



ARIZONA PUBLIC  
DEFENDER ASSOCIATION

## **Performance Standards for Indigent Defense Counsel**

The *Arizona Public Defender Association Performance Standards for Indigent Defense Counsel* are the culmination of a lengthy and arduous process that started with the establishment of the APDA Standards Committee in 2002. The Committee studied performance standards for criminal defense attorneys from across the country, culling from their pages the provisions that best reflect the standards of practice in Arizona. The Committee created draft standards that were distributed to all Directors for comment in early 2004.

The standards were debated extensively by the Board of Directors and revised repeatedly by the Standards Committee over the ensuing two years, before being adopted by the Board on June 21, 2006.

The APDA Board of Directors wishes to express its profound appreciation to the members of the Standards Committee for their hard work, patience and persistence in developing these standards. The members of the Committee included:

**Bob Hirsh**, Pima County Public Defender  
**Dana Hlavac**, Former Mohave County Public Defender  
**Mark Suagee**, Cochise County Public Defender  
**Jose de la Vara**, Yuma County Legal Defender  
**Dan Lowrance**, Training Director, Maricopa County Public Defender's Office  
**Susan Kettlewell**, Former Pima County Public Defender

These standards are the result of the best efforts of many individuals who are committed to providing the highest quality legal representation to poor people. The standards are neither exhaustive nor perfect. Some were controversial and the subjects of vigorous debate among members of the Board of Directors. And they are not static - they must evolve over time as the law, ethics rules and standards of practice inevitably change.

For these reasons, the APDA welcomes a continuation of the discussion about standards of performance with those who have to make these standards work in the real world. APDA encourages suggestions, criticism, comments and questions about these standards from the Arizona public defense attorneys for whom they are designed, and who, in the end, must give them life.

Any feedback should be directed to APDA at [pdinfo@mail.maricopa.gov](mailto:pdinfo@mail.maricopa.gov).

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## **Performance Standards for Indigent Defense Counsel**

### **I. ROLE OF DEFENSE COUNSEL**

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client. In order to achieve these goals:

A. Counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation;

B. Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision;

C. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client;

D. Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation;

E. Counsel should not allow counsel's personal opinion of the client's guilt to affect the caliber and quality of the representation provided;

F. Counsel should not allow the client's financial status to affect the quality and caliber of representation provided. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney;

G. Counsel must know and adhere to all applicable ethical opinions and standards. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the State Bar Ethics Committee;

H. Counsel must comply with all the rules of the court. Where appropriate, counsel shall consider a legal challenge to inappropriate rules and/or opinions;

I. Counsel should interpret any good-faith ambiguities in the law or legal opinions in the light most favorable to the client.

## **II. ATTORNEY QUALIFICATIONS**

### **A. Adequate Training and Experience**

To provide Competent Representation counsel must:

1. Be familiar with Arizona criminal law and procedure, including changes and developments in the law;
2. Participate in skills training and education programs in order to maintain and enhance skills. At least ten of the 15 hours of continuing legal education required of Arizona attorneys should be in the area of criminal or juvenile defense for those attorneys who handle a substantial indigent criminal defense practice;
3. Have sufficient experience to provide competent representation for the particular type of case or client prior to undertaking representation;
4. Accept more serious and complex criminal cases only after having experience and/or training in less complex criminal matters;
5. Where possible, consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including serving as co-counsel to more experienced attorneys when possible;
6. Become familiar with local practices of prosecutors and those judges before whom counsel will be likely to appear.

### **B. Adequate Time and Resources**

1. Counsel should not carry a workload that by reason of its excessive size or complexity interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations;
2. If counsel is unable to offer quality representation in a particular case due to total caseload or the complexity of the particular case, counsel shall immediately advise his/her supervisor who shall review the situation to ensure that the client receives quality representation. If counsel is not employed by an established indigent defense agency, or if counsel's supervisor does not take action in response to counsel's expressed inability to render quality representation, the inability to provide quality representation to a client shall be brought to the attention of the court by moving to withdraw or by seeking appointment of co-counsel to assist in the representation;
3. Counsel should not accept employment for the purpose of delaying trial;
4. Counsel should have adequate support personnel available when necessary to assist counsel in rendering effective representation, including but not limited to secretarial assistants, criminal

- investigators, legal assistants, law clerks (or legal research tools), and mitigation specialists;
5. Counsel must maintain a professional office in which to consult with clients and witnesses;
  6. Counsel must maintain a system for receiving collect telephone calls from incarcerated clients.

### **III. ATTORNEY OVERALL RESPONSIBILITIES**

#### **A. Acting Diligently and Promptly**

1. Counsel should act with reasonable diligence and promptness in representing a client;
2. Counsel should avoid unnecessary delay in the disposition of cases.
3. Counsel should be punctual in court attendance 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;
4. Counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance;
5. Counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

#### **B. Acting Ethically**

1. Although counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client, it is nonetheless counsel's duty to know and be guided by the standards of professional conduct as set forth in Supreme Court Rule 42. The functions and duties of defense counsel are the same whether counsel is assigned, privately retained, or serving in a public defender agency;
2. Counsel shall not represent co-defendants in the same case;
3. Counsel shall not accept appointment to any cases which potentially place counsel or any other attorneys in the same agency in danger of violating standards of professional responsibility;
4. Counsel should not intentionally misrepresent matters of fact or law to the court;
5. Counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor;
6. Counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor;
7. Counsel should not seek concessions favorable to one client by an agreement which is detrimental to the legitimate interests of a client in another case;

8. Counsel should not execute any directive of the client which does not comport with the law or Arizona ethical standards.

