94-649 MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Chapter 101: STANDARDS OF PRACTICE FOR ATTORNEYS WHO REPRESENT JUVENILES IN JUVENILE COURT PROCEEDINGS

Summary: This Chapter establishes standards of practice for Commission assigned counsel providing representation in juvenile cases. Theses standards are intended to guide assigned counsel in the conduct of their representation and for use by the Commission in evaluating, supervising and training assigned counsel.

SECTION 1. SCOPE & PURPOSE

1. These Standards apply whenever defense counsel is assigned pursuant to the Maine Commission on Indigent Legal Services' (MCILS) jurisdiction to provide representation to juveniles charged with juvenile or adult crimes who are financially unable to retain defense counsel and who are entitled to representation pursuant to the United States and Maine Constitutions.

2. These standards are intended as a guide for assigned defense counsel and for use by MCILS in evaluating, supervising and training assigned counsel. Although MCILS understands that not every action outlined in these standards is necessary in every case, the Commission will apply these standards, the Maine Rules of Criminal Procedure, the Maine Juvenile Code, and the Maine Rules of Professional Conduct, as well as all other Commission policies and procedures in evaluating the performance or conduct of counsel.

3. Role of defense counsel for the Juvenile. The paramount obligation of defense counsel for the juvenile is to provide zealous and quality representation to the juvenile at all stages of the process. Defense counsel's personal opinion of the juvenile's guilt is not relevant to the defense of the case.

4. Expressed Preferences of the Juvenile.

   A. Defense counsel should represent the juvenile's expressed preferences and follow the juvenile's direction throughout the course of litigation. Defense counsel should refrain from the waiving of substantial rights or the substitution of their own view or the parents' wishes for the position of the juvenile. In addition, defense counsel has a responsibility to advise the juvenile as to potential outcomes of various courses of action.

   B. Defense counsel should advise the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his or her own decisions and advocate the juvenile's viewpoint and wishes to the Court.

   C. Defense counsel may request the appointment of a guardian *ad litem* if there are concerns for the juvenile's safety, well-being, or physical, mental, or emotional

health and defense counsel believes a guardian *ad litem* is necessary to advocate for the best interest of the juvenile.

5. Scope of Representation

A. Certain decisions relating to the conduct of the case are ultimately for the juvenile and other decisions are ultimately for defense counsel. The decisions which are to be made by the juvenile after full consultation with defense counsel are:

(1) What pleas to enter;
(2) Whether to accept a plea agreement;
(3) Whether to participate in a program;
(4) Whether to testify in his or her own behalf; and
(5) Whether to appeal.

B. Defense counsel should explain that final decisions concerning trial strategy, after full consultation with the juvenile and after investigation of the applicable facts and law, are ultimately to be made by defense counsel. The juvenile should be made aware that defense counsel is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of defense counsel's decision-making role in this regard is consideration of the juvenile's input and full disclosure by defense counsel to the juvenile of the factors considered by defense counsel in making the decisions.

SECTION 2. GENERAL AUTHORITY AND DUTIES

1. Basic Competency of Defense Counsel in Juvenile Proceedings

A. Before agreeing to defend a juvenile, defense counsel has an obligation to make sure that they have sufficient time, resources, knowledge and experience to offer quality representation to the juvenile. Before defending - a juvenile, defense counsel should observe juvenile court, including every stage of a juvenile proceeding, and have a working knowledge of juvenile law and practice.

B. Defense counsel should accept the more serious and complex cases only after having had experience and/or training in less complex juvenile matters. Where appropriate, defense counsel should consult with more experienced counsel to acquire knowledge and familiarity with all facets of juvenile representation, including information about the practices of judges, prosecutors, juvenile community corrections officers, and other court personnel.

C. There are special hearings for a juvenile, such as a bind-over hearing, in which defense counsel may not have the skills and resources to represent the juvenile in such situations. In those proceedings defense counsel may need to consult with or seek co-counsel with adequate experience in these matters.

