

**Chapter 102: STANDARDS OF PRACTICE FOR ATTORNEYS WHO REPRESENT ADULTS IN CRIMINAL PROCEEDINGS**

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**Summary:** This Chapter establishes standards of practice for Commission assigned counsel providing representation in adult criminal cases. These 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.

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**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 adults charged with 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 defense 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 and the Maine Rules of Professional Conduct, as well as all other Commission policies and procedures when evaluating the performance or conduct of counsel.
3. The Function of Defense Counsel.
  - A. Defense counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.
  - B. The basic duty defense counsel owes to the administration of justice as an officer of the court is to serve as the accused's counselor and advocate and to render effective, quality representation.
  - C. Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of court, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused hereinafter "client") which does not comport with law or such standards.
4. Defense counsel should not knowingly make a false statement of material fact or law to the court or a third person.

**SECTION 2. ATTORNEY QUALIFICATIONS**

1. Education, Training and Experience of Defense Counsel.

- A. To provide quality representation, defense counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Defense counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, defense counsel should also be informed of the practice of the specific judge before whom a case is pending.
  - B. Prior to handling a criminal matter, defense counsel should have sufficient experience or training to provide quality representation. Defense counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, defense counsel should consult with more experienced counsel to acquire knowledge and familiarity with all facts of criminal representation, including information about practices of prosecutors and other court personnel.
2. General Duties of Defense Counsel.

Before agreeing to act as defense counsel or accepting assignment, defense counsel has an obligation to make sure that he or she has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, defense counsel should move to withdraw.

### **SECTION 3. SCOPE OF REPRESENTATION**

1. Provision of Quality Representation.
- Defense counsel shall provide to their clients quality representation equivalent to that provided by a skilled, knowledgeable and conscientious counsel to retained clients. The paramount obligation of defense counsel is to provide high quality, effective representation and diligent and zealous advocacy for the client at all stages of the representation.
2. Delays; Punctuality; Workload.
- A. Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charge(s), or may lead to the breach of professional obligations.
  - B. Defense counsel should act with reasonable diligence and promptness in representing a client.
  - C. Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance at court proceedings and in the submission of all motions, briefs and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.
  - D. Defense counsel should not knowingly make a false statement of fact or law to

the court in order to obtain a continuance.

- E. Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

#### **SECTION 4. LAWYER-CLIENT RELATIONSHIP**

##### **1. General Duties of Defense Counsel.**

- A. Defense counsel must be alert to all potential and actual conflicts of interest that would impair defense counsel's ability to represent a client.
- B. Upon receiving notice of an assignment, counsel should contact the client to schedule an initial meeting and should maintain regular contact with the client thereafter. Counsel should initiate contact with the client by telephone or by mail as soon as practicable and in any event within at least 7 days of being notified of the assignment. If a client is in custody, counsel should meet and interview the client within at least 7 days of being notified of the assignment. If the client is not in custody, counsel should meet with the client prior to the deadline for filing initial motions. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Maine Rules of Professional Conduct.
- C. Defense counsel should take all reasonable steps necessary to ensure that confidential communications between defense counsel and the client are conducted in privacy. This may include making efforts to request that the court and other officials make reasonable accommodations for private discussions between defense counsel and clients in courthouses, lockups, jails, prisons, detention centers, and other places where a client must confer with defense counsel.

#### **SECTION 5. INITIAL INTERVIEW**

##### **1. Purpose.**

The purpose of the initial interview is to acquire information from the client concerning pretrial release (if needed), to provide the client with information concerning the case and to begin to develop knowledge of the facts of the case. Defense counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

##### **2. General Duties of Defense Counsel.**

- A. Where defense counsel is unable to communicate with the client because of either language differences or mental disability, the defense counsel shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having defense counsel obtain expert assistance including an interpreter for pretrial preparation, interviews, and investigation, as well as in-court

proceedings.