### **C. Refraining from Making Prejudicial Out-of-Court Statements**

Counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

### **D. Identifying and Resolving Conflicts of Interest**

1. Representing Co-defendants: Except for preliminary matters such as initial hearings or applications for bail, defense attorneys who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several co-defendants;

2. Counsel who has formerly represented a co-defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply;

3. Counsel should not defend a criminal case in which counsel's fellow Public Defender, partner or other professional associate is or has been the prosecutor in the same case;

4. Counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor;

5. Counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter.

6. Counsel should seek recusal of the assigned prosecutor and/or the entire prosecutor's office if the assigned prosecutor previously participated personally and substantially in the defense of a defendant;

7. Counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor;

8. Counsel who has a significant personal or financial relationship with a prosecutor shall not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship;

9. Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case unless required by the Rules of

## Professional Conduct;

10. The filing of a Rule 32 petition or appeal alleging ineffective assistance of counsel, or a bar complaint against counsel concerning his or her quality of representation, shall not create a conflict of interest *per se*, as to do so would encourage the filing of frivolous complaints when the client is unable to secure counsel of his/her choice. Withdrawal by counsel should occur if:

- a. ordered by the court;
- b. the filing or existence of the bar complaint/Rule 32/appeal will interfere with counsel's ability to adequately represent the client;
- c. the client has filed a civil lawsuit against counsel alleging malpractice;
- d. a finding of probable cause has been made regarding the pending bar complaint;
- e. counsel is scheduled to testify against the client at a Rule 32 proceeding or motion for new trial alleging ineffective assistance of counsel.

## IV. LAWYER-CLIENT RELATIONSHIP

### A. Meeting with Client as Soon as Practicable

1. As soon as practicable after being retained or appointed, and within 48 hours if the client is in custody, counsel should contact the client and conduct an initial client interview;
2. The initial interview with the client should occur in person, in an appropriate and private setting;
3. 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 Rules of Professional Responsibility.

### B. Preparing for the Initial Client Interview

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

1. Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
2. Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by pretrial services agencies concerning pretrial release, and law enforcement reports that might be available;
3. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting or reviewing those conditions;
4. Be familiar with the different types of pretrial release conditions that might be set and whether

private or public agencies are available to act as custodian for the client's release;

5. Be familiar with methods for posting bond and the ability of counsel to assist with that process.

### **C. Conducting the Initial Client Interview**

The purpose of the initial interview is both to inform the client of the charges and possible penalties and to acquire information from the client concerning pretrial release. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language, literacy, or competency, be overcome.

1. At the initial interview, counsel should obtain the following types of information from the client which may assist in obtaining the client's release:

- a. 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;
- b. The client's physical and mental health, education and armed forces records;
- c. The client's immediate medical needs;
- d. The client's past criminal records, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court. Counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;
- e. The ability of the client to meet any financial conditions of release;
- f. The names of individuals or other sources that counsel can contact to verify the information provided by the client. Counsel should obtain the permission of the client to contact these individuals.

2. Whenever possible or prudent, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include but is not limited to:

- a. The facts surrounding the allegations against or affecting the client. Counsel must use caution and discretion in committing the client to a version of the facts story this early in the process;
- b. Any possible witnesses who should be located;
- c. Any evidence of improper conduct by the police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;

d. Any evidence that should be preserved, including photographs of any injuries which may have occurred to the client during the course of the incident or the arrest;

e. Any evidence of the client's competence to stand trial and/or mental state at the time of the offense.

3. Information that may be provided to the client includes, but is not limited to:

a. The nature of the allegations, what the state must prove, and the likely and maximum potential consequences, to the extent known at the time of the initial interview;

b. The role of defense counsel and the defense function;

c. An explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

d. A general procedural overview of the likely progression of the case to the extent known;

e. The procedures that will be followed in setting or reviewing the conditions of pretrial release if applicable to the type of proceeding and particular client;

f. An explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;

g. How and when counsel and/or relevant support personnel can be reached;

h. When the client can reasonably expect to see counsel next;

i. Realistic answers, where possible, to the client's most urgent questions;

j. 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, etc.

#### **D. Obtaining all Facts from Client**

1. As soon as practicable, counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses;

2. Counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford counsel free rein to take action which would be precluded by counsel knowledge of such facts;

## **E. Overcoming Language and Other Barriers to Communication**

1. Counsel should ensure that special circumstances such as differences in language, literacy, cultural norms, or age, do not interfere with counsel's ability to represent a client;
2. In the event a client poses special communication issues, counsel should assure that sufficient additional time is provided to make the accommodations necessary to adequately communicate with the client;
3. Counsel should secure the assistance of appropriate experts, such as foreign language interpreters or mental health experts, to facilitate communication with a client with special communication issues.

## **F. Protecting Confidentiality of Communication**

1. Counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation;
2. Counsel may reveal confidential information to the extent it is reasonably believed necessary to prevent the client from committing a criminal act that counsel believes is likely to result in imminent death or substantial bodily harm;
3. Counsel should ensure that confidential communications with the client are conducted in privacy, including reasonable efforts to compel court and other officials to make necessary accommodations for private discussions in courthouses, lockups, jails, prisons, detention centers, and other places where clients must confer with counsel;
4. Counsel should ensure that all staff employed by counsel understand the requirements of attorney/client confidentiality.