2. Prior to representing a juvenile, at a minimum, defense counsel should receive training or be knowledgeable in the following areas:

A. Information about relevant federal and state statutes, court decisions and the Maine court rules, including but not limited to:

(1) Maine Juvenile Code;
(2) Maine Rules of Criminal Procedure; and
(3) Maine Rules of Evidence;

B. Placement options for detention and disposition; and

C. Adolescent development, needs, and abilities.

3. Defense counsel representing juveniles should annually complete Continuing Legal Education relevant to the representation of juveniles. Additional legal education may include, but is not limited to:

A. Adolescent mental health diagnoses and treatment including the use of psychotropic medications;

B. How to read a psychological or psychiatric evaluation and how to use these in motions including but not limited to those involving issues of consent and competency relating to Miranda, search and waivers;

C. Normal childhood development (including brain development), developmental delays and mental retardation;

D. Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony;

E. Information on educational rights including special educational rights and services and how to access and interpret school records and how to use them in motions including but not limited to those related to consent and competency issues;

F. School suspension and expulsion procedures;

G. Use and application of the current assessment tool(s) used in your jurisdiction and possible challenges that can be used to protect the juvenile clients;

H. Immigration issues regarding juveniles;

I. Cultural competence.

2. Basic Obligations of the Attorney

A. Defense counsel should:

(1) Obtain copies of all pleadings, discovery, and relevant notices;
(2) Participate in all proceedings, negotiations, pretrial conferences, and hearings;
(3) Defense counsel the juvenile concerning the subject matter of the

litigation, the juvenile's rights, the court system, the proceedings, defense counsel's role, and what to expect throughout the process; and

(4) Develop a theory and strategy of the case to implement at hearings.

3. Conflicts of Interest

A. Defense counsel must be alert to all potential and actual conflicts of interest that would impair their ability to represent a juvenile. Loyalty and independent judgment are essential elements in defense counsel's relationship to a juvenile. Conflicts of interest can arise from defense counsel's responsibilities to another client, a former client or a third person, or from defense counsel's own interests.

B. Joint representation of co-defendants is not a *per se* violation of the constitutional guarantee of effective assistance of counsel. However, if defense counsel must forbear from doing something on behalf of a juvenile because of responsibilities or obligations to another client, there is a conflict. Similarly, if by doing something for one client, another client is harmed, there is a conflict.

C. If a conflict arises, defense counsel should be cautious about permitting a juvenile to waive the conflict. The waiver may have collateral consequences in other motions in the case regarding the juvenile's competency to waive constitutional protections.

D. Defense counsel should not permit a parent or custodian to direct the representation or share information unless disclosure of such information has been approved by the juvenile. Especially when a parent is the alleged victim or has some other adverse interest, defense counsel needs to ensure the confidentiality of the attorney-client communication and independence of the judgment made by the juvenile.

4. Client Communications

A. Defense counsel should keep the juvenile informed of the developments in the case, and the progress of preparing the defense and should promptly comply with all reasonable requests for information.

B. Defense counsel should communicate with the juvenile in a manner that will be effective, considering the juvenile's maturity, intellectual ability, language, educational level, special education needs, cultural background, gender, and physical, mental and emotional health. If appropriate, defense counsel should request funds pursuant to Chapter 302: Procedures Regarding Funds for Experts and Investigators for an interpreter to facilitate communication with the client and insist that the court provide necessary interpreter services at all stages of court proceedings.

5. Client Confidentiality

A. Defense counsel should seek from the outset to establish a relationship of trust and confidence with the juvenile. Defense counsel should explain defense counsel's obligation of confidentiality thus making privileged the juvenile's disclosures relating to the case.

B. Defense counsel should ensure that communications with a juvenile in an institution including a detention center are confidential. One way to ensure confidentiality is to stamp all mail as legal and confidential.

6. Case Organization

A. Defense counsel shall maintain a juvenile case file on each active case, and when appropriate, provide the case file to successor attorneys. Defense counsel is expected to maintain all information about the case's history and future proceedings, deadlines, dates, etc., on or within the juvenile's case file so that it is readily discernible.

B. All case files must reflect the procedural history of the case, and all other information necessary to render effective representation, including copies of the charging documents, all discovery, pleadings, plea offers, notes and other communications.

C. As part of the juvenile representation, defense counsel should maintain relevant updated notes that record information such as information obtained during all interviews of the juvenile; interviews of witnesses, interviews of family members; juvenile's background and history; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the juvenile community correction officer(s); conversations with police officers or investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.

7. Continuity of Representation

Defense counsel should continue their representation through all stages of the proceedings. Unless otherwise ordered by the court, defense counsel shall continue to represent the juvenile from the point of the initial court proceedings through disposition, and any other related proceedings until the case is closed.