- B. To ensure the preservation, protection and promotion of the client's rights and interests, defense counsel must make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.
3. Preparation. Prior to conducting the initial interview, defense counsel should, to the extent possible:
- A. be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
  - B. obtain copies of any relevant documents which are available, including copies of any charging documents, and law enforcement reports that might be available;
  - C. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
  - D. be familiar with the different types of pretrial release conditions the court may set;
  - E. be familiar with any procedures available for reviewing the trial judge's setting of bail.
4. Initial Client Interview.
- A. The purpose of the initial interview is to acquire information from the client concerning pretrial release, to provide the client with information concerning the case and to begin to develop knowledge of the facts of the case. The scope and focus of the initial interview will vary according to the circumstances under which it occurs.
  - B. Defense counsel should conduct a client interview as soon as practicable and if the client is in custody then in no event within more than seven (7) days after receiving notice of an assignment in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. If the client is not in custody, the interview should occur prior to the deadline for filing initial motions.
  - C. Defense counsel should convey the following types of information to the client:
    - (1) an explanation of the procedures that will be followed in setting the conditions of pretrial release;
    - (2) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
    - (3) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the

- attorney;
- (4) a general procedural overview of the progression of the case, where possible;
- (5) an explanation that the client has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify; and to not be compelled to incriminate him/herself.
- (6) the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;
- (7) how and when counsel can be reached;
- (8) when counsel will see the client next;
- (9) realistic answers, where possible, to the client's most urgent questions;
- (10) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers.

D. Defense counsel should request the following types of information from the client:

- (1) the facts surrounding the allegations against or affecting the client;
- (2) any possible witnesses who should be located;
- (3) any evidence of improper conduct by police or other investigative agencies, mental health departments or the prosecution which may affect the client's rights;
- (4) any evidence that should be preserved;
- (5) evidence of the client's competence to stand trial and/or mental state at the time of the offense.
- (6) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;
- (7) the client's physical and mental health, educational and armed services records;
- (8) the client's immediate medical needs;
- (9) 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; defense counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;
- (10) the ability of the client to meet any financial conditions of release;
- (11) 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.

5. Disposition of the Case.

- A. Defense counsel should advise the client with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
- B. Defense counsel should not intentionally understate or overstate the risks, hazards or prospects of the case to exert undue influence on the client's decision.

as to his/her plea(s).

6. Advice and Service on Anticipated Unlawful Conduct.
  - A. Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent, but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.
7. Duty to Keep Client Informed.
  - A. Defense counsel should maintain regular contact with the client and should keep the client informed of the progress of the case, including:
    - (1) the importance of maintaining contact with defense counsel and the need to notify defense counsel of any change of address;
    - (2) the names and contact information regarding defense counsel and staff assisting with the case;
    - (3) any court dates and significant developments in the case.
  - B. Defense counsel should keep the client informed of any developments in the case and the progress of the preparation of the defense, and provide sufficient information to permit intelligent participation in decision making by the client.
  - C. Defense counsel should comply with reasonable requests for information from the client and reply to client correspondence and telephone calls.
8. Preparation for Bail Hearing.
  - A. If identification may be an issue, defense counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
  - B. If the client is detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of pretrial conditions of release. Such information should generally include:
    - (1) client's residence and length of time at that residence;
    - (2) family (names, addresses and phone numbers);
    - (3) health (mental and physical) and employment background;
    - (4) explanation of any court defaults and any other information on the record;
    - (5) probation/parole status;
    - (6) possible sources of bail money;
    - (7) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred.

Such information should be verified whenever possible.

9. Bail or Detention Hearing.
  - A. Defense counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, defense counsel should also be alert to all opportunities for obtaining discovery.
  - B. Defense counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except under the most extraordinary circumstances, speak or testify at a bail hearing. Although comments on the strength and quality of the case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing.
  - C. Defense counsel should be prepared to address the special issues of "dangerousness" that are the focus of the hearings, and, where appropriate and possible, be ready to present "proffers" that address those issues.
  - D. Defense counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pretrial probation, such as electronic monitoring, "stay away" orders, curfews, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. If the client wishes for defense counsel to advocate for conditions of release that may not be reasonable then counsel must do their best to explain the risks and or benefits of doing so to the client.
  - E. Where the client is not able to obtain release under the conditions set by the court, defense counsel should advise the client of his/her right to appeal and the advantages and disadvantages of doing so. Where appropriate, defense counsel should facilitate the bail appeal procedure, including pressing for the opportunity to be heard on the same day and be prepared to represent the client at the hearing.
  - F. Where the client is incarcerated and unable to obtain pretrial release, defense counsel should alert the court and the sheriff to any special needs of the client, e.g., medical problems, security needs, and request the court to direct the appropriate officials to take steps to meet such special needs.
  - G. Defense counsel should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

## **SECTION 6. CASE REVIEW & PREPARATION**

1. Defense counsel has a duty to conduct an independent case review regardless of the client's admissions or statements to the lawyer of facts constituting guilt. The review should be conducted as promptly as possible.