## **G. Keeping the Client Informed of Case Progress**

1. Counsel should maintain regular contact with the client and keep the client informed of the following:
  - a. Any significant developments in the case;
  - b. The progress of the preparation of the defense;
  - c. Sufficient information to permit intelligent participation in decision making by the client;
  - d. Court dates;
  - e. The names and contact information of counsel and staff assisting with the case;
  - f. The importance of maintaining contact with counsel;

- g. The need to notify counsel of any change of address or phone numbers;
2. At a minimum, counsel should meet with the client at the following stages of the proceedings:
- a. Upon initial appointment to the case, and within 48 hours if the client is in custody;
  - b. Upon receipt of the critical disclosure;
  - c. Prior to any change of plea proceeding;
  - d. Prior to trial;
  - e. Prior to the client's testimony at trial;
  - f. Prior to sentencing.

## **H. Specifying Client Versus Attorney Decisions**

1. Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- a. What pleas to enter;
- b. Whether to accept a plea agreement;
- c. Whether to waive a jury trial;
- d. Whether to testify in his or her own behalf; and
- e. Whether to appeal.

2. Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include:

- a. What witnesses to call;
- b. Whether and how to conduct cross-examination;
- c. What jurors to accept or strike;
- d. What trial motions should be made;
- e. What evidence should be introduced;
- f. The explanation of lesser-included offenses and whether to request that the jury be instructed on them; and

g. If applicable, the existence of the right to assert an insanity or incompetency defense.

## **I. Plea Negotiations**

1. Counsel should discuss potential non-trial resolutions of a case with the prosecution, including plea agreements, in order to fully advise the client of available options;
2. Counsel should not accept or reject a plea offer without authorization of the client;
3. Counsel's recommendation on the advisability of accepting or rejecting a plea agreement should be based on a complete review of the circumstances of the case and the client's circumstances;
4. Advising a client to accept a plea offer should not be based solely on the client's acknowledgment of guilt;
5. Advising a client to accept a plea offer should not be based solely on a favorable disposition offer;
6. Counsel should not attempt to coerce acceptance of a plea agreement by overstating the likelihood of conviction or the potential consequences;
7. Counsel should not attempt to coerce acceptance of a plea by threatening to withdraw from representing the accused if he or she declines to accept the proposed agreement;
8. Throughout the pendency of plea negotiations, counsel should continue to prepare for trial;
9. Counsel should not advise a client to plead to the indictment or charges unless there is a specific advantage to be gained by such a plea, i.e., dismissal of other charges or allegations or agreement to a reduced sentence.

## **V. INVESTIGATION AND PREPARATION**

### **A. Case Information Review:**

Counsel has a duty to conduct an independent case review regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The review should be conducted as promptly as possible. Sources of case information may include the following:

1. 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:
  - a. The elements of the offense(s) with which the accused is charged;
  - b. The defenses, ordinary and affirmative, that may be available;
  - c. Any defects in the charging document, constitutional or otherwise, such as statute of

limitations, double jeopardy, or irregularities in the Grand Jury proceedings;

2. Potential Witnesses: Counsel must interview the potential witnesses, including any complaining witnesses, to the extent permitted by the Victims' Bill of Rights, and others adverse to the accused, as well as witnesses for the defense. In conducting pretrial interviews counsel should:

a. Ensure that pretrial interviews are preserved for use as impeachment by one of the following methods:

- 1) Conducting the interview in the presence of a third person who will be available if necessary to testify as a defense witness at trial;
- 2) Videotaping or audio taping the interview;
- 3) Conducting the interview as a deposition in the presence of a court reporter;
- 4) Utilizing a trained investigator to conduct the interview who can be called as a witness.

b. If counsel determines that a pretrial interview of a witness should not be conducted for strategic reasons, counsel should be prepared to establish and articulate the basis for such a strategic decision;

c. Counsel should not use means in contacting or interviewing witnesses which have no substantial purpose other than to embarrass, inconvenience, or burden the witness, or use methods of obtaining evidence that violate the legal rights of such person;

d. Counsel should not compensate a non-expert witness but may reimburse the witness for the reasonable expenses of attendance at court or witness interviews, including transportation, loss of income and reasonable lodging expenses;

3. Police and Prosecution: Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including:

a. Potential exculpatory information;

b. Names & addresses of all prosecution witnesses (as permitted under the Victim's Rights' Bill), their prior statements, their criminal records and their probation records, as well as any agreements for leniency offered by the prosecution in exchange for a witness' testimony or cooperation;

c. Oral and written statements by the client and details of the circumstances under which the statements were made;

d. The client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;

- e. Books, papers, documents, photographs, audio and videotapes, computer discs, tangible objects, buildings or other materials relevant to the case;
  - f. Statements and reports of experts, including data and documents upon which they are based, including but not limited to lab reports, ballistics reports, fingerprint analyses;
  - g. Reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;
  - h. Statements of co-defendants;
  - i. Reports or notes of searches or seizures and the circumstances of any searches or seizures;
  - j. Law enforcement notes (field notes);
  - k. Client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;
  - l. 911 tapes, interoffice radio transmissions and dispatch reports;
  - m. Internal affairs files and investigation records.
4. Courts: Counsel should request and review preliminary hearing tapes or transcripts as well as Grand Jury tapes or transcripts. Where appropriate, counsel should review the client's prior court files;
5. Physical Evidence: Counsel should make a prompt request to the police or investigative agency for any physical evidence relevant to the offense or to sentencing and should consider viewing the physical evidence consistent with case needs;
6. Expert Reports: Counsel should make a prompt request to the police or investigative agency for any reports of experts in their possession which are relevant to the offense or to sentencing;
7. Scene: Whenever possible and permissible, counsel and/or an investigator should view the scene of the alleged offense under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense;
8. Expert Assistance: Counsel should secure the assistance of experts where it is necessary in order to:
- a. Prepare a defense;

