, counsel should be familiar with:

1. The practices of the officials who prepare the pre-sentence report and the client's rights in that process;
2. The access to the pre-sentence report by counsel and the defendant;
3. The defense sentencing presentation and sentencing memorandum;
4. The prosecution's practice in preparing a memorandum on punishment;
5. The opportunity to challenge information presented to the court for sentencing purposes; and
6. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

### **Guideline 6.3: 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 sentencing judge's practices and procedures, if known;
- 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 and mental health history and condition, and financial status, family obligations, and obtain from the client sources through which the information provided can be corroborated;

- D. Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial of other offenses;
- E. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
- F. Prepare the client to be interviewed by the official preparing the presentence report; and ensure the client has adequate time to examine the 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 his or her right to speak personally for a particular sentence or sentences; and
- H. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

#### **Guideline 6.4: 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. Review the completed report and discuss it with the client; and
- D. Take appropriate steps to ensure that erroneous or misleading information that may harm the client is challenged or deleted from the plan.

#### **Guideline 6.5: 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.

**Guideline 6.6: The Defense Sentencing Memorandum**

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

- A. 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;
- B. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
- C. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and
- D. Presentation of a sentencing proposal.

**Guideline 6.7: 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. Where appropriate, counsel should be prepared to present supporting evidence, including testimony of witnesses, affidavits, letters and public records, to establish facts favorable to the client.
- C. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
- D. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- E. If the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, probation or suspension of part or all of the sentence, psychiatric treatment or drug rehabilitation.
- F. Where appropriate, counsel should prepare the client to personally address the court.
- G. After the sentencing hearing is complete, counsel should fully explain to the client the terms of the sentence, including any conditions of probation.

**Guideline 6.8: 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 expungement.

**Part 7: After Sentencing****Guideline 7.1: Motion for a New Trial**

- A. Counsel should be familiar with the procedures available to request 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; and
  4. The time period for receiving a ruling on a motion for new trial, after which the motion is overruled by operation of law.
  
- B. If a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
  1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;
  2. The effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion;
  3. The effect filing a motion for new trial will have on the time period for perfecting an appeal; and
  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.

**Guideline 7.2: Protecting the Right to Appeal**

- A. Following conviction, counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal.

- B. 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, but only after taking all steps necessary to preserve the right to appeal. These steps include:
  1. Assisting the client with 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.

### **Guideline 7.3: 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 records and reporter's transcript.
- 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. Counsel should immediately contract 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.
- D. Counsel should immediately inform the court and the prosecution of the representation by filing the appropriate designation of counsel with the court. A 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.
- E. 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.
- F. 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 notify the court of counsel's desire to present oral argument in the case, when appropriate.
- G. 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 7.4: 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. 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.
- C. 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.

**Guideline 7.5: Bail Pending Appeal**

- A. Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion where appropriate.
- B. Where an appeal is taken and after appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.