2. Sources of case information may include the following:
- A. *Charging Documents* – Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:
    - (1) the elements of the offense(s) with which the accused is charged;
    - (2) the defenses, ordinary and affirmative, that may be available;
    - (3) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the Grand Jury proceedings.
  - B. *The Accused* – 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:
    - (1) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;
    - (2) explore the existence of other potential sources of information relating to the offense;
    - (3) collect information relevant to the sentencing.
  - C. *Potential Witnesses* – Defense counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If defense counsel conducts such interviews of potential witnesses, he or she should do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.
  - D. *The Police and Prosecution* – Defense counsel should secure information in the possession of the prosecution or law enforcement authorities, including police reports through the use of M.R.Crim.P. 16 and 16A. Where necessary, defense counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.
  - E. *The Courts* – Defense counsel should request and review preliminary hearing tapes/transcripts as well as Grand Jury tapes. Where appropriate, defense counsel should review the client's prior court file(s).
  - F. *Physical Evidence* – Where appropriate, defense counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or to sentencing. Defense counsel should consider viewing the physical evidence consistent with case needs.
  - G. *The Scene* – Where appropriate, defense counsel (or an investigator) should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). Defense counsel should consider the taking of photographs and the creation of diagrams



or charts of the actual scene of the offense.

- H. *Expert Assistance* – Defense counsel should secure the assistance of experts where it is necessary in order to:
- (1) prepare a defense;
  - (2) understand the prosecution's case;
  - (3) rebut the prosecution's case;
  - (4) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

3. During case preparation and throughout trial, defense counsel should identify potential legal issues and the corresponding objections. Defense counsel should consider the tactics of whether, when, and how to raise these objections. Defense counsel should also consider how to respond to objections which could be raised by the State.

4. Relations with Prospective Witnesses.

- A. Defense counsel, in representing a client, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- B. Defense counsel should not compensate a witness except as provided by Commission Rule. Chapter 302: Procedures Regarding Funds for Experts and Investigators.
- C. It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.
- D. Defense counsel should not discharge or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for co-defendants information which such person has a right to give.
- E. Unless defense counsel is prepared to forego impeachment of a witness by defense counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

5. Relations with Expert Witnesses.

Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

**SECTION 7. CONTROL & DIRECTION OF THE CASE**

1. Theory of the Case. During investigation and trial preparation, defense counsel should develop and continually reassess a theory of the case.
2. Implementation.
  - A. Defense counsel should develop an overall theory of the case that encompasses the best interest of the client and the realities of the client's situation in order to assist counsel in evaluating choices throughout the course of the representation.
  - B. Defense counsel should allow the case theory to focus the investigation and trial preparation of the case, seeking out and developing the facts and evidence that the theory makes material, but defense counsel should not become a "prisoner" of his or her theory.
3. Certain decisions relating to the conduct of the case are ultimately for the accused and other are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with defense counsel include:
  - A. what pleas to enter;
  - B. whether to accept a plea agreement;
  - C. whether to waive jury trial;
  - D. whether to testify in his or her own behalf;
  - E. whether to appeal.
4. Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.
5. If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, defense counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.
6. Defense counsel should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by defense counsel. The client 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 client's input and full disclosure by defense counsel to the client of the factors considered by the attorney in making the decisions. Defense counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.

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7. Presentment and Arraignment.
    - A. Defense counsel should preserve the client's rights at the initial appearance on the charges by:
      - (1) advising the client to enter a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so or unless the client insists on pleading guilty despite counsel's advice to the contrary;
      - (2) seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges.
  
  8. The Plea Negotiation Process and the Duties of Defense Counsel.
    - A. Defense 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. Defense counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.
    - C. Defense counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.
    - D. Defense counsel should not accept any plea agreement without the client's express authorization. The decision to enter a plea of guilty rests solely with the client, and defense counsel should not attempt to unduly influence that decision.
    - E. The existence of ongoing tentative plea negotiations with the prosecution should not prevent defense counsel from taking steps necessary to preserve a defense.
  