- b. Understand the prosecution's case;
- c. Rebut the prosecution's case;
- d. Investigate the client's competence to proceed, mental state at the time of the incident, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

Counsel should not seek to dictate the formation of the expert's opinion, nor pay an excessive fee for the purpose of influencing the expert's testimony;

### **B. Anticipation of Objections**

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

### **C. Theory of the Case**

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. Effective advocacy calls for storytelling, and the better advocate is the one who has the better or more believable story in the mind of the fact finder. The development of a theory of the case is the plot line to the client's story:

1. Counsel should develop an overall theory of the case that encompasses the best interests 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;
2. 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 counsel should not become a prisoner of his or her theory;

### **D. Pretrial Motions**

1. 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.
2. The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

- a. The pretrial custody of the accused;
- b. The constitutionality of the implicated statute or statutes;

- c. The potential defects in the charging process;
- d. The sufficiency of the charging document;
  
- e. The propriety and prejudice of any joinder of charges or defendants in the charging document;
  
- f. The discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
  
- g. The suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution AND the corresponding or additional state constitutional provisions, including but not limited to:
  - 1) The fruits of illegal searches or seizures;
  - 2) Involuntary statements or confessions;
  - 3) Statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
  - 4) Unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification;
  - 5) Double jeopardy issues.
  
- h. Suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
  
- i. Access to resources which or experts who may be denied to an accused because of his or her indigence;
  
- j. The defendant's right to a speedy trial;
  
- k. The defendant's right to a continuance in order to adequately prepare his or her case;
  
- l. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
  
- m. Change of venue;
  
- n. Matters of trial or courtroom procedure.

3. Counsel should withdraw a motion or decide not to file a motion only after careful consideration, and only after analyzing whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the

ultimate relief requested by the motion. Counsel should consider whether:

- a. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights pending the results of further investigation;
- b. Changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
- c. Later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

#### 4. Motion Hearings

When a pretrial motion requires an evidentiary hearing, counsel's preparation should include:

- a. Investigation and discovery necessary to advance the claim;
- b. Research of the appropriate case law which supports or expands rights guaranteed by federal and state constitutions
- c. Subpoenas for pertinent evidence and witnesses;
- d. A full understanding of the burdens of proof and evidentiary rules;
- e. Careful consideration of the benefits/costs of having the client testify;
- f. Careful preparation of the witnesses who are called, especially the defendant
- g. Whether the assistance of an expert witness is appropriate or necessary;
- h. Whether obtaining a stipulation of facts is appropriate or tactically advisable;
- i. Submission of a memorandum of law.

## **VI. INITIAL APPEARANCES, PRELIMINARY HEARINGS AND ARRAIGNMENTS**

### **A. Initial Appearances**

At the time of the initial appearance counsel should:

1. Promptly advise the client of and take action to preserve all constitutional and statutory rights of the client, including the rights:
  - a. The remain silent;
  - b. To file motions challenging the charging instrument;
  - c. To enter a plea of not guilty or deny the allegations contained in a complaint or delinquency petition, and

- d. To request a jury trial if failure to do so may result in the client being precluded from requesting a jury trial in the future;
2. Waive reading of the complaint, charges, or allegations if the charges are of such a nature to be prejudicial to the client's continued safety, especially while incarcerated. Such charges would include, but are not limited to, crimes against children, sexual assault charges, and homicide charges where the victim is a woman or a child;
3. Request a timely preliminary hearing and insure that the hearing is set within the proper time frame;
4. Seek the release of the client or request that an appropriate bail amount be set;
5. Advise the client not to speak with anyone about his or her case, including the client's parents, siblings, other family members, friends, or other individuals held in custody;
6. If the client is held in custody, conduct an initial interview with the client within 48 hours of appointment.

## **B. Preliminary Hearing**

1. Counsel should make certain that the preliminary hearing is scheduled and conducted within the applicable time limits unless there are strategic reasons for waiving time;
2. In preparing for the preliminary hearing, the attorney should consider:
  - a. The elements of each of the offenses alleged;
  - b. The law for establishing probable cause;
  - c. The factual information which is available concerning probable cause;
  - d. The tactics of calling the defendant as a witness. In most instances, calling the defendant as a witness at this juncture is ill-advised, as discovery and preparation is insufficient to completely evaluate the negative aspects of calling the client as a witness;
  - e. The tactical need to subpoena defense witnesses. Rule 5.3 of the Arizona Rules of Criminal Procedure requires that once the state has concluded its case and the hearing officer has made a finding of probable cause, counsel must make an offer of proof outlining what the evidence would show if the defense was able to call witnesses. If the hearing officer determines that this information is insufficient to rebut a finding of probable cause, the witnesses will not be allowed to testify. As with calling the client as a witness, at this juncture, limitations on discovery and preparation may make it ill-advised to call defense witnesses;
  - f. The tactics of proceeding with or without discovery materials;

g. The tactics of full or partial cross-examination. Counsel should be prepared to make a record that discovery is not complete, the opportunity to prepare has been constrained by time limitations, and therefore complete cross-examination is impossible. Counsel should make a further record that the testimony of the State's witnesses is insufficient to substitute as trial testimony in the event of the witnesses' absence at that time, due to a denial of the right to confrontation as a result of insufficient ability to cross-examine the witnesses, inadequate discovery, and insufficient preparation.

3. The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such a waiver, including:

a. The benefits of waiving the preliminary hearing in order to avoid the preservation of testimony of critical State's witnesses who may not be available at a later trial;

b. The benefits of waiving the preliminary hearing in exchange for a reduction of the charges.