8. Duty of Stand-In Counsel

Defense counsel that is requested to stand in for another at any hearing must (1) represent the juvenile zealously as if it is his or her own client; (2) ensure that the juvenile knows how to contact stand-in counsel in case he or she does not hear from the defense counsel of record, (3) immediately communicate with the defense counsel of record regarding upcoming dates/hearings, how to contact the juvenile , placement of the juvenile , nature of charges, and other timely issues that the defense counsel of record may need to know or address, and (4) immediately or within a reasonable time thereafter provide to the defense counsel of record all notes, documents, and any discovery received.

9. Caseloads

Defense counsel should not have such a large number of cases that he or she is unable to comply with these guidelines. Before agreeing to accept assignment, defense counsel has an obligation to make sure that he or she has sufficient time, resources, knowledge, and

experience to offer quality legal services in a particular matter.

SECTION 3. INITIAL OBLIGATIONS

1. Prompt Action to Protect the Juvenile

Many important rights of the juvenile in juvenile court proceedings can be protected only by prompt advice and action. Defense counsel should immediately inform the client of their rights and pursue any investigatory or procedural steps necessary to protect the juvenile's interests.

2. Advocate for the Juvenile's Release from Detention

A. Defense counsel has an obligation to attempt to secure the pretrial release of the juvenile under the conditions most favorable and acceptable to the juvenile unless contrary to the expressed wishes of the juvenile.

B. Defense counsel should be prepared to present to the juvenile judge a statement of the factual circumstances and the legal criteria supporting release including challenges to probable cause and to make a proposal concerning conditions of release.

C. Defense counsel should determine whether a parent or other adult is able and willing to assume custody of the juvenile. Defense counsel should be aware that most juvenile courts will not release a juvenile without a responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult.

D. Defense counsel should arrange to have witnesses to support release and have anyone the juvenile wishes to have present at any hearing.

E. If the juvenile is released, defense counsel should fully explain the conditions of release to the juvenile and the juvenile's custodian and advise both of the potential consequences of a violation of those conditions.

F. Following the detention hearing, defense counsel should continue to advocate for release of a juvenile or expeditious placement.

G. Whenever a juvenile is held in some form of detention, defense counsel should periodically visit the client.

H. Whenever a juvenile is held in some form of detention, defense counsel should be prepared for an expedited adjudicatory hearing.

3. Meet with Juvenile

A. Defense counsel should conduct a client interview as soon as possible after being assigned by the court/MCILS in order to obtain the information necessary to provide quality representation at the early stages of the case and to provide the juvenile with information concerning the representation and the case

proceedings. Any meeting should be held sufficiently before any court proceeding so as to be prepared for that proceeding.

B. Prior to conducting the initial interview defense counsel should, where possible:

(1) Be familiar with the elements of the offense and the potential punishment where the charges against the juvenile are already known;
(2) Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by the Department of Correction, and law enforcement reports that might be available;

4. Defense counsel should specifically:

A. Ascertain:

(1) The juvenile's current living arrangements, family relationships, and ties to the community, including the length of time his or her family has lived at the current, as well as the juvenile's supervision when at home;
(2) The immigration status of the juvenile and his or her family members, if applicable;
(3) The juvenile's educational history, including current grade level, attendance and any disciplinary history;
(4) The juvenile's work history, if any:
(5) The juvenile's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and any prescribed medications and other immediate needs;
(6) The juvenile's delinquency history, if any, including arrests, detentions, diversions, adjudications, and failures to appear in court;
(7) Whether there are any other pending charges against the juvenile and the identity of any other appointed or retained counsel;

B. Explain the nature of the attorney-client relationship to the juvenile including the requirements of confidentiality;

C. Explain the attorney-client privilege and instruct the juvenile not to talk to anyone about the facts of the case without first consulting with defense counsel ;

D. Explain the nature of the allegations, what the prosecution must prove, and the likely and maximum potential consequences;

E. Explain a general procedural overview of the progression of the case;

F. Explain how and when to contact defense counsel;

G. Explain the role of each player in the system;

H. Obtain a signed release(s) authorizing defense counsel and/or his/her agent to obtain official records related to the juvenile including medical and mental health records, school records, employment records, etc;

I. Discuss arrangements to address the juvenile's most critical needs; e.g., medical or mental health, or contact with family or employers; and

J. Assess whether the juvenile is competent to proceed or has a disability that would impact a possible defense or mitigation.