  9. The Decision to File Pretrial Motions.
    - A. Defense counsel should consider filing an appropriate motion whenever there exists a good faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.
    - B. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that defense counsel should consider addressing in a pretrial motion are:
      - (1) the pretrial custody of the accused;
      - (2) the constitutionality of the implicated statute or statutes;
      - (3) the potential defects in the charging process;
      - (4) the sufficiency of the charging document;
      - (5) the propriety and prejudice of any joinder of charges or co-defendants in the charging document;

- (6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
- (7) the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including:
  - (a) the fruits of illegal searches or seizures;
  - (b) involuntary statements or confessions;
  - (c) statements or confessions obtained in violation of the client's right to counsel, 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 an accused because of his or her indigence;
- (10) the defendant's right to a speedy trial;
- (11) the defendant'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) matters of trial or courtroom procedure.

C. Defense counsel should withdraw a motion or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default.

#### 10. Filing and Arguing Pretrial Motions.

- A. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, defense counsel should be aware of the effect it might have upon the defendant's speedy trial rights.
- B. When a hearing on a motion requires the taking of evidence, defense counsel's preparation for the evidentiary hearing should include:
  - (1) investigation, discovery and research relevant to the claim advanced;
  - (2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
  - (3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

#### 11. Subsequent Filing of Pretrial Motions.

Defense counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, defense counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

12. Trial Motions.

Defense counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions in limine and motions to sequester.

13. Interlocutory Relief.

Where appropriate, defense counsel should consider seeking interlocutory relief, under the applicable rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of the defense counsel, whether the hearing was initiated by defense counsel or by the prosecution.

14. Bench Trial or Jury Trial.

- A. The decision to proceed to trial with or without a jury rests solely with the client after complete advice of defense counsel.
- B. Defense counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Defense counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

15. Continuing Responsibility to Raise Issue of Client's Incompetence.

- A. Defense counsel should consider the client's competence to stand trial or to enter a plea whenever defense counsel has a good faith doubt as to the client's competence to proceed in the criminal case. Defense counsel may move for evaluation over the client's objection, and if necessary, defense counsel may make known to the court those facts which raise the good faith doubt of competence to proceed in the criminal case.
- B. Where competency is at issue, defense counsel has a continuing duty to review and prepare the case for all court proceedings. Defense counsel should develop information relevant to the issue of dangerousness.

16. Entry of the Plea before the Court.

- A. Prior to the entry of the plea, defense counsel should:
  - (1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
  - (2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the client will be exposed to by entering a plea;
  - (3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering

questions of the judge and providing a statement concerning the offense.

- B. When entering a plea, defense counsel should make sure that the full content and conditions of the plea agreement are placed on the record by the court.
- C. After entry of the plea, defense counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, defense 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, defense counsel should, where practicable, advocate for the client's release on bail pending sentencing.
- D. Subsequent to the acceptance of the plea, defense counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

17. Consequences of Conviction.

Defense counsel must also advise the client of the consequences of a conviction, including:

- A. the maximum possible sentence of all offenses;
- B. mandatory minimum sentences where applicable;
- C. different or additional punishments where applicable, such as for second offenses, probation, violation or parole revocation consequences;
- D. potential liability for enhanced punishment after subsequent arrest;
- E. possible federal charges or penalty enhancements as well as the possible loss of eligibility for federal benefits;
- F. conviction consequences for non-citizens;
- G. Sex Offender Registration Act;
- H. potential civil liabilities;
- I. possible loss or suspension of driver's license under Maine or federal law;
- J. possible loss of the right to possess a firearm.

18. The Decision to Enter a Plea of Guilty.

- A. Defense counsel should inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain the advantages, disadvantages and potential consequences of the agreement.
- B. The decision to enter a plea of guilty rests solely with the client, and defense

counsel should not attempt to unduly influence that decision. Where defense counsel reasonably believes that acceptance of a plea offer is in the best interests of the client, defense counsel should advise the client of the benefits of this course of action.

- C. Where the client verbally rejects a fully explained and detailed plea offer, and if appropriate, defense counsel may ask the client to sign a written rejection of plea offer statement.

## **SECTION 8. GENERAL TRIAL PREPARATION**

1. The decision to proceed to trial with or without a jury rests solely with the client. Defense counsel should discuss the relevant strategic considerations of this decision with the client.
2. 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. voir dire questions;
  - D. outline or draft of opening statement;
  - E. cross-examination plans for all possible prosecution witnesses;
  - F. direct examination plans for all prospective defense witnesses;
  - G. copies of defense subpoenas;
  - H. prior statements of all prosecution witnesses (e.g., transcripts, police reports);
  - I. prior statements of all defense witnesses;
  - J. reports from defense experts;
  - K. a list of all defense exhibits, and the witnesses through whom they will be introduced;
  - L. originals and copies of all documentary exhibits;
  - M. proposed jury instructions with supporting case citations;
  - N. copies of all relevant statutes and cases;
  - O. outline or draft of closing argument.
3. Defense counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues

that can reasonably be anticipated to arise in the trial.