4. At the conclusion of the preliminary hearing, counsel should request a modification of the client's release conditions pursuant to Rule 5.4 of the Arizona Rules of Criminal Procedure if preliminary hearing testimony tended to mitigate the nature of the charges or the client's culpability.

### **C. Grand Jury Representation**

1. Prior to Grand Jury presentment, counsel should:

a. Attempt to negotiate a dismissal or settlement of the case with the state;

b. Consider whether to request that the client be allowed to testify before the Grand Jury pursuant to Rule of Criminal Procedure 12.6;

2. After the return of the indictment and receipt of the grand jury transcript, counsel should:

a. Review the empanelment transcript of the grand jury for prejudicial error;

b. Review the transcript of the grand jury proceeding to ensure that:

1) At least nine grand jurors returned a true bill;

2) There are no errors in the presentation of the case to the Grand Jury which should be raised in a motion for a new finding of probable cause pursuant to Arizona Rule of Criminal Procedure 12.9;

3) Filing a motion for redetermination of probable cause is a better strategy than using the error for impeachment purposes at trial;

4) A motion for redetermination of probable cause is filed within 25 days after the transcript of the grand jury proceedings is filed or 25 days after the arraignment, whichever is later, pursuant to Arizona Rule of Criminal Procedure 12.9.

## **VII. DISPOSITION WITHOUT A TRIAL**

### **A. Investigating Plea Alternatives**

Counsel should not encourage the client to plead guilty until the attorney has fully examined the case facts as well as conducted an analysis of the controlling law and the evidence likely to be introduced at trial.

### **B. The Plea Negotiation Process and the Duties of Counsel**

1. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges, including the availability of diversion programs, 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;
2. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations;
3. Counsel should keep the client fully informed of any continued plea discussions and negotiations and convey to the client any offers made by the prosecution for a negotiated settlement;
4. Counsel should not accept any plea agreement without the client's express authorization;
5. Counsel should continue to preserve the client's rights and prepare the client's defense notwithstanding ongoing plea negotiations.

### **C. Strategies for Conducting Plea Negotiations**

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

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
  - a. Waiving the right to proceed to trial on the merits of the charges;
  - b. Refraining from asserting or litigating any particular pretrial motions;
  - c. An agreement to fulfill specified restitution conditions and/or participate in community work or service programs, or in rehabilitation or other programs;

d. Providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

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

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

#### **D. Implementation of the Plea Agreement**

1. Counsel should be fully aware, and ensure the client is fully aware of:

- a. Rights the client will waive by entering into a pretrial admission or disposition agreement;
- b. Conditions and limitations of the plea agreement;
- c. The nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and, in many instances, providing a factual basis for the offense to which the client is pleading guilty;

- d. Deferred sentences, conditional discharges and diversion agreements;
- e. The likely disposition, including what is required by law and the effect of the admission agreement on the client's criminal history;
- f. Possible and likely sentencing enhancements;
- g. Probation or post-incarceration supervision consequences;
- h. Available drug rehabilitation programs, psychiatric treatment, and health care;
- i. Incarceration, including any mandatory minimum requirements and maximum terms;
- j. The possible and likely place and manner of confinement;
- k. The effect of good-time credits on the client's release and conditional leaves;
- l. Self-surrender to place of custody;
- m. Credit for pretrial detention;
- n. Eligibility for correctional programs, work release and conditional leaves;
- o. Probation or suspension of sentence and permissible conditions of probation;
- p. Restitution, fines, assessments and court costs;
- q. If applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;
- r. Weapon or asset forfeiture;
- s. Collateral consequences of the conviction, including but not limited to:
  - 1) Deportation;
  - 2) Civil disabilities;
  - 3) Sex offender registration;
  - 4) Prohibited possessor status;
  - 5) Loss of public benefits;
  - 6) Enhanced sentences for future convictions;

t. Restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;

u. Possibility of later expungement and sealing of records.

## **VIII. TRIAL**

### **A. Trial Preparation**

1. Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued and refined. This preparation should include consideration of:

- a. Summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable;
- b. Marshalling 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.

2. Where appropriate, counsel should have the following materials organized and accessible at the time of trial;

- a. Copies of all relevant documents in the case;
- b. Relevant documents prepared by investigators;
- c. Proposed *voir dire* questions;
- d. Outline of opening statement;
- e. Cross-examination plans for all possible prosecution witnesses;
- f. Outline of argument for directed verdict and supporting authorities;
- g. Direct examination plans for all prospective defense witnesses;
- h. Copies of defense subpoenas;
- i. Prior statements of all prosecution witnesses (e.g. grand jury testimony, witness

interview transcripts, police reports);

j. Prior statements of all defense witnesses including transcripts of previous State or defense interviews;

k. Reports from defense experts;

l. A list of all defense exhibits, and the witnesses through whom each will be introduced;

m. Proposed jury instructions with supporting authorities;

n. Copies of all relevant statutes and cases, including any potential lesser-included offenses;

o. Outline or draft of closing argument.

3. Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.

4. If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g. use of prior convictions to impeach the defendant, prior bad acts, reputation testimony, prejudicial evidence) and where appropriate, counsel should prepare motions and memoranda for such advance rulings.

5. Throughout the trial process, counsel should endeavor to establish a complete and accurate record for appellate review. As part of this effort, counsel should request that all trial proceedings, including motions, bench conferences, conferences in chambers, and jury instructions, be contemporaneously recorded.

6. Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail clothing or other inappropriate clothing, and should take measures to provide appropriate trial clothing for the client.