5. At the initial meeting and thereafter as appropriate, defense counsel should gather information relevant to the preparation of the defense. Such information may include, but is not limited to:

A. The facts surrounding the charges against the juvenile;

B. Any evidence of improper police investigative practices or prosecutorial conduct which affects the juvenile's rights;

C. Any possible witnesses or other potential sources of information;

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

6. Throughout the process, defense counsel should take the time to:

A. Keep the juvenile informed of the nature and status of the proceedings on an ongoing basis;

B. Maintain regular contact with the juvenile during the course of the case, and especially before court hearings;

C. Review all discovery with the juvenile as part of the case theory development;

D. Promptly respond to telephone calls and other types of contact from the juvenile, where possible, within one business day or a within reasonable time thereafter; and

E. Defense counsel on options and related consequences and decisions to be made.

SECTION 4. PRE-ADJUDICATION

1. Diversion/Informal Adjustment

Defense counsel should be familiar with diversionary programs and alternative solutions available in the community. Such programs may include diversion, mediation, or other alternatives that could result in a juvenile's case being dismissed or handled informally. When appropriate and available, defense counsel shall advocate for the use of informal mechanisms that could divert the juvenile's case from the formal court process.

2. Mental Health Examinations

Preserve Rights in Mental Health Examinations. Throughout a delinquency proceeding, the judge may order a mental health examination of the juvenile. Admissions made

during such examinations are not protected from disclosure. Defense counsel should ensure the juvenile understands the consequences of admissions during such examinations and advise the juvenile on the lack of confidentiality and that personal information about the juvenile or the juvenile's family will be revealed to the court or other personnel.

3. Competency and Insanity

A. Competency:

(1) Defense counsel should be familiar with procedures for a determination of mental incompetence under the Maine Juvenile Code and Maine Rules of Criminal Procedure.

(2) Although the juvenile's expressed interests ordinarily control, defense counsel may question capacity to proceed without the juvenile's approval or over the juvenile's objection, if necessary.

(3) If at any time, the juvenile's behavior or mental ability indicates that he or she may be incompetent, or may be mentally retarded, defense counsel should request the court issue an order for a juvenile to be examined for competency to stand trial through State Forensics. Prior to the evaluation by the expert, defense counsel should request from the child and provide to the experts all relevant documents including but not limited to the arrest report, prior psychological/psychiatric evaluations, school records and any other important medical records.

(4) Defense counsel should prepare for and participate fully in the competency hearing.

B. Defense of Insanity:

(1) Defense counsel should be familiar with the substantive law and procedures governing the insanity defense in Maine.

(2) If defense counsel believes that the juvenile did not appreciate the consequences of his/her actions at the time of the offense, the attorney should discuss with the juvenile the possibility of an insanity defense.

(3) Before raising the issue of insanity in open court, defense counsel should consider retaining their own mental health professional to evaluate whether the child appreciated the consequences of his or her actions at the time of the offense. Prior to the evaluation by the expert, defense counsel should request from the child and provide to the experts all relevant documents including but not limited prior psychological/psychiatric evaluations, school records and any other important medical records.

(4) Defense counsel must fully prepare the witnesses to testify on the juvenile's behalf in regard to the juvenile's sanity at the time of the offense.

(5) Defense counsel must advise the juvenile of the potential dispositions available to the Court if he/she is found not guilty by reason of insanity.

(6) Defense counsel must be prepared to advocate on behalf of the juvenile against involuntary commitment and provide other treatment options such as outpatient counseling or services.

4. Initial Appearance/Arraignment

A. If appointed prior to the juvenile's initial appearance, defense counsel should preserve the juvenile's rights at the initial appearance on the charges by reviewing discovery materials to determine probable cause, preserving the right to file motions, and entering a "no answer" to the charges in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so.

B. However, there may be reasons to enter a plea at arraignment such as to benefit from a concurrent sentence or a unique opportunity for a favorable disposition.

Defense counsel is required to explain to the juvenile the consequences of waiving counsel and the collateral consequences of a plea entered.