4. Defense counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, where appropriate, defense counsel should prepare motions and memoranda for such advance rulings.
5. Throughout the trial process, defense counsel should endeavor to establish a proper record for appellate review. As part of this effort, defense counsel should request, whenever necessary, that all trial proceedings be recorded.
6. Where appropriate, defense counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, defense counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
7. Defense counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, defense counsel should seek a court order to have the client available for conferences.
8. Throughout preparation and trial, defense counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.
9. Defense counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that defense counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
  - A. summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable.
  - B. summoning all potentially helpful physical or documentary evidence;
  - C. arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.
  - D. obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;
  - E. obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects or information which may aid the fact finder in understanding the defense case.

## **SECTION 9. VOIR DIRE AND JURY SELECTION**

1. Defense 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. Defense 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, defense counsel should review the prospective juror list and juror questionnaire.
4. Where appropriate, defense counsel should develop voir dire questions in advance of trial. Defense counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
  - A. to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
  - B. to convey to the panel certain legal principles which are critical to the defense case.
5. Defense counsel should be familiar with the law concerning discretionary voir dire inquiries so as to be able to defend any request or make a request to ask particular questions of prospective jurors.
6. Defense counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Defense counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

## **SECTION 10. PRESENTING THE DEFENSE CASE**

1. Defense counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, defense 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.
2. Confronting the Prosecution's Case.
  - A. Defense counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
  - B. Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.
  - C. 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.
  - D. In preparing for cross-examination, defense counsel should:

- (1) consider the need to integrate cross-examination, the theory of the defense and closing argument;
  - (2) consider whether cross-examination of each individual witness is likely to generate helpful information;
  - (3) anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - (4) consider a cross-examination plan for each of the anticipated witnesses;
  - (5) be alert to inconsistencies in witnesses' testimony;
  - (6) be alert to possible variations in witnesses' testimony;
  - (7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - (8) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
  - (9) be alert to issues relating to witness credibility, including bias and motive for testifying.
3. Presentation of Evidence.
- A. Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.
  - B. Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury, offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.
  - C. Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.
  - D. Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.
4. Presenting the Defense Case.
- A. Defense counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
  - B. Defense counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
  - C. In preparing for presentation of a defense case, defense 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) consider the possible use of character witnesses;
    - (4) consider the need for expert witnesses.
  - D. In developing and presenting the defense case, defense counsel should consider the implications it may have for a rebuttal by the prosecutor.
  - E. 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.
  - F. Defense counsel should conduct redirect examination as appropriate.
  - G. At the close of the defense case, defense counsel should renew the motion for judgment of acquittal on each charged count.
5. Jury Instructions.
- A. Defense counsel should be familiar with the local rules and the individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
  - B. Where appropriate, defense 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, defense counsel should provide case law in support of the proposed instructions.
  - C. Where appropriate, defense counsel should object to and argue against improper instructions proposed by the prosecution.
  - D. If the court refuses to adopt instructions requested by defense counsel, or gives instructions over defense counsel's objection, defense counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.
  - E. During delivery of the charge, defense 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.
  - F. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, defense counsel should request that the judge state the proposed charge to defense counsel before it is delivered to the jury.
6. Post-Trial Motions.

Defense counsel's responsibility includes presenting appropriate post-trial motions to protect the defendant's rights.

## 7. Post-Disposition Procedures.

Defense counsel should be familiar with the procedures available to the client after disposition. Implementation is as follows:

- A. Defense counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
- B. Defense counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of defense counsel, defense counsel should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.
- C. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, defense counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.
- D. Where a custodial sentence has been imposed, defense counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.
- E. Defense counsel should inform the client of procedures available for requesting a discretionary review of or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.

## 8. Courtroom Professionalism.

- A. As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.
- B. Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.
- C. When the court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.
- D. Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which defense counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.