7. Counsel should ensure that the client is available for all stages of the proceedings, unless the client specifically waives his presence after being advised of the possible ramifications of non-attendance by counsel and/or the court.

8. Counsel should plan with the client the most convenient and least obtrusive system for conferring throughout the trial.

9. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

## **B. *Voir Dire* and Jury Selection**

### 1. Preparation

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

b. Prior to jury selection, counsel should seek to obtain a prospective jury list;

c. Where appropriate, counsel should develop *voir dire* questions in advance of trial. Counsel should tailor *voir dire* questions to the specific case. To the extent allowed by law, *voir dire* questions should be designed to:

1) Elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

2) Convey to the panel legal principles which are critical to the defense case;

3) Preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

4) Present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor;

5) Establish a relationship with the jury, when the *voir dire* is conducted by an attorney.

d. Counsel should be familiar with the law concerning mandatory and discretionary *voir dire* inquiries so as to be able to defend any request to ask particular questions of prospective jurors;

e. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. 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;

f. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process;

g. Where appropriate, counsel should seek the assistance of a non-attorney (legal secretary, legal assistant, or investigator) in selecting the jury as well as recording juror responses.

### 2. Examining Prospective Jurors

- a. Counsel should request permission to personally *voir dire* the panel pursuant to Arizona Rules of Criminal Procedure 18.5(d). If the court also conducts *voir dire*, counsel should submit proposed questions specific to the client's case and factual background to be incorporated into the court's questions;
- b. Counsel should take all steps necessary to protect the record for appeal, including filing a copy of the proposed *voir dire* questions or reading proposed questions into the record;
- c. If the *voir dire* questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors. Counsel should consider whether the court, rather than counsel, should conduct the *voir dire* as to those sensitive questions;
- d. If the case involves several sensitive or controversial areas, counsel should request that the jurors be required to complete juror questionnaires, developed by the parties with assistance from the judge, which delves into those sensitive areas. This will allow the jurors more opportunity to convey their true beliefs without putting them in potentially embarrassing situations or requiring them to verbalize difficult positions;
- e. In a group *voir dire*, counsel should avoid asking questions which may elicit responses which are likely to prejudice the other prospective jurors. If the court or the state elicits such responses, counsel should consider moving for a mistrial or the impaneling of a new jury.

### 3. Challenges for Cause

- a. Counsel should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client;
- b. When challenges for cause are not granted, counsel should exercise peremptory challenges to eliminate such jurors;
- c. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available;
- d. Counsel should consult with the client in exercising challenges and consider the client's preferences for exercising challenges;
- e. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
- f. If counsel believes a basis exists to challenge the entire panel, pursuant to Arizona Rule of Criminal Procedure 18.4(a), counsel must make this challenge in writing and before any individual juror is examined.

### **C. Defense Strategy**

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

### **D. Opening Statement**

1. Prior to delivering an opening statement, counsel should ask for sequestration of potential witnesses, unless a strategic reason exists for not doing so.
2. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement;
3. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information or commitment to a tenuous position during opening statement;
4. In very rare instances, counsel should consider the strategic advantage of deferring the opening statement until the beginning of the defense case;
5. Counsel should never forego the opportunity to give an opening statement;
6. Counsel's objectives in making an opening statement may include the following:
  - a. To provide an overview of the defense case;
  - b. To identify the weaknesses of the prosecution's case;
  - c. To emphasize the prosecution's burden of proof;
  - d. To summarize the testimony of witnesses, and the role of each in relationship to the entire case;
  - e. To describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - f. To clarify the jurors' responsibilities;
  - g. To state the ultimate inferences which counsel wishes the jury to draw.
7. Counsel should consider incorporating the promises the prosecutor makes to the jury during opening statement into the defense summation.
8. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical

considerations weigh against any such objections or requests. Such tactical considerations may include but are not limited to:

- a. The significance of the prosecutor's error;
- b. The possibility that an objection might further enhance the significance of the information in the jury's mind;
- c. Whether there are any rules made by the judge against objecting during the other attorney's opening statement.

### **E. Confronting the Prosecution's Case**

1. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing motions for judgment of acquittal.
2. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
3. In preparing for cross-examination, counsel should:
  - a. Anticipate the need to integrate cross-examination, the theory of the defense and closing argument;
  - b. Consider whether cross-examination of each individual witness is likely to generate helpful information. Guard against merely reiterating and affirming the State's case;
  - c. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. Consider a cross-examination plan for each of the anticipated witnesses;
  - e. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - f. Be alert to inconsistencies in witnesses' testimony;
  - g. Be alert to possible variations in witnesses' testimony;
  - h. Be alert to significant deficiencies or omissions in the testimony or actions of any witness, e.g. investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics, etc.;
  - i. Where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

j. Have available certified copies of prior convictions or pending cases of witnesses to be used for impeachment purposes;

k. Be alert to issues relating to witness credibility, including bias and motive for testifying.

4. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call.

5. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

6. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by Rule 15 of the Rules of Criminal Procedure. If disclosure has not been made, counsel should seek a continuance in order to be adequately prepared. If new disclosure dramatically changes the course of the trial, counsel should move for a dismissal, a mistrial, preclusion of the witness' testimony, or other appropriate sanctions.

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

## **F. Stipulations**

Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case. Counsel should consider the possibility of receiving the prosecutor's stipulation to defense evidence in exchange for counsel's stipulation to prosecution evidence or some other benefit to the client.

## **G. Presenting the Defense Case**

1. Counsel should develop, in consultation with the client, a sensible overall defense strategy.

2. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof.

3. Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify, including the likely areas of cross-examination and impeachment.

4. Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of

production.

5. In preparing for presentation of a defense case, counsel should, where appropriate:
  - a. Consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
  - b. After discussion with the client, make the decision whether to call any witnesses;
  - c. Develop a plan for direct examination of each potential defense witness;
  - d. Determine the implications that the order of witnesses may have on the defense case;
  - e. Consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  - f. Consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
  - g. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  - h. Attempt to obtain the prior records of all defense witnesses.
6. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor;
7. Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
8. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
9. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
10. If an objection is sustained, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.
11. Counsel should guard against improper cross-examination by the prosecutor.
12. Counsel should conduct redirect examination as appropriate.
13. At the close of the defense case, counsel should renew any previously filed motions for a directed verdict of not guilty on each count charged and/or aggravated element.

14. Counsel should keep a record of all exhibits identified or admitted.

## **H. Closing Argument**

1. Before closing argument, counsel must file and should seek to obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the Court's rulings;

2. Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections, and substance of closing arguments;

3. In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:

a. Highlighting weaknesses in the prosecution's case, including what potential corroborating evidence is missing;

b. Favorable inferences to be drawn from the evidence;

c. Incorporating into the argument:

1) Helpful testimony from direct and cross examination;

2) Verbatim instructions drawn from the expected jury instructions;

3) Responses to anticipated prosecution arguments;

4) Visual aids and exhibits

d. The effects of the defense argument on the prosecutor's possible rebuttal argument.

4. Whenever the prosecutor exceeds the scope of permissible argument, counsel must object either immediately and at the close of the argument, and if merited and beneficial to the defense case, seek a mistrial. Counsel should also determine whether to seek a cautionary instruction or whether such an instruction would call undue attention to the inappropriate argument.

## **I. Jury Instructions**

1. Counsel must file proposed or requested jury instructions as required by the judge, but in all circumstances prior to closing arguments;

2. Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, instructing the jury, use of standard instructions and preserving

objections to the instructions;

3. Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions;

4. Counsel should seek instructions and forms of verdict for lesser-included offenses where appropriate and with the authorization of the client;

5. Where appropriate, counsel should object and argue against instructions proposed by the prosecution;

6. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including filing a copy of the proposed instructions or reading the proposed instructions into the record;

7. During the delivery of the instructions to the jury, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and if necessary, request additional or curative instructions;

8. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard, outside the jury's presence, on the supplemental instruction that is delivered.

9. During the reading of the initial instructions and any supplemental instructions, object to the court proceeding with such instructions in the client's absence unless the client has waived his presence for this purpose.

#### **J. Protection of the Client's Post-trial/Pre-Sentence Rights**

1. Where appropriate counsel should file a motion for new trial within 10 (ten) days as required by Rule 24.1 of the Arizona Rules of Criminal Procedure;

2. In determining whether or not a motion for new trial is appropriate, counsel should consider whether any of the following circumstances exist:

a. The verdict is contrary to law or to the weight of the evidence;

b. The prosecutor has been guilty of misconduct;

c. Juror or jurors have been guilty of misconduct by:

1) Receiving evidence not properly admitted during trial;

2) Deciding the verdict by lot;

3) Perjuring himself or herself or wilfully failing to respond fully to a direct question posed during the voir dire examination;

4) Receiving a bribe or pledging his or her vote in any other way;

5) Becoming intoxicated during the course of the deliberations;

6) Conversing before the verdict with any interested party about the outcome;

In those instances where counsel learns of jury misconduct, counsel should seek authorization from the court to contact the jurors and seek an evidentiary hearing to present evidence of jury misconduct to the court;

d. The court has erred in the decision of a matter of law, or in the instructions of the jury on a matter of law to the substantial prejudice of the client;

e. Any other reason which precluded the client from receiving a fair and impartial trial, not the result of the client's own actions or inaction

## **IX. POST-CONVICTION PROCEDURES**

### **A. Obligations of Counsel in Sentencing**

Among counsel's obligations in the sentencing process are:

1. Where a defendant chooses not to proceed to trial, to ensure that the 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 decisions;

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.

## **B. Sentencing Options, Consequences and Procedures**

1. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:

- a. Any sentencing guideline structure;
- b. Deferred sentence, judgment without a finding, and diversionary programs;
- c. Expungement and sealing of records;
- d. Probation or suspension of sentence and permissible conditions of probation;
- e. Restitution;
- f. Fines;
- g. Court costs;
- h. Imprisonment including any mandatory minimum;
- i. Confinement in a mental hospital or institution;
- j. Forfeiture.

2. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

- a. Credit for pretrial incarceration or detention;
- b. Parole eligibility and applicable parole release ranges;
- 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. Restriction on or loss of license.

3. 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 defendant's rights in that process;
- e. The access to the presentence report by counsel and the defendant;
- 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.

### **C. Preparation for Sentencing**

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

1. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
2. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
3. Obtain from the client relevant information concerning such subjects as:
  - a. His or her background and personal history;

- b. Prior criminal record;
  - c. Employment history and skills;
  - d. Education;
  - e. Medical history and condition;
  - f. Financial status;
  - g. Family obligations and dependents
4. Prepare the client to be interviewed by the official preparing the presentence report;
  5. Inform the client of the effects that admissions and other statement to the probation department or other individuals may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
  6. When necessary to protect the interests of the client, or where circumstances warrant, be present or have counsel's representative present during the probation department's interview(s) of the client for purposes of preparing the presentence report;
  7. Ensure the client has adequate time to review the presentence report;
  8. 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 of any admission of guilt upon an appeal, subsequent retrial or trial on other offenses;
  9. Inform the client of the sentence or range of sentences counsel will ask the court to consider, if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
  10. 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.