5. Bind-over

A. Defense counsel must be familiar with the substantive law and procedures governing bind-over under the Maine Juvenile Code;

B. Defense counsel must advise the juvenile of the consequences of bind-over and of the maximum possible sentence to which the juvenile would be exposed if tried as an adult;

C. Defense counsel must investigate the circumstances of the alleged conduct and the circumstances of the juvenile to identify specific evidence relevant to the issue of bind-over;

D. Defense counsel must identify and prepare witnesses, including expert mental health witnesses, to testify on behalf of the juvenile at any hearing on bind-over;

E. Defense counsel must prepare for and participate fully in any bind-over hearing.

6. Investigation. Defense investigation is an essential aspect of competent representation. Defense counsel should:

A. Review the court file and any prior court records of the juvenile, and other relevant records;

B. Examine all charging documents to determine the specific charges that have been brought against the juvenile. The relevant statutes and precedents should be examined to identify: the elements of the offense(s) with which the juvenile is charged; both the ordinary and affirmative defenses that may be available; any lesser included offenses that may be available; and any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy;

C. Determine and interview any potential defense witness;

D. Interview any state witnesses;

E. Where appropriate, visit and investigate the scene of the alleged act. Defense counsel should consider obtaining photographs, maps and measurements of the area.

F. Seek investigators and experts, as needed, to assist defense counsel in the preparation of a defense, in the understanding of the prosecution's case or in the rebuttal of the prosecution's case.

6. Participate in Discovery

Defense counsel should pursue discovery pursuant to the Maine Rules of Criminal Procedure in all cases and review the response to this quickly to determine what additional investigation or discovery needs to be conducted or obtained.

7. Develop a Theory of the Case

During the investigation and trial preparation, defense counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for a finding of not guilty or adjudication of a lesser offense, while also telling the juvenile's story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which defense counsel determines all actions in a case.

8. File Motions

A. Defense counsel should file motions, or objections as necessary to zealously represent the juvenile. Defense counsel should file motions as soon as possible due to 21 day time constraints for filing pre-trial motions as set out in Maine Rules of Criminal Procedure.

B. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon in the case. When a hearing on a motion requires the taking of evidence, defense counsel's preparation for the evidentiary hearing should include: investigation, discovery and research relevant to the claim advanced; the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses; and full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the juvenile testify.

C. Relief requested may include, but is not limited to:

(1) In consultation with the juvenile, a mental or physical examination of the juvenile;
(2) Relief due to mental incapacity, incompetency, mental retardation or mental illness;
(3) Relief based on the unconstitutionality of the implicated statute or statutes;
(4) Relief based on the insufficiency of the charging document;
(5) Relief based on improper or prejudicial joinder or severance of charges or defendants in the petition or adjudicatory hearing;

(6) Relief based on the failure of the state to meet its discovery obligations;
(7) The suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, state constitutional provisions or statutes, including;
  (a) The fruits of illegal searches or seizures;
  (b) Involuntary statements or confessions;
  (c) Statements or confessions obtained in violation of the juvenile's right to an attorney, or privilege against self-incrimination;
  (d) Unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
(8) Suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
(9) Access to resources which or experts who may be denied to the juvenile because of his or her indigence;
(10) The juvenile's right to a speedy trial;
(11) The juvenile's right to a continuance in order to adequately prepare his or her case;
(12) Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
(13) Motion for judgment of dismissal; or
(14) Matters of trial or courtroom procedures, including inappropriate clothing or restraints of the juvenile.

9. Plea Negotiations

A. Defense counsel should participate in plea negotiations to seek the best result possible for the juvenile consistent with the client's interests and directions to his or her attorney.

B. Prior to entering into any negotiations, defense counsel shall have sufficient knowledge of the strengths and weaknesses of the case(s), or of the issue(s) under negotiation enabling defense counsel to advise the juvenile of the risks and benefits of settlement.

C. Defense counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the juvenile any offers made by the prosecution for a negotiated settlement. Defense counsel should not accept any plea agreement without the juvenile's consent. The decision to enter a plea rests solely with the juvenile client and defense counsel should not attempt to unduly influence that decision or let a parent or other adult unduly influence whether a juvenile enters a plea.

D. Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, defense counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial.

E. In preparing to enter a plea before the court, defense counsel must explain to the juvenile the nature of the plea hearing and prepare the juvenile 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 the appropriate disposition. Specifically, defense counsel should:

(1) Be satisfied there is a factual basis for the plea or admission;
(2) Make certain that the juvenile understands the rights he or she will waive by entering the plea and that the juvenile's decision to waive those rights is knowing, voluntary and intelligent;
(3) Be satisfied that the plea is voluntary and that the juvenile understands the nature of the charges.
(4) Make certain that the juvenile fully and completely understands the conditions and limits of the plea agreement and the maximum punishment in juvenile court, sanctions and other consequences the juvenile will be exposed to by entering a plea;

F. When the plea is against the advice of defense counsel or without adequate time to investigate, defense counsel should indicate this on the record.