## **SECTION 11. OBLIGATIONS OF COUNSEL IN SENTENCING**

Among defense counsel's obligations in the sentencing process are:

1. Where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
2. To ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
3. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
4. To develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
5. To ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;
6. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

## **SECTION 12. SENTENCING OPTIONS, CONSEQUENCES AND PROCEDURES**

1. Defense counsel should be familiar with the sentencing provisions and options applicable to the case, including:
  - A. deferred disposition, judgment without a finding, and diversionary programs;
  - B. probation or suspension of sentence and permissible conditions of probation;
  - C. restitution;
  - D. fines;
  - E. court costs;
  - F. imprisonment, including any mandatory minimum requirements;
  - G. confinement in mental institution;
  - H. forfeiture.
2. Defense counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
  - A. credit for pretrial detention;
  - B. parole eligibility and applicable parole release ranges;

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- C. effect of good-time credits on the client's release date and how those credits are earned and calculated;
  - D. place of confinement and level of security and classification;
  - E. self-surrender to place of custody;
  - F. eligibility for correctional programs and furloughs;
  - G. available drug rehabilitation programs, psychiatric treatment, and health care;
  - H. deportation;
  - I. use of the conviction for sentence enhancement in future proceedings;
  - J. loss of civil rights;
  - K. impact of a fine or restitution and any resulting civil liability;
  - L. restrictions on or loss of license;
  - M. loss of the right to possess a firearm under Maine or federal law.
3. Defense counsel should be familiar with the sentencing procedures, including:
- A. the effect that plea negotiations may have upon the sentencing discretion of the court;
  - B. the procedural operation of any sentencing guideline system;
  - C. the effect of a judicial recommendation against deportation;
  - D. the practices of the officials who prepare the presentence report and the client's rights in that process;
  - E. the access to the presentence report by defense counsel and the client;
  - F. the prosecution's practice in preparing a memorandum on punishment;
  - G. the use of a sentencing memorandum by the defense;
  - H. the opportunity to challenge information presented to the court for sentencing purposes;
  - I. the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;
  - J. the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.
4. Preparation for Sentencing.

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

- A. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
  - B. maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
  - C. obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
  - D. ensure the client has adequate time to examine the presentence report;
  - E. inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
  - F. prepare the client to be interviewed by the official preparing the presentence report;
  - G. 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;
  - H. inform the client of the sentence or range of sentences defense counsel will ask the court to consider; if the client and defense counsel disagree as to the sentence or sentences to be urged upon the court, defense counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
  - I. 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.
5. The Prosecution's Sentencing Position.
- A. Defense 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, defense counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, defense counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

- C. If defense counsel request to see the prosecution memorandum is denied, an applicable motion to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

6. The Sentencing Process.

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

7. The Defense Sentencing Memorandum.

- A. Defense counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics defense counsel may wish to include in the memorandum are:
  - (1) challenges to incorrect or incomplete information in any prosecution sentencing memorandum;
  - (2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;
  - (3) information contrary to that before the court which is supported by affidavits, letters and public records;
  - (4) information favorable to the client concerning such matters as the



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- offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;
- (5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
  - (6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;
  - (7) presentation of a sentencing proposal.
8. Motion for a New Trial.
- A. Defense counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
  - B. When a judgment of guilty has been entered against the defendant after trial, defense 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 defense counsel should consider include:
    - (1) the likelihood of success of the motion, given the nature of the error or errors that can be raised;
    - (2) the effect that such a motion might have upon the client's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion.
9. Bail Pending Appeal.
- A. Where a client indicates a desire to appeal the judgment and/or sentence of the court, defense counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.
  - B. Where an appeal is taken and the client requests bail pending appeal, defense counsel should cooperate with appellate counsel (if different counsel) in providing information to pursue the request for bail.
10. Self-Surrender.
- Where a custodial sentence has been imposed, defense counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.
11. Right to Appeal.
- A. Defense counsel should inform the client of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of counsel, defense counsel should file the notice in

accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal, such as ordering transcripts of the trial proceedings.

- B. Defense counsel's advice to the client should include an explanation of the right to appeal the judgment of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.
- C. Where the client takes an appeal, defense counsel should cooperate in providing information to appellate counsel (if different counsel) concerning the proceedings in the trial court.

12. Sentence Reduction.

Defense counsel should inform the client of procedures available for requesting a discretionary review of, or reduction in, the sentence imposed by the trial court, including any time limitations that apply to such a request.

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

EFFECTIVE DATE: February 27, 2012.