#### **D. The Presentence Report**

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

1. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;

2. Provide to the official preparing the report relevant information favorable to the client, including where appropriate the defendant's version of the offense;
3. Review the completed report;
4. Take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
5. Take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading, and:
  - a. The court refuses to hold a hearing on a disputed allegation adverse to the defendant;
  - b. The prosecution fails to prove an allegation;
  - c. The court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report of the memorandum is distributed to correctional and/or parole officials.

6. Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

#### **E. Defense Sentencing Memorandum**

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

1. Challenges to incorrect or incomplete information in the official presentence report and 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 defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status.

#### **F. Prosecution's Sentencing Position**

1. Counsel should attempt to determine, unless there is a sound tactical reason not to do so, whether the prosecution will advocate that a particular type or length of sentence be imposed;
2. If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented therein is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason not to do so;
3. If the prosecution makes oral statements to the presentence investigator in the process of preparing the presentence report, counsel should request information concerning those comments and be prepared to rebut those comments and/or provide the presentence investigator with additional information to mitigate the prosecutor's oral statements;
4. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

## **G. Sentencing Process**

1. 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;
2. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence;
3. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the 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;
4. 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;
5. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning:
  - a. The place of confinement;
  - b. Parole eligibility;
  - c. Psychiatric treatment or drug rehabilitation;
  - d. Permission for the client to surrender directly to the place of confinement;
  - e. A recommendation against deportation of the client
  - f. Permission for the client to petition the board of executive clemency for a commutation of sentence within 90 days after being committed to the custody of the department of corrections where the sentence required to be imposed by law is clearly excessive.

6. Where appropriate, counsel should prepare the client to personally address the court.

## **X. POST-DISPOSITION PROCEDURES**

### **A. Appeals**

When the client has been convicted after a bench or jury trial or been found in violation of his or her probation after an evidentiary hearing, counsel should:

1. Inform the client of his or her right to appeal the judgment of guilt and sentence and the action that must be taken to perfect an appeal. If the client has proceeded to a jury trial, a Notice of Appeal should be filed unless:

- a. There is a specific reason not to do so;
- b. The client expressly waives the right to file an appeal after proper advice; or
- c. The client received a favorable result at trial which may be overturned in the event the state files a cross-appeal.

2. Where the client wishes to file an appeal, file a notice of appeal on the client's behalf in accordance with the Rules of Criminal Procedure within 20 days of sentencing, and take any other steps as are necessary to preserve the defendant's right to appeal.

3. Explain the nature of any appellate issues which are then known to counsel and the likelihood of success of those issues on review;

4. Explain the time delays that may be involved in the processing of the appeal and inability to obtain a stay of the sentence pending appeal;

5. Whenever possible, ensure that new counsel is assigned to review the record and prepare the appeal; and

6. Cooperate with appellate counsel assigned to handle the appeal.

### **B. Petitions for Post-Conviction Relief**

When the client has been convicted as the result of a plea of guilty, or has admitted to a violation or violations of probation, counsel should:

1. Inform the client of his or her right to file a Petition for Post-Conviction Relief (Rule 32) and the action that must be taken to institute those proceedings;

2. Where the client wishes to file a Petition for Post-Conviction Relief but is unable to do so without the assistance of counsel, file the Notice of Post-Conviction Relief within 90 days of

entry of judgment and sentencing. Counsel should file the Notice on behalf of the client even in those instances where the client expresses a desire to claim ineffective assistance of counsel as a ground for relief;

3. Explain the nature of any issues known to counsel which might be legitimately raised in the Petition for Post-Conviction relief, and the likelihood of a successful outcome on those issues;
4. Explain the time delays involved in Post-Conviction proceedings and the unlikelihood of obtaining a stay of the sentence pending the outcome;
5. Whenever possible, ensure that new counsel is assigned to review the record and prepare the petition. If there is an arguable claim of ineffective assistance of counsel, move to withdraw as counsel if assigned counsel or a member of assigned counsel's agency or firm was counsel at the proceedings below;
6. Cooperate with counsel assigned to handle the Post-Conviction Relief proceedings.

### **C. Other Post-Conviction Motions**

After the client is sentenced, counsel should:

1. File motions to vacate judgment and for modification of sentence, when grounds exist, within 60 of the entry of judgment and sentence pursuant to Rules of Criminal Procedure 24.2 and 24.3;
2. File motions for modification of probation in those instances where it is appropriate, pursuant to Rule 27.2 of the Rules of Criminal Procedure;
3. File motions for early termination of probation in those instances where it is appropriate, pursuant to Rule 27.3 of the Rules of Criminal procedure;
4. File motions to restore civil rights and set aside the conviction when and where appropriate pursuant to A.R.S. Secs. 13-905 to 912.01;
5. File motions for designation of Class 6 or other open-ended felonies as misdemeanors in a timely manner and where appropriate, pursuant to A.R.S. Sec. 13-702(G).

### **D. Retention of Records**

Counsel or counsel's agency or firm shall develop systems for retaining records of former clients for such a period of time as to ensure that the records are available for later judicial proceedings, or at a minimum until completion of the client's sentence or term of probation. In developing retention systems counsel should consider:

1. The need to retain records of prior mental health status examinations;
2. The need to retain records of specific findings of the court relative to future proceedings such

as prosecution under the Sexually Violent Predators Act;

3. Any other information available to counsel which is beneficial to the client and may be unavailable from other agencies in the future.