SECTION 5. ADJUDICATORY HEARINGS

1. Client Explanation

Defense counsel should explain to the juvenile, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing. The attorney should advise the juvenile as to suitable courtroom dress and demeanor.

2. Materials Available. Where appropriate, defense counsel should have the following materials available at the time of trial:

A. Copies of all relevant documents filed in the case;

B. Relevant documents prepared by investigators;

C. Outline or draft of opening statement;

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

E. Direct examination plans for all prospective defense witnesses;

F. Copies of defense subpoenas;

G. Prior statements of all prosecution witnesses (e.g. police reports);

H. Prior statements of all defense witnesses;

I. Reports from all experts;

J. A list of all defense exhibits, and witnesses;

K. Originals and copies of all documentary exhibits;

L. Copies of all relevant statutes and cases;

M. Outline or draft of closing argument.

3. Motions and Objections

Defense counsel should make appropriate motions, including motions in limine and evidentiary and other objections, to advance the juvenile's position at trial or during other hearings. Defense counsel should be aware of the burdens of proof, evidentiary principles and court procedures applying to the motion hearing. Further, during all hearings, defense counsel should preserve legal issues for appeal, as appropriate.

4. Sequestration of Witnesses

Prior to delivering an opening statement, defense counsel should ask for the rule of sequestration of witnesses to be invoked, unless a strategic reason exists for not doing so.

5. Opening Statements

A. Defense Counsel should be familiar with the law and the individual trial judge's rules regarding the permissible content of an opening statement. Defense Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during the opening statement and of deferring the opening statement until the beginning of the defense case. The 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 state the ultimate inferences that defense counsel wishes to draw.

B. Whenever the prosecutor oversteps the bounds of a proper opening statement, defense counsel should consider objecting or requesting a mistrial unless tactical considerations weigh against any such objections or requests.

6. Confronting the Prosecutor's Case

Defense Counsel should attempt to anticipate weaknesses in the prosecution's proof.

7. Cross Examination

A. In preparing for cross-examination, defense 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, defense counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

B. Defense counsel should be aware of the law of competency of witnesses in general and admission of expert testimony in particular in order to be able to

raise appropriate objections.

8. Conclusion of Prosecution's Evidence

Upon conclusion of the state's evidence, defense counsel should motion for a judgment of acquittal, make appropriate argument, and present appropriate case law. *See Maine Rules of Criminal Procedure 29*. If the motion of acquittal is denied, defense counsel should be prepared to renew the motion for judgment of acquittal at the end of all evidence in the case.

9. Defense Strategy

Defense counsel should develop, in consultation with the juvenile, an overall defense strategy. In deciding on a defense strategy, an attorney should consider whether the juvenile's legal 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. In developing and presenting the defense case, defense counsel should consider the implications it may have for a rebuttal by the prosecutor.

10. Affirmative Defenses

Defense counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the juvenile bears the burden of persuasion or a burden of production.

11. Direct Examination

Defense counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, defense counsel should also advise witnesses of suitable courtroom dress and demeanor.

12. Preservation of Appellate Record

Throughout the trial process defense counsel should endeavor to establish a proper record for appellate review.

13. Client's Right to Testify

A. It is the juvenile's right to decide whether to testify. However, it is defense counsel's obligation to advise the juvenile on the advantages and disadvantages of testifying. This advice should include consideration of the juvenile's need or desire to testify, any repercussions of testifying, the necessity of the juvenile's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the juvenile, and the juvenile's developmental ability to provide direct testimony and withstand possible cross-examination.

B. Defense counsel should be familiar with his or her ethical responsibilities that may be applicable if the juvenile insists on testifying untruthfully. Defense counsel should maintain a record of the advice provided to the juvenile and the

juvenile's decision concerning whether to testify.

14. Preparation of Juvenile to Testify

Defense counsel should prepare the juvenile to testify. This should include familiarizing the juvenile with the courtroom, court procedures, and what to expect during direct and cross-examination. Often the decision whether to testify may change at trial. Thus, it is beneficial to prepare in case the juvenile chooses to testify.

15. Questioning the Juvenile

Defense counsel should seek to ensure that questions to the juvenile are phrased in a developmentally appropriate manner. Defense counsel should object to any inappropriately phrased questions by the court or an opposing counsel.

16. Renew Motion for Judgment of Dismissal

At the close of the defense case, defense counsel should renew the motion for judgment of acquittal on each charged count, renew all prior objections and motions and if appropriate submit further argument to the court.

17. Closing Arguments

A. Defense 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.

B. In developing closing argument, defense counsel should consider:

(1) Highlighting the weaknesses in the prosecution's case;
(2) Describing favorable inferences to be drawn from the evidence;
(3) Helpful testimony from direct and cross-examinations;
(4) Responses to anticipated prosecution arguments;

C. Whenever the prosecutor exceeds the scope of permissible argument, defense counsel should consider objecting, requesting a mistrial, unless tactical considerations suggest otherwise.

SECTION 6. DISPOSITION

1. In many cases, defense counsel's most valuable service to their clients will be rendered at this stage of the proceeding. An important part of representation in a juvenile case is planning for disposition. Defense counsel should not make or agree to a specific dispositional recommendation without the juvenile's consent.

2. Preparation. In preparation for a disposition hearing, defense counsel should prepare as for any other evidentiary hearing including the consideration of calling appropriate witnesses, the preparation of evidence in mitigation of or support of the recommended disposition. Among defense counsel's obligations in the disposition processes are:

A. To ensure the juvenile is not harmed by inaccurate information or information

that is not properly before the court in determining the disposition to be imposed;

B. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the juvenile, is presented to the court;

C. To develop a plan which seeks to achieve the least restrictive and burdensome disposition alternative that is most acceptable to the juvenile, and which can reasonably be obtained based on the facts and circumstances of the offense, and the juvenile ‘s background;

D. To consider preparing any arguments to the judge that highlights the juvenile's strengths and the appropriateness of the disposition plan proposed by the defense.

E. In preparing for disposition, defense counsel should also:

(1) Explain to the juvenile the nature of the disposition hearing, the issues involved and the alternatives open to the court;
(2) Explain fully and candidly to the juvenile the nature, obligations, and consequences of any proposed dispositional plan, including the meaning of conditions of probation or conditional release, the characteristics of any institution to which commitment is possible, and the probable duration of the juvenile’s responsibilities under the proposed dispositional plan;
(3) When psychological or psychiatric evaluations are ordered by the court or arranged by defense counsel prior to disposition, defense counsel should explain the nature of the procedure to the juvenile and the potential lack of confidentiality of disclosures to the evaluator.
(4) Obtain from the juvenile relevant information concerning such subjects as his or her background and personal history, prior criminal or delinquency record, employment history and skills, education, and medical history and condition, and obtain from the juvenile sources through which the information provided can be corroborated;
(5) Access social, psychological, psychiatric or other reports. If helpful or necessary, defense counsel should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel to evaluate, consult, or testify to aid the juvenile at disposition;
(6) Inform the juvenile of his or her right to speak at the disposition hearing and assist the juvenile 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;
(7) Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the disposition hearing; and

3. Disposition Options

A. Defense counsel should be familiar with the disposition options applicable to the case, including:

(1) Diversionary programs;

(2) Filings;
(3) Probation and permissible conditions of probation;
(4) Restitution;
(5) Fines;
(6) Community Service;
(7) Commitment to the Department of Corrections Juvenile Facility;
(8) Custody to the Department of Health and Human Services;
(9) Placement in a residential program.

4. The Prosecution's Disposition Position

Defense counsel should attempt to determine whether the state attorney will advocate that a particular type or length of disposition be imposed and persuade the state attorney to support the juvenile's requested disposition.

5. Counseling after Disposition

When a disposition order has been entered, it is defense counsel's duty to explain the nature, obligations and consequences of the disposition to the juvenile and his or her family. The juvenile should also understand the consequences of a violation of probation, commitment, conditional release, or committing new offense.

SECTION 7. APPEAL

1. Defense counsel should advise the client of the right to appeal and should implement the client's decision in that regard. If an appeal is taken, defense counsel should timely file the appropriate notice of appeal and request a transcript of the prior court proceedings.

2. Where there is an appeal, defense counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

STATUTORY AUTHORITY: 4 M.R.S. §1804 (2) (C), §1804 (2) (D), §1804 (2) (E), §1804 (3) (D), §1804(4) (D)

EFFECTIVE DATE: