

## Castillo, Linda

---

**From:** McCormick, John  
**Sent:** Monday, August 04, 2008 10:10 AM  
**To:** All Chambers  
**Cc:** Titus, Ron; Sweet, Robin; Gang, Bill; Castillo, Linda; Lindeman, Tracie  
**Subject:** Performance Standards (ADKT 411)

**Attachments:** Performance Standards Filed.pdf

Good Morning,

Attached please find the Indigent Defense Performance Standards (ADKT 411) for the Court's consideration. Included in the document are:

Majority/Minority Reconciled Report  
Version A (Unreconciled Differences)  
Version B (Reflects changes in the Report)  
Indigent Defense Commission Comments  
Rural Subcommittee Report  
Rural Subcommittee Comments

The IDC had a two week comment period to voice their concerns regarding this final iteration for the Court's consideration, and the Rural Subcommittee met and assembled a report pursuant to the Court's instruction.

I will be bringing a hard copy of the document, which is best viewed in color, by each Justice's Chamber (or via interoffice mail for those in LV), and I will file a hard copy with the Clerk's Office.

Thanks,  
John



Performance  
Standards Filed.pd...

John R. McCormick  
Rural Courts Coordinator  
Administrative Office of the Courts  
(775) 687-9813 / Fax (775) 687-9811  
jmccormick@nvcourts.nv.gov

**Castillo, Linda**

---

**From:** McCormick, John  
**Sent:** Tuesday, August 05, 2008 4:13 PM  
**To:** All Chambers  
**Cc:** Lindeman, Tracie; Castillo, Linda  
**Subject:** Clarification of Memo Accompanying Performance Standards

*ADKT 411*

Good Afternoon,

I has been pointed out to me that my cover memo on the performance standards packet I filed with the Court yesterday needs clarification in the area of its description of Versions A and B of the Standards.

Version A is the agreed set of Standards.

Version B includes proposed changes from the Minority and District Attorneys.

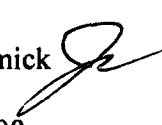
I apologize for any confusion this created.

Thank You,  
John

John R. McCormick  
Rural Courts Coordinator  
Administrative Office of the Courts  
(775) 687-9813 / Fax (775) 687-9811  
jmccormick@nvcourts.nv.gov

Supreme Court of Nevada  
ADMINISTRATIVE OFFICE OF THE COURTS

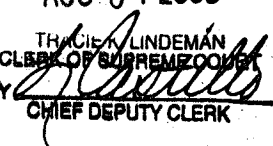
**MEMORANDUM**

**TO:** Nevada Supreme Court  
**COPY:** Supreme Court Clerk's Office  
Indigent Defense Commission  
**FROM:** John McCormick   
**DATE:** August 4, 2008  
**SUBJECT:** Performance Standards

---

**FILED**

AUG 04 2008

THACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

The following documents encompass the work of the Indigent Defense Commission and the Rural Subcommittee on the Performance Standards subsequent to the last ADKT 411 Administrative Hearing on July 1, 2008.

Members of the Indigent Defense Commission were provided a two-week comment period (July 16 to August 1) to offer input on the Report and Versions A and B of the Standards as provided by the Standards Working Group.

The Rural Subcommittee offers the attached Report and comments pursuant to the Court's instruction.

Pages 2 to 19:	Indigent Defense Commission Majority/Minority Reconciled Report
Pages 20 to 83:	Performance Standards, Version A (Unreconciled Differences)
Pages 84 to 148:	Performance Standards, Version B (Changes in Report)
Page 149:	Indigent Defense Commission Comments
Page 150:	Rural Subcommittee Report
Pages 151 to 153:	Rural Subcommittee Comments

Attachment

**INDIGENT DEFENSE COMMISSION**  
**MAJORITY/MINORITY RECONCILED REPORT**

**July 14, 2008**

At the May 30, 2008 Commission meeting, a motion was made to adopt a new preamble to the performance standards issued by the Nevada Supreme Court in its January 4, 2008 Order and affirm the remainder of the standards without any additional changes.<sup>1</sup> The motion passed. A majority of the individuals who voted against the motion approved of the preamble language, but wished to have the same subcommittee that drafted the preamble meet again to discuss other proposed changes designed to address issues about the standards expressed in writing and at the March 18, 2008 Supreme Court hearing by members of the judiciary, prosecutorial organizations and county/city representatives. The idea was to narrow the issues to be presented to the Supreme Court at its July 1, 2008 hearing.

A majority and minority report discussing the proposed changes was prepared. Prior to the hearing, Federal Public Defender Franny Forsman and Clark County Deputy District Attorney Nancy Becker, members of the subcommittee that drafted the preamble, met to see if additional compromises could be reached. In their discussions, Ms. Forsman and Becker also took into consideration comments made by the third member of the subcommittee, the Honorable Stewart Bell, during subcommittee and Commission meetings as well as additional comments from the main constituencies – defense bar, prosecutors, judges and government managers. Several agreements were reached and these were presented to the Supreme Court on July 1, 2008. As a result, the Court asked Ms. Forsman and Becker to make all the agreed upon changes to the Standards and then submit to the proposed Standards, together with any remaining disputed language, to the Commissions Rural Subcommittee for comments. In addition, to

---

<sup>1</sup> Although not subject to a motion, the Commission also agreed to re-number the Standards to facilitate citations.

avoid any confusion, the Court also asked that the respective interested parties: judges, prosecutors, county/city management and defense bar who serve on the Commission or submitted comments, be given a chance to review the revised standards and make sure the uncontested portions represented a consensus view.

Two copies of the Standards are attached. Standard A represents the original Standards together with any changes that were agreed upon. Standard B is a highlighted version of Standard A, indicating the proposed changes that remain unresolved and require a decision by this Court.

This report is designed to provide the reader with a brief discussion of the proposed changes and facilitate any additional comments from interested parties. A copy of the report, and the attachments, was sent to each member of the Commission, the Rural Sub-Committee and other individuals who expressed concerns prior to or at the March, 2008 hearing. In each case, the rationale for the proposed change is presented first, with the opposition to the change following.

#### **I. “Quality” and “High Quality” Terminology**

##### **Rationale for Proposed Change**

The ABA commentary<sup>2</sup> reflects that the term “quality” refers to a lawyer’s general duty to use that knowledge, skill, thoroughness and preparation reasonably necessary for representation to a client on a given case or issue. In this regard it is akin to ABA Model Code of Professional Conduct and Nevada Code of Professional Conduct 1.1 and 1.3. The term “high quality” was intended emphasize the need for a greater degree of skill and experience on the part of defense counsel in a capital versus non-capital case due to the complexity and demands of a capital case. It also recognizes that the scope of investigation, need to retain experts and other considerations are greater in a capital case.

The Minority Report noted no problem with the use of the terms in this context. However, at public hearings and at Commission meetings, some

---

<sup>2</sup> The 2003 Death Penalty Guidelines and Commentary, as well as the 1993 ABA Standards for Defense, can be found at the ABA’s website. The Death Penalty information can also be found at 31 Hofstra Law Review 913 (2003).

Commission members and organization representatives have stated that this language means an indigent defendant is entitled to the same monetary resources per case as a non-indigent defendant. In fact, the argument was made that an indigent defendant has a right to have the same amount spent on his or her case as a millionaire.

While this is a laudable goal, it is for the Legislative or Executive Branch to implement. The Judicial Branch is responsible for insuring constitutional mandates are met. Indigent defendants are constitutionally entitled to the resources reasonably necessary to provide competent representation. Those resources will be greater in a capital case, but the amount of resources in any case will differ depending upon the nature of the charges, possible penalties, complexity of the evidence, etc. It is an inevitable fact of life that some people can afford to hire more attorneys and experts than others, whether indigent or not. This is not an issue to be addressed in these standards; therefore the Minority Report suggested that the term "competent" be substituted or that some additional language or commentary be added that eliminates this problem.

#### **Opposition**

The Standards employ certain adjectives to describe how certain tasks of the defense function are to be carried out. In the Standards applicable to the defense of capital cases, the Minority Report suggested that the terms "quality" and "high quality" should be replaced by "competent." Similarly, the Minority Report suggested that the term "thorough" when it is used to modify "investigation" should be changed to "appropriate."

The proposed changes would seem to have the effect of reducing the performance Standards to the minimum required by the constitutional guarantee of effective assistance of counsel. This is not the goal of the performance Standards.

The performance standards, like other standards relating to the conduct of attorneys, are "rules of reason," Nev. R. Prof. Conduct 1.0A(a). An interpretation of the "quality" and "high quality" terminology that would mandate unnecessary

expenditure of time and resources, to provide services that could be obtained by a defendant with unlimited financial resources, would not be a reasonable interpretation of the language of the standards.

The purpose of caseload and performance standards is to improve the general quality of representation, which is not the purpose of the Sixth Amendment guarantee of effective assistance of counsel. The Supreme Court in *Strickland*, makes this distinction clear:

“The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”

*Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The Nevada Supreme Court is responsible for regulating the practice of attorneys in Nevada. Nev. Sup. Ct. Rule 39 (“the government of the legal profession is a judicial function”). Adoption of rules imposing performance standards for counsel is well within the Court’s inherent powers to promulgate rules regulating criminal practice. See *id.*

There is no basis for contending that the Nevada Supreme Court cannot adopt performance standards in capital or other criminal cases that require counsel to perform better than the bare minimum required by the federal constitution. The rules of professional conduct for instance are rife with provisions that are not constitutionally mandated. E.g., Nev. R. Prof. Conduct 1.4(c), 1.14, 1.15, 1.17, 3.6, 4.4, 5.1, 5.4, 6.1, 6.2, 7.2, 8.3. The rules of professional conduct provide that the violation of a rule does not necessarily give rise to a cause of action nor does it “create any presumption. . .that a legal duty has been breached.” Nev. R. Prof. Conduct 1.0A(d). The performance standards similarly provide that a failure to comply with the standards “does not, in and of itself constitute ineffective assistance of counsel.” Standard 1(d), and this principle are consistent with

current law,<sup>3</sup> by elevating the standard of practice to the point where ineffective assistance will be less likely to occur.<sup>4</sup>

<sup>3</sup>See, e.g., *United States v. Cronin*, 466 U.S. 648, 1663, 666(1984) (finding of ineffective assistance cannot be inferred from abstract factors such as counsel's inexperience, complexity of case or inadequate time for investigation or preparation, but must focus on "special errors made by trial counsel"); *Schriro v. Landrigan*, 127 S.Ct. 1933, 1941-1962 (2007) (defense counsel's failure to present mitigating evidence at penalty phase not IAC where defendant instructed counsel not to present mitigation); *Bell v. Cone*, 535 U.S. 685, 701-702 (2002) (waiver of final argument in penalty phase not ineffective, where waiver prevented more persuasive prosecuting attorney from giving final argument for state); *LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir. 1998) (failure of defense counsel to personally interview prospective witnesses, and failure to call them because he believed their testimony would be cumulative, not IAC); cf., e.g., *Harris v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (failure to investigate because counsel does not think it would help found ineffective as "abdication of advocacy"). A successful claim of ineffective assistance of counsel also requires a showing of prejudice, which is not satisfied merely by showing that counsel acted unreasonably. See, e.g., *Tanner v. McDaniel*, 493 F.3d 1135, 1144 (9th Cir. 2007) (counsel ineffective for failing to discuss filing appeal with defendant, but potential claims frivolous so deficient performance harmless); *Evans v. State*, 946 S.2d 1, 12 (Fla. 2006) (no evidence failure to appoint second counsel prejudiced defendant); *Torres v. State*, 120 P.3d 1184, 1189 (Okla. Crim. 2005); *Harlow v. State*, 105 P.3d at 1070-1071 (no ineffective assistance in failure to raise meritless issues); *Mitchell v. State*, 971 P.2d 727, 733 (Idaho 1998).

<sup>4</sup> Experience has shown that relying on the litigation of individual cases to enforce constitutional minimum of effective assistance of counsel does not generally result in improving the quality of capital representation overall. The United States Supreme Court has repeatedly had to reverse capital sentences because trial counsel stopped investigating mitigation at issues at a point which they apparently believed was "appropriate," but which resulted in the failure to find readily available mitigation evidence. See *Rompilla v. Beard*, 545 U.S. 374, 382-385 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523-524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wilson v. State*, 105 Nev. 110, 113-115, 771 P.2d 583, 584-585 (1989). In fact, in *Taylor* the Supreme Court itself emphasized counsel's obligation "to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396 (emphasis supplied), citing 1 ABA Standards for Criminal Justice 4-4.1, Commentary at 4-55 (2d ed. 1980); *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984) (counsel's strategic choices "virtually unchallengeable" if "made after thorough investigation of facts and law" (emphasis supplied).) Moreover, experience has shown that thorough investigation of guilt issues should not necessarily be bypassed even when the defendant has confessed: the Department of Justice's Report on DNA exonerations includes many cases in which defendant confessed but was later found not to be the culprit. U.S. Dep't of Justice, Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 15-17 (1996).

All of these considerations militate against "watering down" the language of the performance standards, which sends precisely the wrong message to the public and to the Bar.

#### **PROPOSED RESOLUTION**

After considering the matter further, to resolve the issue on the use of the terms "high quality" and "quality" it is suggested that the Nevada Supreme Court incorporate the following language in any order approving a revised version of the Standards:

"The standards promote high quality representation in capital cases and quality representation in non-capital cases by setting out the actions a defense attorney should have the time to consider performing when making an individualized decision about what is in the best interests of a particular client. That is, an attorney may decide that a full investigation of the facts surrounding a low level felony or other case is not in the best interests of the client so long as the attorney took the time to appropriately weigh the consequences before making the decision and is not simply forgoing an investigation for reasons related solely to lack of funding or too many cases to perform an adequate investigation."

This language clarifies that the issue is not matching funds with the private sector, rather it recognizes that providing a defendant with an attorney alone does not satisfy a governments' responsibility under the Constitution. For representation to have meaning, i.e. "quality," the attorney must have the time and resources to adequately investigate a case and consult with the client. The amount of time and resources will vary from case to case and an institutional defender office or individual attorney will budget or make applications for funds according to the needs of the case. The parties have not agreed on the substitution of the word "appropriate" for "thorough" and that matter is addressed below.

## II. Standard 2-1 Defense Team

### Rationale for Proposed Change

As written, this Standard could be read as an unfunded mandate to the State or counties that, in addition to counsel provided for in Supreme Court Rules (currently SCR 250), mitigation specialists, investigators and mental health screening professionals are required to be employed or retained in every death penalty case. While that may be the view of the ABA, that organization is not responsible for the funding and day-to-day management of the criminal justice system. The Constitutional requirement for the employment or retention of non-attorney professional services is set forth in Ake v. Oklahoma, 470 U.S. 68 (1985) and its progeny.<sup>5</sup> Defense must demonstrate that the professional service is reasonably necessary to provide adequate legal representation. In fact, the reasonably necessary language is used in Standard 2-1(b)(1)(A).

Large institutional defense offices include line-items in their budgets for retaining all types of professionals, including mitigation specialists, etc. They also request and receive staff positions in these categories based upon projections of the number of death cases those offices expect to handle in a year. When arguing for those positions, or filing motions with a court, the *Ake* standard is used.

The suggested change shifts investigators, mitigation specialist and mental health screening professionals from 2.1(a) to 2.1(b) thus eliminating any inference of a mandate. The Minority Report did not dispute that mitigation specialists, investigators or mental health screening may be common and frequently justified under *Ake*, only that the issue should either be decided on a case-by-case basis and/or by a decision of the Legislative or Executive Branches to include lump sum funding in budgets, not in court-enacted standards. Including them in the Standard is the equivalent of the Court finding, absent a case or controversy, that these services are always reasonably necessary under *Ake* regardless of the facts and

---

<sup>5</sup> The Majority felt that *Ake* is no longer the standard and that *Wiggins v. Smith* is the current standard. This dispute will be subject to litigation in individual cases. Regardless of which case controls now or in the future, the defense must comply with that case law before additional experts, may be employed.

circumstances of a given case or that the State of Nevada should exceed the Constitutional obligation of *Ake*.

The remaining change to Standard 2.1(b) deletes subsection 2. The Minority Report questioned the ability of a judge or other "appointing authority" to provide services to non-indigent defendants and the term "financially unable" is too vague.

#### **Opposition to Proposed Change**

The Minority Report objected to those Standards which provide that in addition to two qualified counsel, the "defense team" "should consist of an investigator, and a mitigation specialist" and at least one member qualified to screen for mental health issues. The Minority Report suggested that the Standard should be reduced to the minimal constitutional requirement. As discussed above, the Performance Standards are not intended to enforce only minimum constitutional standards but to improve the quality of defense representation. Experience has shown that the ancillary services provided for in Standard 2-1(a),(b)(1)(A) are those normally required in capital cases, in which mitigation investigation, and examination of mental health issues, are practically universal, using the services of such professionals is part of the thorough investigation which is necessary in every capital case to allow counsel to make fully-informed strategic and tactical decisions and to advise the client adequately.

Additionally, the Minority Report suggested eliminating Standard 2-1(b)(2) which provides that similar services should be provided to appointed counsel not a part of an institutional Defender office. Once a defendant has established indigence, whether as an initial matter, or in the course of the proceedings, the state is required to provide ancillary services, *Widdis v. District Court*, 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998), and providing those services through the appointing authority is consistent with the other provisions relating to the appointment power. The same principle should apply to the provision of training both to institutional defenders and their staffs, and to private counsel and the

providers of ancillary services to them. Thus Standard 2-3(a) should also not be altered.

### **III. Standard 2.2(c)(1); 2.2(c)(4) – Removal**

#### **Rationale for Proposed Change**

The proposed change in Subsection 1 relates to the authority of the monitoring agency to take action to protect the interests of the attorney's current and future clients. Language has been added that narrows the scope of appropriate action to exclude interference with a particular case or removal of an attorney in a particular case, rather than removing an attorney from any future appointments. There are established procedures and case law for removing an attorney from a case, with or without the clients' consent, and these procedures should be used. The ABA commentary indicates this provision is not intended to be a procedure for micro-managing counsel's work on a case and does not discuss taking action to remove an attorney from a case, rather than future cases.

The Minority Report was concerned with logistical problems that could arise from the court and appointing agency both reviewing a defendant's complaints about counsel's performance in a case: the possibility of inconsistent decisions; documenting the record; duplicitous hearings, etc. Certainly the monitoring agency can bring to the court's and prosecution's attention serious issues that would impair counsel's ability to continue representation – but beyond that, the matter should be left to the court.

#### **Opposition to Proposed Change**

The Minority Report argues that the appointing agency should not have the power to remove appointed counsel from a pending case. Minority Report at 5-6; Standard 2-2(c). This standard should not be altered on this point. If the appointing authority receives information, by complaints from the client, co-counsel, or other, or from observation of counsel's performance, that counsel is not performing adequately, the appointing authority should have the power "to take appropriate action," including removing counsel from the case. Notice should be provided

before any such action is taken, and Standard 2-2(c)(4) should be modified to provide: "Before taking final action making an attorney or defender office ineligible to receive additional appointments, or removing counsel from a case. . . ."

As noted above, the performance standards are "rules of reason," and nothing in this section is intended to allow the appointing authority to "micro-manage" the litigation of a capital case. Other provisions of ADKT 411 protect the independence of the defense attorney, including creation of Selection Committees in urban court systems through the Model Plan for Assigned Counsel.

#### **IV. Standard 2-3(a) – Training**

##### **Rationale for Proposed Change**

Currently the language indicates that all members of the defense team are entitled to government paid training and education regardless of whether they are a government employee. Again this may be an ideal goal, but should not be mandated by Supreme Court order. The proposed change indicates defense team members employed by institutional defender offices should be funded for such training. Attorneys on an appointment or conflict panel should be provided such training at government expense if necessary to maintain a pool of qualified attorneys and other non-employee professionals are responsible for their own training costs.

##### **Opposition to Proposed Change**

See Opposition under 2-1 Defense Team

#### **V. Standard 2-6 – Role of Defense Team**

Adds the "if reasonably necessary and appropriate under applicable case law" to process for creating defense team. The Rationale and Opposition are set forth under 2-1 Defense Team above.

#### **VI. Standard 2-9(a) – Investigation**

##### **Rationale for Proposed Change**

The suggested change is to substitute the word “appropriate” for “thorough.” The current language suggests that counsel investigate everything exhaustively regardless of any client communications or evidence. The purpose of this section, according to the ABA Commentary, was to address those situations where counsel does nothing simply because a client says the facts as alleged by the prosecution are correct or indicates no mitigation is to be presented. Case law makes it clear that counsel has a duty to do sufficient investigation in order to have enough information to properly advise the client and allow the client to make informed decisions. This includes decisions regarding mitigation evidence. Wiggins v. Smith, 539 U.S. 510 (2003) (investigation insufficient to make reasonable decisions about mitigation); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10<sup>th</sup> Cir. 2001) (failure to investigate affects ability to advise client); Blanco v. Singletary, 943 F.2d 1477, 1501-03) (insufficient investigation impairs client’s ability to make informed decision.) However these cases do not require counsel to explore and investigate every possible issue or avenue regardless of the evidence or client information. Thus the word “appropriate” more accurately reflects the law in this area.

To the extent the word “thorough” is intended to reflect the difference between the need for more extensive investigation in capital versus non-capital cases, then the language of the preamble together with a statement by the Court to this affect may eliminate the issue and render the change unnecessary.

#### **Opposition to Proposed Change**

See Opposition under Section I – “High Quality”/“Quality”

#### **VII. Collateral Consequences – Standards 2-11(b); 2-12; 4-9(e)(2)**

##### **Rationale for Proposed Change**

The law in Nevada and across the Country does not require counsel to inform clients of collateral consequences of a criminal conviction. Nollette v. State, 118, Nev. 344, 46 P.3d 871 (2002); Barajas v. State, 115 Nev. 440, 991 P.2d 474 (1999). The Minority Report contended any mention in the standards that a

criminal defense attorney should consider advising clients about matters outside the expertise of that attorney, is unwise.<sup>6</sup> The Clark County Public Defender agreed with this view in Commission meetings. He did not wish to provide immigration or other services as a part of his office. Robert Langford, a conflict contract attorney indicated that such services are not provided in private practice. If he knows his client is not a United States Citizen, then he advises them to consult with an immigration attorney about collateral consequences and before making decisions on a case.

Some Commission members believe this is unfair because an indigent defendant doesn't have the resources to pay for such consultations and therefore they should be provided at government expense. Again this is a decision for the Legislative and Executive Branches. While the Minority Report indicated all language referencing collateral consequences should be stricken, alternative language is proposed below mirroring the practice followed by the private sector. Similar strike-outs and additions would be made to any standard mentioning "collateral" or "other" consequences.

(b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;
2. the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole . . .

(c) If counsel is aware of potential collateral consequences of penalties less than death, such as forfeiture of assets, deportation, civil liabilities, etc., counsel should inform the client of the potential for

**Deleted:** the possible collateral consequences

**Deleted:** any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and

<sup>6</sup> This issue was discussed in depth at the April 23<sup>rd</sup> Commission meeting and does reflect the views of the individuals who dissented on the motion and may be the view of a majority of Commission members.

collateral consequences and that counsel cannot advise the client on such issues.

### **Opposition to Proposed Change**

The Minority Report recommended that any language in either the capital case standards or the felony/misdemeanor standards which obligates defense counsel to advise a client on “collateral consequences” of a conviction or plea should be deleted.

In a capital case, counsel should be prepared to advise the client of collateral consequences of potential penalties less than death. Those collateral consequences may include deportation, forfeiture, civil liability and use of a conviction in other proceedings. An indigent client should be informed of all relevant considerations involved in a negotiated disposition, and counsel in a capital case should be expected to have, or develop, the expertise necessary to do so.

In non-capital cases, the primary concern of those seeking to delete any obligation to inform the client of collateral consequences appears to be that the Standard may require counsel to advise the client in an area in which he/she has no expertise. First, a reasonable reading of the Standard would be that counsel is required to recognize issues which may result in a collateral consequence and insure that the client is fully informed before deciding what course of action to take. An indigent defendant is entitled to be fully informed of all consequences of the course of action he selects.

### **VIII. Standard 2-19(d) – Post-Conviction Duties**

### **Rationale for Proposed Change**

Add “where appropriate” to the provision discussing post-conviction counsel’s duties regarding filing petitions for writs of certiorari in the United States Supreme Court. The preamble may eliminate the need for this language since it clarifies that whether to take an action is to be decided on a case-by-case basis.

### **Opposition to Proposed Change**

It is the position of the Majority that a Writ of Certiorari should be pursued in every death case.

## **IX. Standard 3-1 – Appellate Counsel**

### **Rationale for Proposed Change**

The current language requires trial counsel to advise a client of a right to appeal in all cases. The proposed change indicates that such advice is to be given only when required by Roe v. Flores-Ortega, 528 U.S. 470 (2000) and Thomas v. State, 115 Nev. 148 (1999). Those cases hold that counsel has a duty to inform the client of appeal rights whenever a case has gone to trial but in a guilty plea situation, the duty to advise is very limited. On guilty pleas, the duty exists only if the attorney knows of issues that could be raised and would therefore have reason to believe the client would want to raise them or if the attorney learns of information that calls into question the validity of the plea. The language should reflect the actual state of the law. If there is no basis for an appeal from a plea of guilty, there is an incongruity with counseling the client to enter a plea and then informing the client of a right to appeal.

### **Opposition to Proposed Change**

Standard 3-1 provides that trial counsel “should advise the client of his or her right to appeal and any limits on that right.” The Minority Report recommended that this obligation be limited only to those circumstances in which

counsel would be deemed ineffective for failing to advise of the right to appeal. Again, the Performance Standards are designed to improve the quality of performance of indigent defense counsel and to enhance the services provided to indigent defendants. The Preamble advises that the Standards are not intended to create new substantive or procedural rights. In the interests of reducing post-conviction litigation, the language of this Standard should not be changed.<sup>7</sup>

**X. Standard 3-7(c) – Fast Track Appeals**

The proposed change recognized there may be occasions when consulting with a client before filing a fast track statement may not be feasible and added language to that effect. Neither side presented any detailed arguments in their reports on this issue. It is left to the Supreme Court's discretion.

**XI. Standard 4-4(b) – Initial Client Interview**

**Rationale for Proposed Change**

The Minority Report questioned whether the 48 hour time frame is reasonable in all areas of the State and suggests 72 hours. Also, given that this standard applies to all three categories of non-capital cases: felony, gross-misdemeanor and misdemeanor proceedings, the language about confidential setting needs the qualifier "whenever possible" to incorporate the ability to talk to a client without going to a separate room but in a setting that protects client confidentiality – hallways, in the courtroom away from other prisoners, etc.

**Opposition to Proposed Change**

The current version of the Standard reads as follows:

Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview within 48 hours of appointment to the case. The initial interview should be conducted in a confidential setting.

---

<sup>7</sup> The Federal courts advise all defendants of the right to appeal at the time of sentencing, even if that right is severely curtailed when the defendant has pleaded guilty. See F.R.Crim.P 32(j).

The language "as soon as practicable" and "should attempt" sufficiently modify the Standard to allow for circumstances in which counsel cannot, for instance, travel to a rural location to interview a client within 48 hours of appointment. The 48 hour expectation should not be changed.

The Minority seeks to modify the setting of the initial interview from an expectation that the setting will be confidential in all cases to only those cases in which a confidential interview is "possible." Altering this language will remove the ability of defense counsel to insist to a court or a detention facility that an opportunity for a confidential meeting with the client is required. Additionally, it will permit attorneys to conduct the interview in a jury box or a hallway because a court would not allow sufficient time or the physical setting required for this important initiation of the attorney-client relationship.

#### **XII. Standard 4-7(b)(7) - Non-capital Investigation**

Language reflecting the case law for obtaining experts has been added. See 2-1 Defense Team for Rationale and Opposition.

#### **XIII. Standard 4-8 – Pretrial Motions**

Replace "thorough" with "reasonable." See Section I and VI of this Report for Rationale and Opposition.

#### **XIV. Standard 4-9(b) – Plea Negotiations**

##### **Rationale for Proposed Change**

The proposed language addresses the role of early case resolution programs in negotiations. It indicates counsel should explore resolutions under such programs and when conveying any offer, explain the investigations or legal challenges that would be abandoned upon accepting an offer. There was concern that the Standards prohibited any participation in any type of early case resolution program and by specifically mentioning them, the intent is to clarify that participation in such a program is not banned per se, but participation is subject to

the ability of the client to have sufficient information to advise the client and the client's best interests.

### **Opposition to Proposed Change**

Reference to "early case resolution" programs should not be included in the Performance Standards. The Performance Standards do not preclude "fast track" or "early case resolution" treatment of cases as long as counsel can comply with the Standards in carrying out his/her ethical responsibilities. If, for instance, a program prevents confidential and informed advice to the client, the creation of an attorney-client relationship or such a lack of information about a case that counsel cannot meaningfully consult with a client, then counsel may not ethically stand by while a client enters a plea of guilty. Nevada Rules of Professional Conduct 1.2(a); 1.4. On the other hand, if an expedited resolution program is designed which will permit counsel to abide by the Rules of Professional Conduct and the Performance Standards; then it can be implemented without suggesting that the Standards may be avoided or diluted based upon fiscal considerations.

### **XV. Standard 4-20(b) – Post Disposition Responsibilities**

See comments under Section IX above referencing duties of appellate counsel.

### **XVI. Standards 5-7; 5-8**

See discussions above regarding use of word "thorough" versus "reasonable."

### **XVII. Standard 5-17 – Transfer Proceedings**

Adds language indicating counsel should employ such experts as are necessary and appropriate under existing case law. See comments above under Section II.

## **CONCLUSION**

The Report is a compilation of the issues on which the members of the Commission could not reach a consensus. They are being presented to the Court for its consideration and decision. Copies have been sent to all Commission members and other interest parties with instructions that any written comments must be provided to the Court on or before August 15, 2008 so that the Court will have time to consider them prior to September 5, 2008.

Respectfully submitted

Nancy Becker and Franny Forsman

## VERSION A

### NEVADA INDIGENT DEFENSE STANDARDS OF PERFORMANCE

#### **Standard 1: Function of Performance Standards**

a) These performance standards are designed to improve the quality of indigent defense representation in Nevada and provide objective guidelines for the allocation of resources for indigent defense.

(b) These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for indigent criminal defendants. The standards also may be used as a training tool.

(c) Every attorney who defends persons accused of crime must be familiar with these standards. The steps covered in these standards are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The standards recognize that the representation of indigent criminal defendants is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically "fits" the case, the client and the court proceeding.

(d) These standards are intended to facilitate the efficient and effective operation of indigent defense programs and are to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. Failure to adhere to the standards does not, in and of itself, constitute ineffective assistance of counsel. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances. These standards are not intended to create substantive or procedural rights which might accrue either to the accused, or convicted persons, or to counsel. Nothing contained herein shall be construed to overrule, expand, or extend, whether directly or by analogy, the decision reached by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) nor its progeny as adopted by the Nevada Supreme Court.

#### **CAPITAL CASE REPRESENTATION**

#### **Standard 2-1: The Defense Team and Services of Experts in Capital Cases**

**(a) The Defense Team**

The defense team should:

1. consist of no fewer than two attorneys qualified in accordance with Standard 2-2, an investigator, and a mitigation specialist; and
2. contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

**(b) Expert and Ancillary Services**

1. Counsel should:

- (A) secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings;
  - (B) have the right to have such services provided by persons independent of the government; and
  - (C) have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.
2. The appointing authority should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

**Standard 2-2: Appointment, Retention, and Removal of Defense Counsel**

**(a) Qualifications of Defense Counsel**

1. Consistent with Supreme Court Rules, the appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.
2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital client has:
  - (A) obtained a license or permission to practice in the jurisdiction;

- (B) demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and
  - (C) satisfied the training requirements set forth in Standard 2-3.
3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital client within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:
- (A) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;
  - (B) skill in legal research, analysis, and the drafting of litigation documents;
  - (C) skill in oral advocacy;
  - (D) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
  - (E) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
  - (F) skill in the investigation, preparation, and presentation of mitigating evidence; and
  - (G) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

**(b) Workload**

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing clients in death penalty cases is maintained at a level that enables counsel to provide each client with high-quality legal representation in accordance with the Nevada Indigent Defense Standards of Performance.

**(c) Monitoring; Removal**

1. The appointing authority should monitor the performance of all defense counsel to ensure that the client is receiving high-quality legal

representation. Where there is evidence that an attorney is not providing high-quality legal representation, the responsible agency should take appropriate action to protect the interests of the attorney's current and potential clients.

2. The appointing authority should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high-quality legal representation.
3. The appointing authority should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high-quality legal representation. Where there is evidence that an attorney has failed to provide high-quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high-quality legal representation, the office should not receive additional appointments.
4. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the appointing authority should provide written notice that such action is being contemplated and give the attorney or defender office an opportunity to respond in writing.
5. An attorney or defender office sanctioned pursuant to this Standard should be restored to the roster only in exceptional circumstances.
6. The appointing authority should ensure that this standard is implemented consistently with standard 2-2, so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this guideline.

### **Standard 2-3: Training**

- (a) Funds should be made available for the effective training, professional development, and continuing education of all members of the defense team,

whether the members are employed by an institutional defender or are employed or retained by counsel appointed by the court.

- (b) Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
1. relevant state, federal, and international law;
  2. pleading and motion practice;
  3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
  4. jury selection;
  5. trial preparation and presentation, including the use of experts;
  6. ethical considerations particular to capital defense representation;
  7. preservation of the record and of issues for post-conviction review;
  8. counsel's relationship with the client and his family;
  9. post-conviction litigation in state and federal courts; and
  10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
- (c) Attorneys seeking to remain on the appointment roster should be required to attend and successfully complete, at least once every 2 years, a specialized training program that focuses on the defense of death penalty cases.

#### **Standard 2-4: Funding and Compensation**

- (a) The appointing authority must ensure funding for the full cost of high-quality legal representation by the defense team and outside experts selected by counsel, as defined by these guidelines.
- (b) Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
  2. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (c) Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
1. Mitigation specialists and experts retained by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
  2. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (d) Additional compensation should be provided in unusually protracted or extraordinary cases.
- (e) Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

**Standard 2-5: Obligations of Counsel Respecting Workload**

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high-quality legal representation in compliance with the Nevada Indigent Defense Standards of Performance.

### **Standard 2-6: Role of the Defense Team**

As soon as possible after appointment, counsel should assemble a defense team by selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

- (a) at least one mitigation specialist and one fact investigator;
- (b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
- (c) any other members needed to provide high-quality legal representation; and
- (d) at all stages demanding on behalf of the client all resources necessary to provide high-quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

### **Standard 2-7: Relationship With the Client**

- (a) Counsel at all stages of the case should:
  - 1. make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client;
  - 2. conduct an interview of the client within 24 hours of initial counsel's entry into the case, barring exceptional circumstances;
  - 3. promptly advise the prosecution the client is represented by counsel and communicate in an appropriate manner with the client regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards; and
  - 4. at all stages of the case, re-advise the client and communicate with the prosecution regarding these matters as appropriate.
- (b) Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

**Standard 2-8: Additional Obligations of Counsel Representing a Foreign National**

- (a) Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- (b) Unless predecessor counsel has already done so, counsel representing a foreign national should:
  1. immediately advise the client of his or her right to communicate with the relevant consular office; and
  2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

**Standard 2-9: Investigation**

- (a) Counsel at every stage has an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty.
  1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by

the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
- (b) Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
- (c) Counsel at every stage has an obligation to assure that the official record of the proceedings is complete and to supplement the record as appropriate.

**Standard 2-10: Duty to Assert Legal Claims**

- (a) Counsel at every stage of the case, exercising professional judgment in accordance with these standards, should:
1. consider all legal claims potentially available;
  2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
  3. evaluate each potential claim in light of:
    - (A) the unique characteristics of death penalty law and practice; and
    - (B) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;
    - (C) the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
    - (D) any other professionally appropriate risks and benefits to the assertion of the claim.
- (b) Counsel who decide to assert a particular legal claim should:
1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

**Standard 2-11: Duty to Seek an Agreed-Upon Disposition**

- (a) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.
- (b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
  1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;
  2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits;
  3. the general range of sentences for similar offenses committed by defendants with similar backgrounds and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
  4. the governing legal regime, including, but not limited to, whatever choices the client may have as to the fact-finder and/or sentencer;
  5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, or other plea that does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
  6. whether any agreement negotiated can be made binding on the court, penal/parole authorities, and any others who may be involved;

7. the practices, policies, and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities that may affect the content and likely results of plea negotiations;
8. Concessions that the client might offer, such as:
  - (A) an agreement to waive trial and to plead guilty to particular charges;
  - (B) an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
  - (C) an agreement, if permitted under applicable law, regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
  - (D) an agreement to forgo in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
  - (E) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
  - (F) an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
  - (G) an agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and
  - (H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.
9. Benefits the client might obtain from a negotiated settlement, including:
  - (A) a guarantee that the death penalty will not be imposed;
  - (B) an agreement that the client will receive a specified sentence;

- (C) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - (D) an agreement that one or more of multiple charges will be reduced or dismissed;
  - (E) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
  - (F) an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
  - (G) an agreement that the court or prosecutor will, to the extent provided by law, make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement; and
  - (H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.
- (c) Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
  - (d) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement.
  - (e) If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
  - (f) Counsel should not accept any agreed-upon disposition without the client's express authorization.
  - (g) The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

### **Standard 2-12: Entry of a Plea of Guilty**

- (a) The informed decision whether to enter a plea of guilty lies with the client.
- (b) In the event the client determines to enter a plea of guilty, prior to the entry of the plea, counsel should:
  - 1. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
  - 2. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea; and
  - 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 in court, and providing a statement concerning the offense.
- (c) During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

### **Standard 2-13: Trial Preparation Overall**

As the investigations addressed in Standard 2-7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

### **Standard 2-14: Voir Dire and Jury Selection**

- (a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases

that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons, as well as to the selection of the petit jury venire.

(b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:

1. for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the client is death-eligible, regardless of the individual circumstances of the case;
2. for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and
3. for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

(c) Counsel should consider seeking expert assistance in the jury selection process.

**Standard 2-15: Defense Case Concerning Penalty**

(a) As set out in Standard 2-7, counsel at every stage of the case has a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

(b) Counsel should discuss with the client early in the case the sentencing alternatives available and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

(c) Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

(d) Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

- (e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
- (f) In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
  - 1. witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;
  - 2. expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
  - 3. witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
  - 4. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones; and
  - 5. demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.
- (g) In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating

evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration and should make a full record in order to support any subsequent challenges.

- (h) Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any noncompliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.
- (i) Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.
- (j) If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:
  - 1. consider what legal challenges may appropriately be made to the interview or the conditions surrounding it;
  - 2. consider the legal and strategic issues implicated by the client's cooperation or noncooperation;
  - 3. ensure that the client understands the significance of any statements made during such an interview; and
  - 4. attend the interview.
- (k) Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- (l) While taking into consideration all ethical and legal requirements, counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

### **Standard 2-16: Official Presentence Report**

If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

- (a) where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;
- (b) provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;
- (c) review the completed report;
- (d) take appropriate steps to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report; and
- (e) take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate, or misleading.

### **Standard 2-17: Duty to Facilitate the Work of Successor Counsel**

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- (a) maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- (b) providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- (c) sharing potential further areas of legal and factual research with successor counsel; and
- (d) cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

### **Standard 2-18: Duties of Trial Counsel After Conviction**

Trial counsel should:

- (a) be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence;
- (b) While considering all ethical and legal requirements, take whatever action(s), such as filing a notice of appeal and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief;
- (c) not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Standard 2-17 applies in its entirety; and
- (d) take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

### **Standard 2-19: Duties of Post-Conviction Counsel**

- (a) Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- (b) If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available forms.
- (c) Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high-quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

- (d) The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the responsible agency.
- (e) Post-conviction counsel should fully discharge the ongoing obligations imposed by these standards, including the obligations to:
  - 1. maintain close contact with the client regarding litigation developments;
  - 2. continually monitor the client's mental, physical, and emotional condition for effects on the client's legal position;
  - 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
  - 4. continue an aggressive investigation of all aspects of the case.

**Standard 2-20: Duties of Clemency Counsel**

Clemency counsel should:

- 1. be familiar with the procedures for and permissible substantive content of a request for clemency;
- 2. conduct an investigation in accordance with Standard 2-7;
- 3. ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case, and jurisdiction; and
- 4. ensure that the process governing consideration of the client's application is substantively and procedurally just, and if not, should seek appropriate redress.

## **APPELLATE AND POST-CONVICTION REPRESENTATION**

### **Standard 3-1: Role of Appellate Defense Counsel**

The paramount obligation of appellate criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court. Trial counsel should advise the client of his or her right to appeal and any limits on that right. If the client instructs the attorney to proceed with an appeal, even if the attorney believes that the appeal is without merit or is not cognizable, trial counsel will assure that a Notice of Appeal is filed. If the client wishes to proceed with the appeal, against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court and complies with the Nevada Rules of Appellate Procedure.

### **Standard 3-2: Identification of issues on appeal**

In selecting issues to be presented on appeal, counsel should:

- (a) conduct a thorough review of the trial transcript, the pleadings, and docket entries in the case;
- (b) investigate potentially meritorious unpreserved claims of error;
- (c) assert claims of error that are supported by facts of record that will benefit the client if successful, that possess arguable legal merit, and that should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research;
- (d) not hesitate to assert claims that may be complex, unique, or controversial in nature, such as issues of first impression or arguments for change in the existing law;
- (e) inform the client when counsel has decided not to raise issues that the client desires to be raised and the reasons why the issues were not raised; and
- (f) consider whether there are federal constitutional claims that, in the event that relief is denied in the state appellate court, would form the basis for a writ of habeas corpus in federal district court. Such claims should raise and

argue the federal constitutional claims, unless counsel concludes that there is a tactical basis for not including such claims.

**Standard 3-3: Diligence and Accuracy**

In presenting the appeal, counsel should:

- (a) be diligent in perfecting appeals and expediting prompt submission to the appellate court;
- (b) be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument; and
- (c) not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

**Standard 3-4: Duty to Meet With Trial Lawyers**

In preparing the appeal, counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the client's issues on appeal.

**Standard 3-5: Duty to Confer and Communicate With Client**

In preparing and processing the appeal, counsel should:

- (a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel;
- (b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the appeal along with a statement of the reasons certain issues

will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations;

- (c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing;
- (d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense;
- (e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and
- (f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

#### **Standard 3-6: Duty to Seek Release during Appeal**

Appellate counsel should file appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

#### **Standard 3-7: Responsibilities in "Fast Track" Appeals**

If the conviction qualifies for "fast track" treatment under NRAP 3C, counsel shall fulfill the responsibilities set forth in the rule. In preparing the "fast track" statement, counsel should:

- (a) order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal;
- (b) thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e); and

- (c) consult with the client as to which issues should be presented in the statement.

### **Standard 3-8: Post-Decision Responsibilities**

If the decision of the appellate court is adverse to the client, appellate counsel should:

- (a) promptly inform the client of the decision and confer with the client with regard to the availability of rehearing or en banc reconsideration and the benefits or disadvantages of filing such a motion;
- (b) file a Motion for Rehearing and/or Request for en banc reconsideration if grounds for such a motion and/or request exist;
- (c) advise the client whether a petition for writ of certiorari to the United States Supreme Court is warranted and determine whether such a petition will be filed;
- (d) promptly advise the client of any remedies that are available in state or federal court for post-conviction review and shall advise the client of the applicable statute of limitations for filing for such relief;
- (e) advise the client of any claims such as ineffective assistance of counsel that may be available to the client but that will not be pursued by appellate counsel;
- (f) provide the client with any available forms for post-conviction relief and appointment of counsel; and
- (g) cooperate with the client and with post-conviction counsel in securing the trial and appellate record and investigation of potential claims for post-conviction relief.

### **Standard 3-9: Post-Conviction Representation**

Counsel appointed to represent a client in post-conviction proceedings should:

- (a) assure that the client is able to contact post-conviction counsel telephonically during the pendency of the appeal including arrangements for the acceptance

of collect telephone calls. Promptly after appointment or assignment to the post-conviction case, counsel shall provide advice to the client, in writing, as to the method(s) that the client can employ to discuss the post-conviction proceeding with counsel;

- (b) consult with trial/appellate counsel and secure the entire trial and appeal file;
- (c) seek to litigate all issues, whether or not previously presented, that are arguably meritorious;
- (d) maintain close contact with the client and consult with the client on all decisions with regard to the content of any pleadings seeking collateral or post-conviction relief prior to the filing of any petition for post-conviction relief. When possible, post-conviction counsel should meet in person with the client and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the post-conviction proceeding along with a statement of the reasons certain issues will not be raised, if any;
- (e) investigate all potentially meritorious claims that require factual support;
- (f) secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition;
- (g) raise all federal constitutional claims, along with appropriate citations, that are arguably meritorious; and
- (h) advise the client of remedies that may be available should post-conviction relief not be granted, including appeal from the denial and federal habeas corpus along with any applicable time limits for seeking such relief. Post-conviction counsel shall advise the client in writing if counsel will not be representing the client in any subsequent proceedings and shall provide advice on the steps that must be taken and the time limits that are applicable to appeals or the seeking of relief in the federal courts.

## **FELONY AND MISDEMEANOR TRIAL CASES**

### **Standard 4-1: Role of Defense Counsel**

- (a) The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.
- (b) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

### **Standard 4-2: Education, Training, and Experience of Defense Counsel**

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the courts of Nevada. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, 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, counsel should have sufficient experience or training to provide quality representation and should move to be relieved as counsel should determine at a later point that he or she does not possess sufficient experience or training to handle the case assigned.

### **Standard 4-3: Adequate Time and Resources**

Counsel has an obligation to make available sufficient time, resources, knowledge, and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain

an appropriate, professional office in which to consult with clients and witnesses, and must maintain a system for receiving collect telephone calls from incarcerated clients.

#### **Standard 4-4: Initial Client Interview**

(a) **Preparing for Initial Interview:** Prior to conducting the initial interview, the attorney should:

1. be familiar with the elements of each offense charged and the potential punishment;
2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by agencies concerning pretrial release, and law enforcement reports;
3. be familiar with legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. be familiar with the different types of pretrial release conditions the court may set; and
5. be familiar with any procedures available for reviewing the judge's setting of bail.

(b) **Timing of the Initial Interview:** Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview within 48 hours of appointment to the case. The initial interview should be conducted in a confidential setting.

(c) **Contents of the Initial Interview:** The purpose of the initial interview is both to inform the client of the charges/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 or literacy are overcome. Information that counsel should consider acquiring from the client includes, but is not limited to:

1. the client's ties to the community, including the length of time in the community, family relationships, immigration status, and employment record and history;
2. the client's physical and mental health, education, and armed services record;
3. the client's immediate medical needs;
4. the client's criminal history and a determination of whether the client has other pending charges or is on supervision;
5. the ability of the client to meet any financial conditions of release; and
6. sources of verification (counsel should obtain permission from the client before contacting such sources).

(d) The following information should be provided to the client in the initial interview:

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 an explanation that the client should not make any statements regarding 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. the charges and the potential penalties;
5. a general procedural overview of the progression of the case;
6. how and when counsel can be reached;
7. when counsel will see the client next;
8. realistic answers, where possible, to the client's most urgent questions; and
9. 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.

#### **Standard 4-5: Pretrial Release Proceedings**

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release. Counsel should:

- (a) present about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives, or other persons who may take custody of the client or provide third-party surety;
- (b) consider pursuing modification of the conditions of release under available procedures when the client is not able to obtain release under the conditions set by the court; and
- (c) explain to the client the available options, procedures, and risks in posting security if the court sets conditions of release.

#### **Standard 4-6: Preliminary Hearings/Grand Jury Representation**

- (a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- (b) In preparing for the preliminary hearing, the attorney should consider:
  - 1. the elements of each offense charged;
  - 2. the law for establishing probable cause;
  - 3. the factual information that is available concerning probable cause;
  - 4. the tactics of calling witnesses or calling the client as a witness and the potential for later use of the testimony; and
  - 5. any issues arising from the limited availability of discovery inherent at this stage of the proceeding.
- (c) Counsel should meet with the client prior to the preliminary hearing. The client has the sole right to waive a preliminary hearing. Counsel must

evaluate and advise the client regarding the consequences of such waiver and the tactics of full or partial cross-examination.

- (d) Where counsel becomes aware that his or her client is the subject of a grand jury investigation, appointed counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Nevada law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

#### **Standard 4-7: Case Preparation and Investigation**

- (a) Counsel should conduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the client's admissions or statements to defense counsel of facts constituting guilt or the client's stated desire to plead guilty, however counsel may consider such admissions, statements or desires in determining the scope of the investigation.
- (b) Counsel should:
1. obtain and examine all charging documents, pleadings, and discovery;
  2. research and review the relevant statutes and caselaw to identify elements of the charged offense(s); defects in the prosecution such as statute of limitations or double jeopardy; and available defenses and required notices of those defenses;
  3. conduct an in-depth interview of the client to assist in shaping the investigation;

4. attempt to locate all potential witnesses and have them interviewed. (If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
5. request and secure discovery including exculpatory/impeaching information; names and addresses of prosecution witnesses and their prior statements and criminal records; the prior statements of the client and his or her criminal history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, mental health, drug treatment, or other records of the client, victim, or witnesses and records of police officers as appropriate;
6. inspect the scene of the offense as appropriate; and
7. obtain the assistance of such experts as are appropriate to the facts of the case.

**Standard 4-8: Pretrial Motions and Writs**

- (a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client 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 the case. Among the issues that counsel should consider addressing in a pretrial motion are:
  1. the pretrial custody of the client;
  2. the constitutionality of the implicated statute(s);
  3. any defects in the charging process or the charging document;
  4. severance of charges or defendants;
  5. discovery issues;
  6. suppression of evidence or statements;

7. speedy trial issues; and
  8. evidentiary issues.
- (c) Counsel should determine whether a pretrial writ should be filed challenging the determination that probable cause exists. The decision whether to file a pretrial writ should be made based upon an examination of the preliminary hearing or grand jury transcripts. If transcripts are not available at the time of arraignment, appropriate steps should be taken to secure an extension of time to prepare the writ after the transcripts are received pursuant to NRS 34.700. Counsel shall advise the client as to the effect of filing a pretrial writ on his speedy trial rights and provide an evaluation of the likelihood of success to assist in the decision to waive such rights, which rests with the client, after consultation with counsel.
- (d) Counsel should only withdraw or decide not to file a motion 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.
- (e) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:
1. investigation, discovery, and research relevant to the claim advanced;
  2. subpoenaing of all helpful evidence and witnesses; and
  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.
- (f) Requests or agreements to continue a trial date shall not be made without consultation with the client.
- (g) Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

#### **Standard 4-9: Plea Negotiations**

- (a) Under no circumstances should defense counsel recommend to a client acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.
- (b) Counsel should:
  - 1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
  - 2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
  - 3. keep the client fully informed of the progress of the negotiations;
  - 4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges discussed in Standards 4-7(b) and 4-8 that would be abandoned as a result of accepting an offer ;
  - 5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
  - 6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.
- (c) In developing a negotiation strategy, counsel must be completely familiar with:
  - 1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to: not to proceed to trial on the merits of the charges; to decline from asserting or litigating any particular pretrial motions; an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and 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: that the prosecution will not oppose the client's release on bail pending sentencing or appeal; that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction; to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement; that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct; that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range; that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the Division of Parole and Probation, a specified position with respect to the sanction to be imposed on the client by the court; and that the client will receive, or the prosecution will recommend, if permitted by case law or statute, specific benefits concerning the client's place and/or manner of confinement and/or release on parole.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

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 the plea; and
  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.
- (f) After entry of the plea, counsel should:
1. be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing; and
  2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

**Standard 4-10: Trial Preparation**

- (a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- (b) Where appropriate, counsel should have the following materials available at the time of trial:
1. copies of all relevant documents filed in the case;
  2. relevant documents prepared by investigators;
  3. voir dire questions;
  4. outline or draft of opening statement;
  5. cross-examination plans for all prospective prosecution witnesses;
  6. direct examination plans for all prospective defense witnesses;
  7. copies of defense subpoenas;
  8. prior statements of all prosecution witnesses (e.g., preliminary hearing/grand jury transcripts, police reports/statements);

9. prior statements of all defense witnesses;
  10. reports from all experts;
  11. a list and copies or originals of defense and prosecution exhibits;
  12. proposed jury instructions with supporting authority;
  13. copies of all relevant statutes or cases; and
  14. outline or draft of closing argument.
- (c) 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.
- (d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence, use of prior convictions of client) and, where appropriate, counsel should prepare motions and memoranda in support of the client's position.
- (e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
- (f) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated or is not able to secure appropriate clothing for trial, counsel shall arrange for the provision of appropriate clothing for the client to wear in the courtroom.
- (g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek an order to facilitate conferences with the client.
- (h) If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.
- (i) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

#### **Standard 4-11: Voir Dire and Jury Selection**

In preparing for and conducting jury selection, counsel should:

- (a) be familiar with the law governing selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire;
- (b) be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures;
- (c) seek access to any jury questionnaires that have been completed by jurors and should petition the court to use a special questionnaire when appropriate due to unique issues in the case;
- (d) should seek attorney-conducted voir dire and should develop, support, and file written voir dire questions if the court restricts attorney-conducted voir dire;
- (e) consider whether additional peremptory challenges should be requested due to the circumstances present in the case;
- (f) consider whether sensitive or unusual facts or circumstances of the case support sequestered voir dire of jurors;
- (g) consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client; and
- (h) object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

#### **Standard 4-12: 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.

#### **Standard 4-13: Trial**

- (a) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.
- (b) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (c) In preparing for cross-examination, counsel should:
  - 1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
  - 2. consider the need to integrate cross-examination, theory, and theme of the defense;
  - 3. avoid asking unnecessary questions that may hurt the defense case;
  - 4. anticipate witnesses that the prosecution may call in its case-in-chief and on rebuttal;
  - 5. create a cross-examination plan for all anticipated witnesses;
  - 6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
  - 7. review relevant statutes, regulations, and policies applicable to police witnesses; and
  - 8. consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of the expert or reliability of the anticipated opinion.

#### **Standard 4-14: Presenting the Client's Case**

- (a) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

- (b) 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, counsel should, where appropriate, do the following:
  - 1. develop a plan for direct examination of each potential defense witness;
  - 2. determine the implications that the order of witnesses may have on the defense case;
  - 3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  - 4. consider the possible use of character witnesses;
  - 5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  - 6. review all documentary evidence that must be presented; and,
  - 7. review all tangible evidence that must be presented.
- (d) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (e) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (f) Counsel should conduct redirect examination as appropriate.
- (g) At the close of the defense case, counsel should seek an advisory instruction directing the jury to acquit when appropriate.

**Standard 4-15: Jury Instructions**

- (a) Counsel should be familiar with the appropriate rules of the court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of instructions typically given, and preserving objections to the instructions.
- (b) Counsel should always submit proposed jury instructions in writing.

- (c) Where appropriate, counsel should submit modifications to instructions proposed by the State or the court in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser-included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.
- (d) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- (e) 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 ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.
- (f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instruction, object to deviations unfavorable to the client, and if necessary, request additional or curative instructions.
- (g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

**Standard 4-16: Obligations of Counsel in Final Sentencing Hearings**

Among counsel's obligations in the sentencing process are:

- (a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the presentence report.
- (b) To present to the court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.
- (c) To develop a plan that seeks to achieve the least restrictive and burdensome sentencing alternative that is most favorable to the client and that can

reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

**Standard 4-17: Preparation for Sentencing**

In preparing for sentencing, counsel shall:

- (a) inform the client of the applicable sentencing requirements, options, alternatives including any applicable regulations and statutory minimum requirements concerning parole eligibility;
- (b) maintain 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 his or her background and personal history, prior criminal record, employment history, skills, education, medical history and condition, and financial status and obtain from the client sources that can corroborate the information provided by the client;
- (d) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- (e) ensure the client has an opportunity to examine the presentence report;
- (f) 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 deliver to the court;
- (g) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings;
- (h) inform the client of the sentence or range of sentences counsel will ask the court to consider;
- (i) where appropriate, collect 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;

- (j) prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing; and
- (k) advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution where applicable.

**Standard 4-18: Official Presentence Report**

- (a) Counsel should prepare the client for the interview with the official preparing the presentence report.
- (b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:
  - 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 waiving the report;
  - 2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
  - 3. attend any interview of the client by an agency presentence investigator where appropriate;
  - 4. review the completed report prior to sentencing;
  - 5. take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
  - 6. 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
  - 7. make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

#### **Standard 4-19: Sentencing Hearing**

- (a) At the sentencing proceeding, counsel shall take steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- (b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- (c) Where appropriate under statutory or case law, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.
- (d) Counsel should obtain a copy of the judgment and review it promptly to determine that it is accurate or to take steps to correct any errors.

#### **Standard 4-20: Post-Disposition Responsibilities**

Counsel should be familiar with the procedures available to the client after disposition. Counsel should:

- (a) 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) inform the client of his or her right to appeal a conviction after trial, after a conditional plea or after a guilty plea that was not entered in a knowing, intelligent, and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision. If the client instructs counsel to appeal after consultation with counsel, even if counsel believes that an appeal will not be successful or is not cognizable, the attorney 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) fulfill the responsibilities set forth in NRAP 3C if the conviction qualifies for "fast track" treatment under the rule. Counsel shall order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in

which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal. Counsel shall thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e);

- (d) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;
- (e) inform the client of any right that may exist to be released pending disposition of the appeal;
- (f) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed;
- (g) include in the advice to the client an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-conviction proceedings. Counsel should provide a pro se habeas packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise the client of the relevant time frames for filing state and federal habeas corpus petitions and provide information and advice necessary to protect a client's right to post-conviction relief; and
- (h) inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

## **JUVENILE DELINQUENCY CASES**

Counsel for juveniles in delinquency proceedings should abide by the Nevada Indigent Defense Standards of Performance applicable to felony and misdemeanor cases where applicable. The performance standards set forth below recognize the need to meet some concerns particular to representation of juveniles in delinquency proceedings.

### **Standard 5-1: The Role of Defense Counsel**

(a) The role of counsel in delinquency cases is to be an advocate for the child. Counsel should:

1. Ensure that the interests and rights of the client are fully protected and advanced irrespective of counsel's opinion of the client's culpability;
2. fully explain to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings;
3. make sure the juvenile fully understands all court proceedings, as well as all his or her rights and defenses;
4. upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent;<sup>1</sup>
5. not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile;
6. fully inform both the juvenile and juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications;

---

<sup>1</sup>The use of the word "parent" in these Standards refers to parent, guardian, custodial adult, or person assuming legal responsibility for the child.

7. present the juvenile with comprehensible choices, help the juvenile reach his or her own decisions, and advocate the juvenile's viewpoint and wishes to the court; and
  8. refrain from waiving substantial rights or substituting counsel's own view, or the parents' wishes, for the position of the juvenile.
- (b) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases, both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

**Standard 5-2: Education, Training, and Experience of Defense Counsel**

- (a) Counsel who undertake the representation of a client in a juvenile delinquency proceeding shall have the knowledge and experience necessary to represent a child diligently and effectively.
- (b) Counsel should consider working with an experienced juvenile delinquency practitioner as a mentor when beginning to represent clients in delinquency cases.
- (c) At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.
- (d) Counsel shall familiarize themselves with Nevada statutes relating to delinquency proceedings, as well as the Nevada Rules of Criminal Procedure, Nevada Rules of Evidence, Nevada Rules of Appellate Procedure, relevant caselaw, and any relevant local court rules. Counsel should be knowledgeable about and seek ongoing formal and informal training in the following areas:
  1. Competency and Developmental Issues:
    - (A) Child and adolescent development;
    - (B) Brain development;

- (C) Mental health issues, common childhood diagnoses, and other disabilities; and
  - (D) Competency issues and the filing and processing of motion for competency evaluations.
2. Attorney/Client Interaction:
- (A) Interviewing and communication techniques for interviewing and communicating with children, including police interrogations and Miranda considerations;
  - (B) Ethical issues surrounding the representation of children and awareness of the role of the attorney; and
  - (C) Awareness of the role of the attorney versus the role of the guardian ad litem, including knowledge of how to work with a guardian ad litem
3. Department of Juvenile Justice Services/Other State and Local Programs:
- (A) Diversion services available through the court and probation;
  - (B) The child welfare system and services offered by the child welfare system;
  - (C) Nevada Department of Child and Family Services facility operations, release authority, and parole policies;
  - (D) Community resources and service providers for children and all alternatives to incarceration available in the community for children;
  - (E) Intake, programming, and education policies of local detention facility;
  - (F) Probation department policies and practices; and
  - (G) Gender specific programming available in the community.
4. Specific Areas of Concern:
- (A) Police interrogation techniques and Miranda consideration, as well as other Fourth, Fifth, and Sixth Amendment issues as they relate to children and adolescents;
  - (B) Substance abuse issues in children and adolescents;
  - (C) Special education laws, rights, and remedies;

- (D) Cultural diversity;
- (E) Immigration issues regarding children;
- (F) Gang involvement and activity;
- (G) School-related conduct and zero tolerance policies ("school to prison pipeline" research, search and seizure issues in the school setting);
- (H) What factors lead children to delinquent behaviors;
- (I) Signs of abuse and/or neglect;
- (J) Issues pertaining to status offenders; and
- (K) Scientific technologies and evidence collection.

### **Standard 5-3: Adequate Time and Resources**

Counsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of quality legal service, endangers the juvenile's interest in the speedy disposition of charges, or risks breach of professional obligations. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, knowledge, and experience and will pursue adequate resources to offer quality legal services in a particular matter. If, after accepting an appointment, counsel finds he or she is unable to continue effective representation, counsel should consider appropriate caselaw and ethical standards in deciding whether to move to withdraw or take other appropriate action. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

### **Standard 5-4: Initial Client Interview**

- (a) Preparing for the Initial Interview: Prior to conducting the initial interview, the attorney should:
  - 1. be familiar with the elements of the offense and the potential punishment;

2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by the Department of Juvenile Justice and law enforcement;
  3. be familiar with detention alternatives and the procedures that will be followed in setting those conditions;
  4. consider all possible defenses and affirmative defenses and any lesser-included offenses that may be available;
  5. consider the collateral consequences attaching to any possible sentencing, for example parole or probation revocation, immigration consequences, sex offender registration and reporting provisions, loss of driving privileges, DNA collection, school suspension or expulsion, consequences relating to public housing, etc.; and
  6. review the petition for any defects.
- (b) Counsel shall make every effort to conduct a face-to-face interview with the client as soon as practicable and sufficiently in advance of any court proceedings. In cases where the client is detained or in custody, counsel should make efforts to visit with the client within 24-48 hours after receiving the appointment. Counsel should:
1. interview the client in a setting that is conducive to maintaining the confidentiality of communications between attorney and client;
  2. maintain ongoing communications and/or meetings with the client, which are essential to establishing a relationship of trust between the attorney and client;
  3. provide the client with a method to contact the attorney, including information on calling collect from detention facilities;
  4. utilize the assistance of an interpreter as necessary and seek funding for such interpreting services from the court;
  5. work cooperatively with the parents, guardian, and/or other person with custody of the child to the extent possible without jeopardizing the legal interests of the child;
  6. consider the client's age, developmental stage, mental retardation, and mental health diagnoses in all cases, understand the nature and

consequences of a competency proceeding, and resolve issues of raising or not raising competency in consultation with the client; and

7. be alert to issues that may impede effective communication between counsel and client and ensure that communication issues such as language, literacy, mental or physical disability, or impairment are effectively addressed to enable the client to fully participate in all interviews and proceedings. Appropriate accommodations should be provided during all interviews, preparation, and proceedings, which might include the use of interpreters, mechanical or technological supports, or expert assistance.

#### **Standard 5-5: Detention Hearing**

- (a) When appropriate, counsel should attempt to obtain the pretrial release of any client. Counsel should advocate for the use of alternatives to detention for the youth at the detention hearing. Such alternatives might include electronic home monitoring, day or evening reporting centers, utilization of other community-based services such as after school programming, etc. If counsel is appointed after the initial detention hearing or if the youth remains detained after the initial detention hearing, counsel should consider the filing of a motion to review the detention decision.
- (b) If the youth's release from secure detention is ordered by the court, counsel should carefully explain to the juvenile the conditions of release from detention and any obligations of reporting or participation in programming. Counsel should take steps to secure appointment of counsel to juveniles prior to the detention hearing.

#### **Standard 5-6: Informal Supervision/Diversion**

Counsel should be familiar with all available alternatives offered by the court or available in the community. Such programs may include diversion, mediation, or other informal programming that could result in a juvenile's case being dismissed, handled informally, or referred to other community programming. When appropriate

and available, counsel should advocate for the use of informal mechanisms that could steer the juvenile's case away from the formal court process.

**Standard 5-7: Case Preparation and Investigation**

A thorough investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions or statements to defense counsel of facts or the youth's stated desire to plead guilty, however counsel may consider such admissions statements or desires in determining the scope of the investigation.

Counsel should:

- (a) obtain and examine all charging documents, pleadings, and discovery;
- (b) request and secure discovery, including exculpatory/impeaching information;
- (c) request the names and addresses of prosecution witnesses, their prior statements, and criminal records;
- (d) obtain the prior statements of the client and his or her delinquency history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, records of the client, including, but not limited to, educational, psychological, psychiatric, substance abuse treatment, children services records, court files, and prior delinquency records and be prepared to execute any needed releases of information or obtain any necessary court orders to obtain these records;
- (e) research and review the relevant statutes and caselaw to identify elements of the charged offense(s), defects in the prosecution, and available defenses;
- (f) conduct an in-depth interview of the client to assist in shaping the investigation;
- (g) consider seeking the assistance of an investigator when necessary and consider moving the court for funding to pay for the use of an investigator;

- (h) attempt to locate all potential witnesses and have them interviewed (if counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
- (i) obtain the assistance of such experts as are appropriate to the facts of the case;
- (j) consider going to the scene of the alleged offense or offenses in a timely manner;
- (k) consider the preservation of evidence and document such by using photographs, measurements, and other means; and

#### **Standard 5-8: Pretrial Motions**

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief that the court has discretion to grant. Counsel shall review all statements, reports, and other evidence and interview the client to determine whether any motions are appropriate. Counsel should timely file all appropriate pretrial motions and participate in all pretrial proceedings.

- (a) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
  - 1. the pretrial detention of the client;
  - 2. the constitutionality of the implicated statute(s);
  - 3. defects in the charging process or the charging document;
  - 4. severance of charges or defendants;
  - 5. discovery issues;
  - 6. suppression of evidence or statements;
  - 7. speedy trial issues; and
  - 8. evidentiary issues.
- (b) Counsel should only withdraw or decide not to file a motion 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.

- (c) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:

1. investigation, discovery, and research relevant to the claim advanced;
2. subpoenaing of all helpful evidence and witnesses; and
3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to that hearing, including the benefits and costs of having the client testify.

- (d) Requests or agreements to continue a contested hearing date shall not be made without consultation with the client. Counsel shall diligently work to complete the investigation and preparation in order to be fully prepared for all court proceedings. In the event that counsel finds it necessary to seek additional time to adequately prepare for a proceeding, counsel should consult with the client and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well-articulated reasons on the record in the event it becomes an appealable issue.

**Standard 5-9: Plea Negotiations**

- (a) Under no circumstances should defense counsel recommend to a client acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

- (b) Counsel should:

1. with the consent of the client, explore diversion and other informal and formal admission of disposition agreements with regard to the allegations;

2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges that would be abandoned as a result of accepting an offer;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel must be completely familiar with:

1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
  - (A) not to proceed to trial on the merits of the charges;
  - (B) to decline from asserting or litigating particular pretrial motions;
  - (C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
  - (D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal/delinquent activity.
2. benefits the client might obtain from a negotiated settlement, including, but not limited to:
  - (A) that the prosecution will not oppose the client's release pending disposition 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) that one or more of the charged offenses may be dismissed or reduced 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 delinquent conduct;
  - (E) that the client will receive, with the agreement of the court, a specified sentence or sanction;
  - (F) that the prosecution will take, or refrain from taking, at the time of disposition and/or in communications with the probation department a specified position with respect to the sanction to be imposed on the client by the court; and
  - (G) 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 probation.
- (d) In the decision-making process, counsel should:
1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
  2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client; where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.
- (e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:
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 intelligently made;
  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 the plea; and
  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.

**(f) After entry of the plea, counsel should:**

1. be prepared to address the issue of release pending disposition hearing. Where the client has been released, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release pending disposition; and
2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

**Standard 5-10: Adjudicatory Hearing**

**(a) Counsel should develop a theory of the case in advance of the adjudicatory hearing. Counsel shall issue subpoenas and obtain court orders for all necessary evidence to ensure the evidence's availability at the adjudicatory hearing. Sufficiently in advance of the hearing, counsel shall subpoena all potential witnesses. Where appropriate, counsel should have the following materials available at the time of the contested hearing:**

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all prospective prosecution witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses;
8. prior statements of all defense witnesses;
9. reports from all experts;
10. a list and copies of originals of defense and prosecution exhibits;
11. copies of all relevant statutes or cases; and
12. outline or draft of closing argument.

- (b) 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.
- (c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence), and where appropriate, counsel should prepare motions and memoranda in support of the client's position.
- (d) Throughout the adjudicatory process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
- (e) Counsel should advise the client as to suitable courtroom dress and demeanor.
- (f) Counsel should plan with the client the most convenient system for conferring throughout the contested hearing.
- (g) During the adjudicatory hearing, counsel shall raise objections on the record to any evidentiary issues; in order to best preserve a client's appellate rights, counsel shall object on the record and state the grounds for such objection following the court's denial of any defense motion.
- (h) Counsel shall ensure that an official court record is made and preserved of any pretrial hearings and the adjudicatory hearing.
- (i) Counsel shall utilize expert services when appropriate and petition the court for assistance in obtaining expert services when necessary.
- (j) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.
- (k) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (l) In preparing for cross-examination, counsel should:
  - 1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;

2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate evidence that the prosecution may call in its case-in-chief and on rebuttal;
5. create a cross-examination plan for all anticipated witnesses;
6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances; and
7. review relevant statutes, regulations, and policies applicable to police witnesses and consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of experts or reliability of the anticipated opinion.

**Standard 5-11: Presenting the Client's Case**

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- (c) 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.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:
  1. develop a plan for direct examination of each potential witness;
  2. determine the implications that the order of witnesses may have on the defense case;

3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  4. consider the possible use of character witnesses;
  5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  6. review all documentary evidence that must be presented; and
  7. review all tangible evidence that must be presented.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examination as appropriate.

#### **Standard 5-12: Objections to the Hearing Master's Recommendations**

Counsel should advise client of the role of the Hearing Master and the procedure and purpose of filing objections to the Hearing Master's findings and recommendations. Counsel should review the Hearing Master's decision for possible meritorious grounds for objection. If the Hearing Master's decision does not contain findings of facts and conclusions of law, counsel request in writing such findings of facts and conclusions of law in accordance with NRS 62B.030(3). Counsel should ensure that the transcript of the proceeding is timely obtained and objections are timely filed in accordance with NRS 62B.030(4). Counsel should draft and file objections and supplemental points and authorities with specificity and particularity and participate in the oral argument if scheduled.

#### **Standard 5-13: Preparation for the Disposition Hearing**

Preparation for disposition should begin upon appointment. Counsel should:

- (a) be knowledgeable of available dispositional alternatives both locally and outside of the community;

- (b) review, in advance of the dispositional hearing, the recommendations of the probation department or other court department responsible for making dispositional recommendations to the court;
- (c) inform their client of these recommendations and other available dispositional alternatives; and
- (d) be familiar with potential support systems of the client such as school, family, and community programs and consider whether such supportive services could be part of a dispositional plan.

**Standard 5-14: The Disposition Process**

During the disposition process, counsel should:

- (a) correct inaccurate information that may be detrimental to the client and object to information that is not properly before the court in determining the disposition;
- (b) present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports;
- (c) develop a plan that seeks to achieve the least restrictive and burdensome disposition alternative and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable disposition and alternatives, and other information pertinent to the disposition decision;
- (d) consider filing a memorandum setting forth the defense position with the court prior to the dispositional hearing;
- (e) maintain contact with the client prior to the disposition hearing and inform the client of the steps being taken in preparation for sentencing;
- (f) obtain from the client and/or the client's family relevant information concerning his or her background and personal history, prior delinquency record, employment history, education, and medical history and condition and obtain from the client sources that can corroborate the information provided;

- (g) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- (h) ensure the client has an opportunity to examine the disposition report;
- (i) inform the client of his or her right to speak at the disposition hearing and assist the client in preparing the statement, if any, to deliver to the court;
- (j) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings;
- (k) collect affidavits to support the defense position when appropriate and prepare witnesses to testify at the sentencing hearing and request the opportunity to present tangible and testimonial evidence;
- (l) prepare to address victim participation either through the victim impact statement or by direct testimony at the disposition hearing; and
- (m) ensure that an official court record is made and preserved of any disposition hearing.

#### **Standard 5-15: The Disposition Report**

Counsel should:

- (a) become familiar with the procedures concerning the preparation, submission, and verification of the disposition report;
- (b) prepare the client for the interview with the official preparing the disposition report;
- (c) determine whether a written disposition report will be prepared and submitted to the court prior to the disposition hearing; where preparation of the report is optional, counsel should consider the strategic implications of requesting report;
- (d) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
- (e) attend any interview of the client by an agency disposition investigator; review the completed report prior to sentencing;
- (f) take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report; and

- (g) take reasonable steps to ensure that a corrected copy of the report is sent to corrections officials if there are any amendments made to the report by the court.

### **Standard 5-16: Post-Disposition Responsibilities/Advocacy**

Following the disposition hearing, counsel should:

- (a) review the disposition order to ensure that the sentence is clearly and accurately recorded and take steps to correct any errors and ensure that it includes language regarding detention credits and plea agreements;
- (b) be aware of sex offender registration requirements and other requirements, both state and federal, imposed on sex offenders and communicate those requirements to the client;
- (c) be familiar with the procedure for sealing and expunging records, advise the client of those procedures, and utilize those procedures when available;
- (d) be familiar with the procedures to request a new contested hearing, 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 and advise the client of his or her rights with regard to those procedures;
- (e) inform the client of his or her rights to representation and to appeal an adjudication after a contested hearing, after a conditional plea or after an admission that was not entered in a knowing, intelligent, and voluntary manner and document the client's decision regarding appeal;
- (f) ensure that the notice of appeal and request for appointment of counsel is filed, or that the client has obtained or the court has appointed, appellate counsel in a timely manner even if counsel believes that an appeal will not be successful or is not cognizable;
- (g) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;
- (h) inform the client of any right that may exist to be released pending disposition of the appeal;
- (i) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed; and

- (j) include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-adjudication proceedings.

**Standard 5-17: Transfer Proceedings to Adult Court**

- (a) Transfer proceedings require special knowledge and skill due to the severity of the consequence of the proceedings. Counsel shall not undertake representation of children in these areas without sufficient experience, knowledge, and training in these unique areas. It is recommended that counsel representing children in transfer proceedings have litigated at least 2 criminal jury trials or be assisted by co-counsel with the requisite experience.
- (b) Counsel representing juveniles in transfer proceedings should:
1. be fully knowledgeable of adult criminal procedures and sentencing;
  2. be fully knowledgeable of the legal issues regarding probable cause hearings and transfer proceedings;
  3. investigate the social, psychological, and educational history of the child;
  4. retain or employ experts including psychologists, social workers, and investigators in order to provide the court with a comprehensive analysis of the child's strengths and weaknesses in support of retention of juvenile jurisdiction;
  5. be knowledgeable of the statutory findings the court must make before transferring jurisdiction to the criminal court and any caselaw affecting the decision;
  6. be prepared to present evidence and testimony to prevent transfer, including testimony from teachers, counselors, psychologists, community members, probation officers, religious associates, employers, or other persons who can assist the court in determining that juvenile jurisdiction should be retained;
  7. ensure that all transfer hearing proceedings are recorded;
  8. preserve all issues for appeal; and

9. investigate possible placements for the client if the case remains in juvenile court.

**VERSION B**  
**(INCLUDES HIGHLIGHTED PROPOSED CHANGES**  
**REFERENCED IN MINORITY/MAJORITY REPORT)**

**NEVADA INDIGENT DEFENSE**  
**STANDARDS OF PERFORMANCE**

**Standard 1: Function of Performance Standards**

a) These performance standards are designed to improve the quality of indigent defense representation in Nevada and provide objective guidelines for the allocation of resources for indigent defense.

(b) These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for indigent criminal defendants. The standards also may be used as a training tool.

(c) Every attorney who defends persons accused of crime must be familiar with these standards. The steps covered in these standards are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The standards recognize that the representation of indigent criminal defendants is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically "fits" the case, the client and the court proceeding.

(d) These standards are intended to facilitate the efficient and effective operation of indigent defense programs and are to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. Failure to adhere to the standards does not, in and of itself, constitute ineffective assistance of counsel. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances. These standards are not intended to create substantive or procedural rights which might accrue either to the accused, or convicted persons, or to counsel. Nothing contained herein shall be construed to overrule, expand, or extend, whether directly or by analogy, the decision reached by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) nor its progeny as adopted by the Nevada Supreme Court.

## CAPITAL CASE REPRESENTATION

### Standard 2-1: The Defense Team and Services of Experts in Capital Cases

(a) The Defense Team

The defense team should:

1. consist of no fewer than two attorneys qualified in accordance with Standard 2-2,

(b) Expert and Ancillary Services

1. Counsel should:

- (A) secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide competent legal representation at every stage of the proceedings, including but not limited to, an investigator, mitigation specialist and persons qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
- (B) have the right to have such services provided by persons independent of the government; and
- (C) have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Formatted: Bullets and Numbering

Deleted: an investigator, and a mitigation specialist; and contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

Deleted: high-quality

### Standard 2-2: Appointment, Retention, and Removal of Defense Counsel

(a) Qualifications of Defense Counsel

1. Consistent with Supreme Court Rules, the appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with competent legal representation.

Deleted: 2. The appointing authority should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

Deleted: high-quality

2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital client has:

- (A) obtained a license or permission to practice in the jurisdiction;
- (B) demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and
- (C) satisfied the training requirements set forth in Standard 2-3.

3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital client within the jurisdiction receives competent legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

Deleted: high-quality

- (A) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;
- (B) skill in legal research, analysis, and the drafting of litigation documents;
- (C) skill in oral advocacy;
- (D) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (E) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (F) skill in the investigation, preparation, and presentation of mitigating evidence; and
- (G) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(b) Workload

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing clients in death penalty cases is maintained at a level that enables counsel to provide each client with competent legal representation in accordance with the Nevada Indigent Defense Standards of Performance.

Deleted: high-quality

(c) Monitoring; Removal

1. The appointing authority should monitor the performance of all defense counsel to ensure that the client is receiving competent legal representation. Where there is evidence that an attorney is not providing high-quality legal representation, the responsible agency should take appropriate action to protect the interests of the attorney's current and potential clients. The appointing authority shall not interfere with, or attempt to micro-manage, counsel's legal representation. Nor shall the appointing authority remove or move to remove an attorney from a specific case.
2. The appointing authority should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide competent legal representation.
3. The appointing authority should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing competent legal representation. Where there is evidence that an attorney has failed to provide competent legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to systemically fail to provide competent legal representation, the office should not receive additional appointments.
4. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the appointing authority should provide written notice that such action is being contemplated and give the attorney or defender office an opportunity to respond in writing.
5. An attorney or defender office sanctioned pursuant to this Standard should be restored to the roster only in exceptional circumstances.
6. The appointing authority should ensure that this standard is implemented consistently with standard 2-2, so that an attorney's zealous

Deleted: high-quality

Deleted: high-quality

Deleted: high-quality

Deleted: high-quality

Deleted: high-quality

representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this guideline.

### **Standard 2-3: Training**

- (a) Funds should be made available for the effective training, professional development, and continuing education of all members of the defense team who are employed by an institutional defender. Where attorneys are not employed by an institutional defender, funds should be made available for the effective training, professional development and continuing education of such attorneys to the extent necessary to maintain a pool of qualified attorneys under Standard 2-2(a)(3).
- (b) Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
1. relevant state, federal, and international law;
  2. pleading and motion practice;
  3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
  4. jury selection;
  5. trial preparation and presentation, including the use of experts;
  6. ethical considerations particular to capital defense representation;
  7. preservation of the record and of issues for post-conviction review;
  8. counsel's relationship with the client and his family;
  9. post-conviction litigation in state and federal courts; and
  10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
- (c) Attorneys seeking to remain on the appointment roster should be required to attend and successfully complete, at least once every 2 years, a specialized training program that focuses on the defense of death penalty cases.

**Deleted:** , whether the members are employed by

**Deleted:** or are employed or retained by counsel appointed by the court

**Deleted:** .

#### Standard 24: Funding and Compensation

Deleted:

- (a) The appointing authority must ensure funding for the full cost of competent legal representation by the defense team and outside experts selected by counsel, as defined by these guidelines.
- (b) Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of competent legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
  - 1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
  - 2. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (c) Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
  - 1. Mitigation specialists and experts retained by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
  - 2. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (d) Additional compensation should be provided in unusually protracted or extraordinary cases.
- (e) Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Deleted: high-quality

Deleted: high-quality

Deleted: 1

### **Standard 2-5: Obligations of Counsel Respecting Workload**

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with competent legal representation in compliance with the Nevada Indigent Defense Standards of Performance.

Deleted: high-quality

### **Standard 2-6: Role of the Defense Team**

As soon as possible after appointment, counsel should assemble a defense team by selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes if reasonably necessary and appropriate under applicable case law:

- (a) at least one mitigation specialist and one fact investigator;
- (b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
- (c) any other members needed to provide competent legal representation; and
- (d) at all stages demanding on behalf of the client all resources necessary to provide competent legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

Deleted: high-quality

Deleted: high-quality

### **Standard 2-7: Relationship With the Client**

Deleted:

- (a) Counsel at all stages of the case should:
  - 1. make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client;
  - 2. conduct an interview of the client within 24 hours of initial counsel's entry into the case, barring exceptional circumstances;
  - 3. promptly advise the prosecution the client is represented by counsel and communicate in an appropriate manner with the client regarding the protection of the client's rights against self-incrimination, to the

effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards; and

4. at all stages of the case, re-advise the client and communicate with the prosecution regarding these matters as appropriate.

Deleted:

(b) Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

**Standard 2-8: Additional Obligations of Counsel Representing a Foreign National**

(a) Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

(b) Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and
2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

**Standard 2-9: Investigation**

- (a) Counsel at every stage has an obligation to conduct an appropriate, and independent investigation relating to the issues of both guilt and penalty.
  - 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
  - 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
- (b) Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
- (c) Counsel at every stage has an obligation to assure that the official record of the proceedings is complete and to supplement the record as appropriate.

**Standard 2-10: Duty to Assert Legal Claims**

- (a) Counsel at every stage of the case, exercising professional judgment in accordance with these standards, should:
  - 1. consider all legal claims potentially available;
  - 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
  - 3. evaluate each potential claim in light of:
    - (A) the unique characteristics of death penalty law and practice; and
    - (B) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;
    - (C) the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

(D) any other professionally appropriate risks and benefits to the assertion of the claim.

- (b) Counsel who decide to assert a particular legal claim should:
1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and
  2. ensure that a full record is made of all legal proceedings in connection with the claim.

**Standard 2-11: Duty to Seek an Agreed-Upon Disposition**

(a) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

(b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;
2. the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits;
3. the general range of sentences for similar offenses committed by defendants with similar backgrounds and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
4. the governing legal regime, including, but not limited to, whatever choices the client may have as to the fact-finder and/or sentencer;
5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, or other plea

**Deleted:** the possible collateral consequences,

**Deleted:** any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and

- that does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
6. whether any agreement negotiated can be made binding on the court, penal/parole authorities, and any others who may be involved;
  7. the practices, policies, and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities that may affect the content and likely results of plea negotiations;
  8. Concessions that the client might offer, such as:
    - (A) an agreement to waive trial and to plead guilty to particular charges;
    - (B) an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
    - (C) an agreement, if permitted under applicable law, regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
    - (D) an agreement to forgo in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
    - (E) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
    - (F) an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
    - (G) an agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and
    - (H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

9. Benefits the client might obtain from a negotiated settlement, including:
- (A) a guarantee that the death penalty will not be imposed;
  - (B) an agreement that the client will receive a specified sentence;
  - (C) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - (D) an agreement that one or more of multiple charges will be reduced or dismissed;
  - (E) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
  - (F) an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
  - (G) an agreement that the court or prosecutor will, to the extent provided by law, make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement; and
  - (H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.
- (c) Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
- (d) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement.
- (e) If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

- (f) Counsel should not accept any agreed-upon disposition without the client's express authorization.
- (g) The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

**Standard 2-12: Entry of a Plea of Guilty**

- (a) The informed decision whether to enter a plea of guilty lies with the client.
- (b) In the event the client determines to enter a plea of guilty, prior to the entry of the plea, counsel should:
  - 1. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
  - 2. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and direct consequences to which he or she will be exposed by entering the plea; and
  - 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 in court, and providing a statement concerning the offense.
- (c) During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

Deleted: other

**Standard 2-13: Trial Preparation Overall**

As the investigations addressed in Standard 2-7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

**Standard 2-14: Voir Dire and Jury Selection**

- (a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons, as well as to the selection of the petit jury venire.
- (b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:
  - 1. for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the client is death-eligible, regardless of the individual circumstances of the case;
  - 2. for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and
  - 3. for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.
- (c) Counsel should consider seeking expert assistance in the jury selection process.

### **Standard 2-15: Defense Case Concerning Penalty**

- (a) As set out in Standard 2-7, counsel at every stage of the case has a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.
- (b) Counsel should discuss with the client early in the case the sentencing alternatives available and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.
- (c) Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
- (d) Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.
- (e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
- (f) In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
  - 1. witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;
  - 2. expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison; to

- explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
3. witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
  4. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones; and
  5. demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.
- (g) In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration and should make a full record in order to support any subsequent challenges.
- (h) Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any noncompliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.
- (i) Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.
- (j) If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. consider what legal challenges may appropriately be made to the interview or the conditions surrounding it;
  2. consider the legal and strategic issues implicated by the client's cooperation or noncooperation;
  3. ensure that the client understands the significance of any statements made during such an interview; and
  4. attend the interview.
- (k) Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- (l) While taking into consideration all ethical and legal requirements, counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

**Standard 2-16: Official Presentence Report**

If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

- (a) where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;
- (b) provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;
- (c) review the completed report;
- (d) take appropriate steps to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report; and

- (e) take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate, or misleading.

**Standard 2-17: Duty to Facilitate the Work of Successor Counsel**

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- (a) maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- (b) providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- (c) sharing potential further areas of legal and factual research with successor counsel; and
- (d) cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

**Standard 2-18: Duties of Trial Counsel After Conviction**

Trial counsel should:

- (a) be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence;
- (b) While considering all ethical and legal requirements, take whatever action(s), such as filing a notice of appeal and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief;
- (c) not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Standard 2-17 applies in its entirety; and

- (d) take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

**Standard 2-19: Duties of Post-Conviction Counsel**

- (a) Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- (b) If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available forms.
- (c) Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to competent capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
- (d) The duties of the counsel representing the client on direct appeal should include, where appropriate, filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the responsible agency.
- (e) Post-conviction counsel should fully discharge the ongoing obligations imposed by these standards, including the obligations to:
1. maintain close contact with the client regarding litigation developments;
  2. continually monitor the client's mental, physical, and emotional condition for effects on the client's legal position;
  3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
  4. continue an aggressive investigation of all aspects of the case.

Deleted: high-quality

**Standard 2-20: Duties of Clemency Counsel**

Clemency counsel should:

1. be familiar with the procedures for and permissible substantive content of a request for clemency;
2. conduct a reasonable investigation in accordance with Standard 2-7;
3. ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case, and jurisdiction; and
4. ensure that the process governing consideration of the client's application is substantively and procedurally just, and if not, should seek appropriate redress.

Deleted: n

## APPELLATE AND POST-CONVICTION REPRESENTATION

### **Standard 3-1: Role of Appellate Defense Counsel**

The paramount obligation of appellate criminal defense counsel is to provide zealous and competent representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court. Trial counsel should advise the client of his or her right to appeal and any limits on that right, pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *Thomas v. State*, 115 Nev. 148 (1999). If the client instructs the attorney to proceed with an appeal, even if the attorney believes that the appeal is without merit or is not cognizable, trial counsel will assure that a Notice of Appeal is filed. If the client wishes to proceed with the appeal, against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court and complies with the Nevada Rules of Appellate Procedure.

Deleted: quality

### **Standard 3-2: Identification of issues on appeal**

In selecting issues to be presented on appeal, counsel should:

- (a) conduct a thorough review of the trial transcript, the pleadings, and docket entries in the case;
- (b) investigate potentially meritorious unpreserved claims of error.;
- (c) assert claims of error that are supported by facts of record that will benefit the client if successful, that possess arguable legal merit, and that should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research;
- (d) not hesitate to assert claims that may be complex, unique, or controversial in nature, such as issues of first impression or arguments for change in the existing law;
- (e) inform the client when counsel has decided not to raise issues that the client desires to be raised and the reasons why the issues were not raised; and
- (f) consider whether there are federal constitutional claims that, in the event that relief is denied in the state appellate court, would form the basis for a

writ of habeas corpus in federal district court. Such claims should raise and argue the federal constitutional claims, unless counsel concludes that there is a tactical basis for not including such claims.

**Standard 3-3: Diligence and Accuracy**

In presenting the appeal, counsel should:

- (a) be diligent in perfecting appeals and expediting prompt submission to the appellate court;
- (b) be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument; and
- (c) not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

**Standard 3-4: Duty to Meet With Trial Lawyers**

In preparing the appeal, counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the client's issues on appeal.

**Standard 3-5: Duty to Confer and Communicate With Client**

In preparing and processing the appeal, counsel should:

- (a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel;
- (b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be

employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations;

- (c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing;
- (d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense;
- (e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and
- (f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

#### **Standard 3-6: Duty to Seek Release during Appeal**

Appellate counsel should file appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

#### **Standard 3-7: Responsibilities in "Fast Track" Appeals**

If the conviction qualifies for "fast track" treatment under NRAP 3C, counsel shall fulfill the responsibilities set forth in the rule. In preparing the "fast track" statement, counsel should:

- (a) order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal;

- (b) thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e); and
- (c) consult, if possible within the "fast track" deadlines, with the client as to which issues should be presented in the statement.

**Standard 3-8: Post-Decision Responsibilities**

If the decision of the appellate court is adverse to the client, appellate counsel should:

- (a) promptly inform the client of the decision and confer with the client with regard to the availability of rehearing or en banc reconsideration and the benefits or disadvantages of filing such a motion;
- (b) file a Motion for Rehearing and/or Request for en banc reconsideration if grounds for such a motion and/or request exist;
- (c) advise the client whether a petition for writ of certiorari to the United States Supreme Court is warranted and determine whether such a petition will be filed;
- (d) promptly advise the client of any remedies that are available in state or federal court for post-conviction review and shall advise the client of the applicable statute of limitations for filing for such relief;
- (e) advise the client of any claims such as ineffective assistance of counsel that may be available to the client but that will not be pursued by appellate counsel;
- (f) provide the client with any available forms for post-conviction relief and appointment of counsel; and
- (g) cooperate with the client and with post-conviction counsel in securing the trial and appellate record and investigation of potential claims for post-conviction relief.

**Standard 3-9: Post-Conviction Representation**

Counsel appointed to represent a client in post-conviction proceedings should:

- (a) assure that the client is able to contact post-conviction counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the post-conviction case, counsel shall provide advice to the client, in writing, as to the method(s) that the client can employ to discuss the post-conviction proceeding with counsel;
- (b) consult with trial/appellate counsel and secure the entire trial and appeal file;
- (c) seek to litigate all issues, whether or not previously presented, that are arguably meritorious;
- (d) maintain close contact with the client and consult with the client on all decisions with regard to the content of any pleadings seeking collateral or post-conviction relief prior to the filing of any petition for post-conviction relief. When possible, post-conviction counsel should meet in person with the client and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the post-conviction proceeding along with a statement of the reasons certain issues will not be raised, if any;
- (e) investigate all potentially meritorious claims that require factual support;
- (f) secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition;
- (g) raise all federal constitutional claims, along with appropriate citations, that are arguably meritorious; and
- (h) advise the client of remedies that may be available should post-conviction relief not be granted, including appeal from the denial and federal habeas corpus along with any applicable time limits for seeking such relief. Post-conviction counsel shall advise the client in writing if counsel will not be representing the client in any subsequent proceedings and shall provide advice on the steps that must be taken and the time limits that are applicable to appeals or the seeking of relief in the federal courts.

## FELONY AND MISDEMEANOR TRIAL CASES

### Standard 4-1: Role of Defense Counsel

- (a) The paramount obligation of criminal defense counsel is to provide zealous and competent representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.
- (b) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

Formatted: Indent: Left: 0",  
Hanging: 0.5"

Deleted: quality

### Standard 4-2: Education, Training, and Experience of Defense Counsel

- (a) To provide competent representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the courts of Nevada. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, 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, counsel should have sufficient experience or training to provide competent representation and should move to be relieved as counsel should counsel determine at a later point that he or she does not possess sufficient experience or training to handle the case assigned.

Deleted: quality

Deleted: quality

### Standard 4-3: Adequate Time and Resources

Counsel has an obligation to make available sufficient time, resources, knowledge, and experience to afford competent representation of a client in a particular matter

before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses, and must maintain a system for receiving collect telephone calls from incarcerated clients.

**Standard 4-4: Initial Client Interview**

- (a) Preparing for Initial Interview: Prior to conducting the initial interview, the attorney should:
1. be familiar with the elements of each offense charged and the potential punishment;
  2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by agencies concerning pretrial release, and law enforcement reports;
  3. be familiar with legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
  4. be familiar with the different types of pretrial release conditions the court may set; and
  5. be familiar with any procedures available for reviewing the judge's setting of bail.
- (b) Timing of the Initial Interview: Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview within 72 hours of appointment to the case. The initial interview should be conducted whenever possible in a confidential setting.
- (c) Contents of the Initial Interview: The purpose of the initial interview is both to inform the client of the charges/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 or literacy are overcome. Information that counsel should consider acquiring from the client includes, but is not limited to:

Deleted: 48

1. the client's ties to the community, including the length of time in the community, family relationships, immigration status, and employment record and history;
2. the client's physical and mental health, education, and armed services record;
3. the client's immediate medical needs;
4. the client's criminal history and a determination of whether the client has other pending charges or is on supervision;
5. the ability of the client to meet any financial conditions of release; and
6. sources of verification (counsel should obtain permission from the client before contacting such sources).

(d) The following information should be provided to the client in the initial interview:

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 an explanation that the client should not make any statements regarding 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. the charges and the potential penalties;
5. a general procedural overview of the progression of the case;
6. how and when counsel can be reached;
7. when counsel will see the client next;
8. realistic answers, where possible, to the client's most urgent questions; and
9. 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.

#### **Standard 4-5: Pretrial Release Proceedings**

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release. Counsel should:

- (a) present about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives, or other persons who may take custody of the client or provide third-party surety;
- (b) consider pursuing modification of the conditions of release under available procedures when the client is not able to obtain release under the conditions set by the court; and
- (c) explain to the client, the available options, procedures, and risks in posting security if the court sets conditions of release.

Deleted: and any third party

#### **Standard 4-6: Preliminary Hearings/Grand Jury Representation**

- (a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- (b) In preparing for the preliminary hearing, the attorney should consider:
  - 1. the elements of each offense charged;
  - 2. the law for establishing probable cause;
  - 3. the factual information that is available concerning probable cause;
  - 4. the tactics of calling witnesses or calling the client as a witness and the potential for later use of the testimony; and
  - 5. any issues arising from the limited availability of discovery inherent at this stage of the proceeding.
- (c) Counsel should meet with the client prior to the preliminary hearing. The client has the sole right to waive a preliminary hearing. Counsel must

evaluate and advise the client regarding the consequences of such waiver and the tactics of full or partial cross-examination.

- (d) Where counsel becomes aware that his or her client is the subject of a grand jury investigation, appointed counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Nevada law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

#### **Standard 4-7: Case Preparation and Investigation**

- (a) Counsel should conduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the client's admissions or statements to defense counsel of facts constituting guilt or the client's stated desire to plead guilty, however counsel may consider such admissions, statements or desires in determining the scope of the investigation.
- (b) Counsel should:
  - 1. obtain and examine all charging documents, pleadings, and discovery;
  - 2. research and review the relevant statutes and caselaw to identify elements of the charged offense(s); defects in the prosecution such as statute of limitations or double jeopardy; and available defenses and required notices of those defenses;
  - 3. conduct an in-depth interview of the client to assist in shaping the investigation;

4. attempt to locate all potential witnesses and have them interviewed. (If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
5. request and secure discovery including exculpatory/impeaching information; names and addresses of prosecution witnesses and their prior statements and criminal records; the prior statements of the client and his or her criminal history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, mental health, drug treatment, or other records of the client, victim, or witnesses and records of police officers as appropriate;
6. inspect the scene of the offense as appropriate; and
7. obtain the assistance of such experts as are appropriate to the facts of the case and reasonably necessary under applicable case law.

**Standard 4-8: Pretrial Motions and Writs**

- (a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief, which the court has discretion to grant.
- (b) The decision to file pretrial motions should be made after appropriate investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
  1. the pretrial custody of the client;
  2. the constitutionality of the implicated statute(s);
  3. any defects in the charging process or the charging document;
  4. severance of charges or defendants;
  5. discovery issues;
  6. suppression of evidence or statements;
  7. speedy trial issues; and

Deleted: thorough

8. evidentiary issues.
- (c) Counsel should determine whether a pretrial writ should be filed challenging the determination that probable cause exists. The decision whether to file a pretrial writ should be made based upon an examination of the preliminary hearing or grand jury transcripts. If transcripts are not available at the time of arraignment, appropriate steps should be taken to secure an extension of time to prepare the writ after the transcripts are received pursuant to NRS 34.700. Counsel shall advise the client as to the effect of filing a pretrial writ on his speedy trial rights and provide an evaluation of the likelihood of success to assist in the decision to waive such rights, which rests with the client, after consultation with counsel.
  - (d) Counsel should only withdraw or decide not to file a motion 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.
  - (e) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:
    - 1. investigation, discovery, and research relevant to the claim advanced;
    - 2. subpoenaing of all helpful evidence and witnesses; and
    - 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.
  - (f) Requests or agreements to continue a trial date shall not be made without consultation with the client.
  - (g) Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

**Standard 4-9: Plea Negotiations**

- (a) Under no circumstances should defense counsel recommend to a client acceptance of a plea offer unless appropriate investigation and study of the

case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial. (b) Counsel should:

Deleted: 1

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements, including early case resolutions, with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges discussed in Standards 4-7(b) and 4-8 that would be abandoned as a result of accepting an offer ;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel must be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to: not to proceed to trial on the merits of the charges; to decline from asserting or litigating any particular pretrial motions; an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and 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: that the prosecution will not oppose the client's release on bail pending sentencing or appeal; that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction; to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution

agreement; that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct; that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range; that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the Division of Parole and Probation, a specified position with respect to the sanction to be imposed on the client by the court; and that the client will receive, or the prosecution will recommend, if permitted by case law or statute, specific benefits concerning the client's place and/or manner of confinement and/or release on parole.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and direct consequences of the agreement; and
2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

Deleted: potential

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

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 direct consequences the client will be exposed to by entering the plea; and
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.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing; and
2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

#### **Standard 4-10: Trial Preparation**

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Where appropriate, counsel should have the following materials available at the time of trial:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. voir dire questions;
4. outline or draft of opening statement;
5. cross-examination plans for all prospective prosecution witnesses;
6. direct examination plans for all prospective defense witnesses;
7. copies of defense subpoenas;
8. prior statements of all prosecution witnesses (e.g., preliminary hearing/grand jury transcripts, police reports/statements);
9. prior statements of all defense witnesses;
10. reports from all experts;
11. a list and copies or originals of defense and prosecution exhibits;
12. proposed jury instructions with supporting authority;
13. copies of all relevant statutes or cases; and

14. outline or draft of closing argument.
- (c) 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.
  - (d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence, use of prior convictions of client) and, where appropriate, counsel should prepare motions and memoranda in support of the client's position.
  - (e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
  - (f) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated or is not able to secure appropriate clothing for trial, counsel shall arrange for the provision of appropriate clothing for the client to wear in the courtroom.
  - (g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek an order to facilitate conferences with the client.
  - (h) If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.
  - (i) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

#### **Standard 4-11: Voir Dire and Jury Selection**

In preparing for and conducting jury selection, counsel should:

- (a) be familiar with the law governing selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire;

- (b) be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures;
- (c) seek access to any jury questionnaires that have been completed by jurors and should petition the court to use a special questionnaire when appropriate due to unique issues in the case;
- (d) should seek attorney-conducted voir dire and should develop, support, and file written voir dire questions if the court restricts attorney-conducted voir dire;
- (e) consider whether additional peremptory challenges should be requested due to the circumstances present in the case;
- (f) consider whether sensitive or unusual facts or circumstances of the case support sequestered voir dire of jurors;
- (g) consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client; and
- (h) object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

#### **Standard 4-12: 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.

#### **Standard 4-13: Trial**

- (a) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.

- (b) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (c) In preparing for cross-examination, counsel should:
  - 1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
  - 2. consider the need to integrate cross-examination, theory, and theme of the defense;
  - 3. avoid asking unnecessary questions that may hurt the defense case;
  - 4. anticipate witnesses that the prosecution may call in its case-in-chief and on rebuttal;
  - 5. create a cross-examination plan for all anticipated witnesses;
  - 6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
  - 7. review relevant statutes, regulations, and policies applicable to police witnesses; and
  - 8. consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of the expert or reliability of the anticipated opinion.

**Standard 4-14: Presenting the Client's Case**

- (a) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- (b) 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, counsel should, where appropriate, do the following:
  - 1. develop a plan for direct examination of each potential defense witness;

2. determine the implications that the order of witnesses may have on the defense case;
  3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  4. consider the possible use of character witnesses;
  5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  6. review all documentary evidence that must be presented; and,
  7. review all tangible evidence that must be presented.
- (d) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
  - (e) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
  - (f) Counsel should conduct redirect examination as appropriate.
  - (g) At the close of the defense case, counsel should seek an advisory instruction directing the jury to acquit when appropriate.

#### **Standard 4-15: Jury Instructions**

- (a) Counsel should be familiar with the appropriate rules of the court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of instructions typically given, and preserving objections to the instructions.
- (b) Counsel should always submit proposed jury instructions in writing.
- (c) Where appropriate, counsel should submit modifications to instructions proposed by the State or the court in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser-included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.
- (d) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

- (e) 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 ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.
- (f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instruction, object to deviations unfavorable to the client, and if necessary, request additional or curative instructions.
- (g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

**Standard 4-16: Obligations of Counsel in Final Sentencing Hearings**

Among counsel's obligations in the sentencing process are:

- (a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the presentence report.
- (b) To present to the court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.
- (c) To develop a plan that seeks to achieve the least restrictive and burdensome sentencing alternative that is most favorable to the client and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

**Standard 4-17: Preparation for Sentencing**

In preparing for sentencing, counsel shall:

- (a) inform the client of the applicable sentencing requirements, options, alternatives including any applicable regulations and statutory minimum requirements concerning parole eligibility;
- (b) maintain 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 his or her background and personal history, prior criminal record, employment history, skills, education, medical history and condition, and financial status and obtain from the client sources that can corroborate the information provided by the client;
- (d) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- (e) ensure the client has an opportunity to examine the presentence report;
- (f) 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 deliver to the court;
- (g) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings;
- (h) inform the client of the sentence or range of sentences counsel will ask the court to consider;
- (i) where appropriate, collect 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;
- (j) prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing; and
- (k) advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution where applicable.

**Standard 4-18: Official Presentence Report**

- (a) Counsel should prepare the client for the interview with the official preparing the presentence report.
- (b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:
  - 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 waiving the report;
  - 2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
  - 3. attend any interview of the client by an agency presentence investigator where appropriate;
  - 4. review the completed report prior to sentencing;
  - 5. take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
  - 6. 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
  - 7. make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

**Standard 4-19: Sentencing Hearing**

- (a) At the sentencing proceeding, counsel shall take steps necessary to advocate fully for the requested sentence and to protect the client's interest.

- (b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- (c) Where appropriate under statutory or case law, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.
- (d) Counsel should obtain a copy of the judgment and review it promptly to determine that it is accurate or to take steps to correct any errors.

**Standard 4-20: Post-Disposition Responsibilities**

Counsel should be familiar with the procedures available to the client after disposition. Counsel should:

- (a) 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) inform the client of his or her right to appeal a conviction after trial, after a conditional plea or after a guilty plea, pursuant to Roe v. Flores-Ortega, 528 U.S. 470 (2000) and Thomas v. State, 115 Nev. 148 (1999), or where counsel has received new information indicating the plea was not entered in a knowing, intelligent, and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision. If the client instructs counsel to appeal after consultation with counsel, even if counsel believes that an appeal will not be successful or is not cognizable, the attorney 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) fulfill the responsibilities set forth in NRAP 3C if the conviction qualifies for "fast track" treatment under the rule. Counsel shall order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal. Counsel shall thoroughly research the issues in

the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e);

- (d) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;
- (e) inform the client of any right that may exist to be released pending disposition of the appeal;
- (f) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed;
- (g) include in the advice to the client an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-conviction proceedings. Counsel should provide a pro se habeas packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise the client of the relevant time frames for filing state and federal habeas corpus petitions and provide information and advice necessary to protect a client's right to post-conviction relief; and
- (h) inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

## JUVENILE DELINQUENCY CASES

Counsel for juveniles in delinquency proceedings should abide by the Nevada Indigent Defense Standards of Performance applicable to felony and misdemeanor cases where applicable. The performance standards set forth below recognize the need to meet some concerns particular to representation of juveniles in delinquency proceedings.

### Standard 5-1: The Role of Defense Counsel

(a) The role of counsel in delinquency cases is to be an advocate for the child. Counsel should:

1. Ensure that the interests and rights of the client are fully protected and advanced irrespective of counsel's opinion of the client's culpability;
2. fully explain to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings;
3. make sure the juvenile fully understands all court proceedings, as well as all his or her rights and defenses;
4. upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent;<sup>1</sup>
5. not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile;
6. fully inform both the juvenile and juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications;

---

<sup>1</sup>The use of the word "parent" in these Standards refers to parent, guardian, custodial adult, or person assuming legal responsibility for the child.

7. present the juvenile with comprehensible choices, help the juvenile reach his or her own decisions, and advocate the juvenile's viewpoint and wishes to the court; and
  8. refrain from waiving substantial rights or substituting counsel's own view, or the parents' wishes, for the position of the juvenile.
- (b) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases, both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

**Standard 5-2: Education, Training, and Experience of Defense Counsel**

- (a) Counsel who undertake the representation of a client in a juvenile delinquency proceeding shall have the knowledge and experience necessary to represent a child diligently and effectively.
- (b) Counsel should consider working with an experienced juvenile delinquency practitioner as a mentor when beginning to represent clients in delinquency cases.
- (c) At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.
- (d) Counsel shall familiarize themselves with Nevada statutes relating to delinquency proceedings, as well as the Nevada Rules of Criminal Procedure, Nevada Rules of Evidence, Nevada Rules of Appellate Procedure, relevant caselaw, and any relevant local court rules. Counsel should be knowledgeable about and seek ongoing formal and informal training in the following areas:
  1. Competency and Developmental Issues:
    - (A) Child and adolescent development;
    - (B) Brain development;

- (C) Mental health issues, common childhood diagnoses, and other disabilities; and
  - (D) Competency issues and the filing and processing of motion for competency evaluations.
2. Attorney/Client Interaction:
- (A) Interviewing and communication techniques for interviewing and communicating with children, including police interrogations and Miranda considerations;
  - (B) Ethical issues surrounding the representation of children and awareness of the role of the attorney; and
  - (C) Awareness of the role of the attorney versus the role of the guardian ad litem, including knowledge of how to work with a guardian ad litem
3. Department of Juvenile Justice Services/Other State and Local Programs:
- (A) Diversion services available through the court and probation;
  - (B) The child welfare system and services offered by the child welfare system;
  - (C) Nevada Department of Child and Family Services facility operations, release authority, and parole policies;
  - (D) Community resources and service providers for children and all alternatives to incarceration available in the community for children;
  - (E) Intake, programming, and education policies of local detention facility;
  - (F) Probation department policies and practices; and
  - (G) Gender specific programming available in the community.
4. Specific Areas of Concern:
- (A) Police interrogation techniques and Miranda consideration, as well as other Fourth, Fifth, and Sixth Amendment issues as they relate to children and adolescents;
  - (B) Substance abuse issues in children and adolescents;
  - (C) Special education laws, rights, and remedies;

- (D) Cultural diversity;
- (E) Immigration issues regarding children;
- (F) Gang involvement and activity;
- (G) School-related conduct and zero tolerance policies ("school to prison pipeline" research, search and seizure issues in the school setting);
- (H) What factors lead children to delinquent behaviors;
- (I) Signs of abuse and/or neglect;
- (J) Issues pertaining to status offenders; and
- (K) Scientific technologies and evidence collection.

### **Standard 5-3: Adequate Time and Resources**

Counsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of competent legal service, endangers the juvenile's interest in the speedy disposition of charges, or risks breach of professional obligations. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, knowledge, and experience and will pursue adequate resources to offer competent legal services in a particular matter. If, after accepting an appointment, counsel finds he or she is unable to continue effective representation, counsel should consider appropriate caselaw and ethical standards in deciding whether to move to withdraw or take other appropriate action. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

Deleted: quality

Deleted: quality

### **Standard 54: Initial Client Interview**

Deleted:

- (a) Preparing for the Initial Interview: Prior to conducting the initial interview, the attorney should:
  - 1. be familiar with the elements of the offense and the potential punishment;

2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by the Department of Juvenile Justice and law enforcement;
  3. be familiar with detention alternatives and the procedures that will be followed in setting those conditions;
  4. consider all possible defenses and affirmative defenses and any lesser-included offenses that may be available;
  5. consider the collateral consequences attaching to any possible sentencing, for example parole or probation revocation, immigration consequences, sex offender registration and reporting provisions, loss of driving privileges, DNA collection, school suspension or expulsion, consequences relating to public housing, etc.; and
  6. review the petition for any defects.
- (b) Counsel shall make every effort to conduct a face-to-face interview with the client as soon as practicable and sufficiently in advance of any court proceedings. In cases where the client is detained or in custody, counsel should make efforts to visit with the client within 24-48 hours after receiving the appointment. Counsel should:
1. interview the client in a setting that is conducive to maintaining the confidentiality of communications between attorney and client;
  2. maintain ongoing communications and/or meetings with the client, which are essential to establishing a relationship of trust between the attorney and client;
  3. provide the client with a method to contact the attorney, including information on calling collect from detention facilities;
  4. utilize the assistance of an interpreter as necessary and seek funding for such interpreting services from the court;
  5. work cooperatively with the parents, guardian, and/or other person with custody of the child to the extent possible without jeopardizing the legal interests of the child;
  6. consider the client's age, developmental stage, mental retardation, and mental health diagnoses in all cases, understand the nature and

- consequences of a competency proceeding, and resolve issues of raising or not raising competency in consultation with the client; and
7. be alert to issues that may impede effective communication between counsel and client and ensure that communication issues such as language, literacy, mental or physical disability, or impairment are effectively addressed to enable the client to fully participate in all interviews and proceedings. Appropriate accommodations should be provided during all interviews, preparation, and proceedings, which might include the use of interpreters, mechanical or technological supports, or expert assistance.

**Standard 5-5: Detention Hearing**

- (a) When appropriate, counsel should attempt to obtain the pretrial release of any client. Counsel should advocate for the use of alternatives to detention for the youth at the detention hearing. Such alternatives might include electronic home monitoring, day or evening reporting centers, utilization of other community-based services such as after school programming, etc. If counsel is appointed after the initial detention hearing or if the youth remains detained after the initial detention hearing, counsel should consider the filing of a motion to review the detention decision.
- (b) If the youth's release from secure detention is ordered by the court, counsel should carefully explain to the juvenile the conditions of release from detention and any obligations of reporting or participation in programming. Counsel should take steps to secure appointment of counsel to juveniles prior to the detention hearing.

**Standard 5-6: Informal Supervision/Diversion**

Counsel should be familiar with all available alternatives offered by the court or available in the community. Such programs may include diversion, mediation, or other informal programming that could result in a juvenile's case being dismissed, handled informally, or referred to other community programming. When appropriate

and available, counsel should advocate for the use of informal mechanisms that could steer the juvenile's case away from the formal court process.

**Standard 5-7: Case Preparation and Investigation**

An appropriate investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions or statements to defense counsel of facts or the youth's stated desire to plead guilty, however counsel may consider such admissions statements or desires in determining the scope of the investigation.

Counsel should:

- (a) obtain and examine all charging documents, pleadings, and discovery;
- (b) request and secure discovery, including exculpatory/impeaching information;
- (c) request the names and addresses of prosecution witnesses, their prior statements, and criminal records;
- (d) obtain the prior statements of the client and his or her delinquency history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, records of the client, including, but not limited to, educational, psychological, psychiatric, substance abuse treatment, children services records, court files, and prior delinquency records and be prepared to execute any needed releases of information or obtain any necessary court orders to obtain these records;
- (e) research and review the relevant statutes and caselaw to identify elements of the charged offense(s), defects in the prosecution, and available defenses;
- (f) conduct an in-depth interview of the client to assist in shaping the investigation;
- (g) consider seeking the assistance of an investigator when necessary and consider moving the court for funding to pay for the use of an investigator;

Deleted: thorough

Deleted: 1

- (h) attempt to locate all potential witnesses and have them interviewed (if counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
- (i) obtain the assistance of such experts as are appropriate to the facts of the case;
- (j) consider going to the scene of the alleged offense or offenses in a timely manner;
- (k) consider the preservation of evidence and document such by using photographs, measurements, and other means; and

#### **Standard 5-8: Pretrial Motions**

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief that the court has discretion to grant. Counsel shall review all statements, reports, and other evidence and interview the client to determine whether any motions are appropriate. Counsel should timely file all appropriate pretrial motions and participate in all pretrial proceedings.

- (a) The decision to file pretrial motions should be made after appropriate investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
  - 1. the pretrial detention of the client;
  - 2. the constitutionality of the implicated statute(s);
  - 3. defects in the charging process or the charging document;
  - 4. severance of charges or defendants;
  - 5. discovery issues;
  - 6. suppression of evidence or statements;
  - 7. speedy trial issues; and
  - 8. evidentiary issues.
- (b) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may

Deleted: thorough

be necessary to protect the client's rights against later claims of waiver or procedural default.

- (c) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:
1. investigation, discovery, and research relevant to the claim advanced;
  2. subpoenaing of all helpful evidence and witnesses; and
  3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to that hearing, including the benefits and costs of having the client testify.
- (d) Requests or agreements to continue a contested hearing date shall not be made without consultation with the client. Counsel shall diligently work to complete the investigation and preparation in order to be fully prepared for all court proceedings. In the event that counsel finds it necessary to seek additional time to adequately prepare for a proceeding, counsel should consult with the client and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well-articulated reasons on the record in the event it becomes an appealable issue.

#### **Standard 5-9: Plea Negotiations**

- (a) Under no circumstances should defense counsel recommend to a client acceptance of a plea offer unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.
- (b) Counsel should:
1. with the consent of the client, explore diversion and other informal and formal admission of disposition agreements with regard to the allegations;

2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
  3. keep the client fully informed of the progress of the negotiations;
  4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges that would be abandoned as a result of accepting an offer;
  5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
  6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.
- (c) In developing a negotiation strategy, counsel must be completely familiar with:
1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
    - (A) not to proceed to trial on the merits of the charges;
    - (B) to decline from asserting or litigating particular pretrial motions;
    - (C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
    - (D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal/delinquent activity.
  2. benefits the client might obtain from a negotiated settlement, including, but not limited to:
    - (A) that the prosecution will not oppose the client's release pending disposition 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) that one or more of the charged offenses may be dismissed or reduced 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 delinquent conduct;
  - (E) that the client will receive, with the agreement of the court, a specified sentence or sanction;
  - (F) that the prosecution will take, or refrain from taking, at the time of disposition and/or in communications with the probation department a specified position with respect to the sanction to be imposed on the client by the court; and
  - (G) 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 probation.
- (d) In the decision-making process, counsel should:
1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
  2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client; where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.
- (e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:
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 intelligently made;
  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 the plea; and
  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.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending disposition hearing. Where the client has been released, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release pending disposition; and
2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

**Standard 5-10: Adjudicatory Hearing**

(a) Counsel should develop a theory of the case in advance of the adjudicatory hearing. Counsel shall issue subpoenas and obtain court orders for all necessary evidence to ensure the evidence's availability at the adjudicatory hearing. Sufficiently in advance of the hearing, counsel shall subpoena all potential witnesses. Where appropriate, counsel should have the following materials available at the time of the contested hearing:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all prospective prosecution witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses;
8. prior statements of all defense witnesses;
9. reports from all experts;
10. a list and copies of originals of defense and prosecution exhibits;
11. copies of all relevant statutes or cases; and
12. outline or draft of closing argument.

- (b) 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.
- (c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence), and where appropriate, counsel should prepare motions and memoranda in support of the client's position.
- (d) Throughout the adjudicatory process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
- (e) Counsel should advise the client as to suitable courtroom dress and demeanor.
- (f) Counsel should plan with the client the most convenient system for conferring throughout the contested hearing.
- (g) During the adjudicatory hearing, counsel shall raise objections on the record to any evidentiary issues; in order to best preserve a client's appellate rights, counsel shall object on the record and state the grounds for such objection following the court's denial of any defense motion.
- (h) Counsel shall ensure that an official court record is made and preserved of any pretrial hearings and the adjudicatory hearing.
- (i) Counsel shall utilize expert services when appropriate and petition the court for assistance in obtaining expert services when necessary.
- (j) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.
- (k) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (l) In preparing for cross-examination, counsel should:
  - 1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;

2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate evidence that the prosecution may call in its case-in-chief and on rebuttal;
5. create a cross-examination plan for all anticipated witnesses;
6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances; and
7. review relevant statutes, regulations, and policies applicable to police witnesses and consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of experts or reliability of the anticipated opinion.

**Standard 5-11: Presenting the Client's Case**

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- (c) 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.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:
  1. develop a plan for direct examination of each potential witness;
  2. determine the implications that the order of witnesses may have on the defense case;

3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  4. consider the possible use of character witnesses;
  5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  6. review all documentary evidence that must be presented; and
  7. review all tangible evidence that must be presented.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examination as appropriate.

**Standard 5-12: Objections to the Hearing Master's Recommendations**

Counsel should advise client of the role of the Hearing Master and the procedure and purpose of filing objections to the Hearing Master's findings and recommendations. Counsel should review the Hearing Master's decision for possible meritorious grounds for objection. If the Hearing Master's decision does not contain findings of facts and conclusions of law, counsel request in writing such findings of facts and conclusions of law in accordance with NRS 62B.030(3). Counsel should ensure that the transcript of the proceeding is timely obtained and objections are timely filed in accordance with NRS 62B.030(4). Counsel should draft and file objections and supplemental points and authorities with specificity and particularity and participate in the oral argument if scheduled.

**Standard 5-13: Preparation for the Disposition Hearing**

Preparation for disposition should begin upon appointment. Counsel should:

- (a) be knowledgeable of available dispositional alternatives both locally and outside of the community;

- (b) review, in advance of the dispositional hearing, the recommendations of the probation department or other court department responsible for making dispositional recommendations to the court;
- (c) inform their client of these recommendations and other available dispositional alternatives; and
- (d) be familiar with potential support systems of the client such as school, family, and community programs and consider whether such supportive services could be part of a dispositional plan.

**Standard 5-14: The Disposition Process**

During the disposition process, counsel should:

- (a) correct inaccurate information that may be detrimental to the client and object to information that is not properly before the court in determining the disposition;
- (b) present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports;
- (c) develop a plan that seeks to achieve the least restrictive and burdensome disposition alternative and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable disposition and alternatives, and other information pertinent to the disposition decision;
- (d) consider filing a memorandum setting forth the defense position with the court prior to the dispositional hearing;
- (e) maintain contact with the client prior to the disposition hearing and inform the client of the steps being taken in preparation for sentencing;
- (f) obtain from the client and/or the client's family relevant information concerning his or her background and personal history, prior delinquency record, employment history, education, and medical history and condition and obtain from the client sources that can corroborate the information provided;

- (g) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- (h) ensure the client has an opportunity to examine the disposition report;
- (i) inform the client of his or her right to speak at the disposition hearing and assist the client in preparing the statement, if any, to deliver to the court;
- (j) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings;
- (k) collect affidavits to support the defense position when appropriate and prepare witnesses to testify at the sentencing hearing and request the opportunity to present tangible and testimonial evidence;
- (l) prepare to address victim participation either through the victim impact statement or by direct testimony at the disposition hearing; and
- (m) ensure that an official court record is made and preserved of any disposition hearing.

**Standard 5-15: The Disposition Report**

Counsel should:

- (a) become familiar with the procedures concerning the preparation, submission, and verification of the disposition report;
- (b) prepare the client for the interview with the official preparing the disposition report;
- (c) determine whether a written disposition report will be prepared and submitted to the court prior to the disposition hearing; where preparation of the report is optional, counsel should consider the strategic implications of requesting report;
- (d) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
- (e) attend any interview of the client by an agency disposition investigator; review the completed report prior to sentencing;
- (f) take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report; and

- (g) take reasonable steps to ensure that a corrected copy of the report is sent to corrections officials if there are any amendments made to the report by the court.

**Standard 5-16: Post-Disposition Responsibilities/Advocacy**

Following the disposition hearing, counsel should:

- (a) review the disposition order to ensure that the sentence is clearly and accurately recorded and take steps to correct any errors and ensure that it includes language regarding detention credits and plea agreements;
- (b) be aware of sex offender registration requirements and other requirements, both state and federal, imposed on sex offenders and communicate those requirements to the client;
- (c) be familiar with the procedure for sealing and expunging records, advise the client of those procedures, and utilize those procedures when available;
- (d) be familiar with the procedures to request a new contested hearing, 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 and advise the client of his or her rights with regard to those procedures;
- (e) inform the client of his or her rights to representation and to appeal an adjudication after a contested hearing, after a conditional plea or after an admission that was not entered in a knowing, intelligent, and voluntary manner and document the client's decision regarding appeal;
- (f) ensure that the notice of appeal and request for appointment of counsel is filed, or that the client has obtained or the court has appointed, appellate counsel in a timely manner even if counsel believes that an appeal will not be successful or is not cognizable;
- (g) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;
- (h) inform the client of any right that may exist to be released pending disposition of the appeal;
- (i) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed; and

- (j) include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-adjudication proceedings.

**Standard 5-17: Transfer Proceedings to Adult Court**

- (a) Transfer proceedings require special knowledge and skill due to the severity of the consequence of the proceedings. Counsel shall not undertake representation of children in these areas without sufficient experience, knowledge, and training in these unique areas. It is recommended that counsel representing children in transfer proceedings have litigated at least 2 criminal jury trials or be assisted by co-counsel with the requisite experience.
- (b) Counsel representing juveniles in transfer proceedings should:
  - 1. be fully knowledgeable of adult criminal procedures and sentencing;
  - 2. be fully knowledgeable of the legal issues regarding probable cause hearings and transfer proceedings;
  - 3. investigate the social, psychological, and educational history of the child;
  - 4. retain or employ experts including psychologists, social workers, and investigators, as necessary and appropriate under applicable case law, in order to provide the court with a comprehensive analysis of the child's strengths and weaknesses in support of retention of juvenile jurisdiction;
  - 5. be knowledgeable of the statutory findings the court must make before transferring jurisdiction to the criminal court and any caselaw affecting the decision;
  - 6. be prepared to present evidence and testimony to prevent transfer, including testimony from teachers, counselors, psychologists, community members, probation officers, religious associates, employers, or other persons who can assist the court in determining that juvenile jurisdiction should be retained;
  - 7. ensure that all transfer hearing proceedings are recorded;
  - 8. preserve all issues for appeal; and

9. investigate possible placements for the client if the case remains in juvenile court.

## **Indigent Defense Commission Comments on the Performance Standards**

***John Berkich, Assistant Washoe County Manager:***

Writing on behalf of Washoe County, the Administration supports Version A which is the original standards including the preamble together with the agreed-upon changes to date. As to Version B, the Administration supports only those unresolved changes proposed by the Minority.

## **Report of the Nevada Supreme Court's Indigent Defense Commission, Rural Subcommittee Regarding the Revised Performance Standards from ADKT 411**

Pursuant to the Nevada Supreme Court's (Court) Administrative Docket 411 (ADKT 411) entered on July 8, 2008, the Indigent Defense Commission (Commission), Rural Subcommittee (Subcommittee) met, via teleconference, on July 23, 2008 to discuss and consider the revisions to the ADKT 411 Performance Standards presented to, and filed with the Court, by Franny Forsman and Nancy Becker. The following summarizes the position of the Subcommittee developed on the conference call, and after careful review of the Revised Performance Standards (Standards).

- 1) It is the consensus of the Subcommittee that the Proposed Resolution on page 6 of the Indigent Defense Commission Majority/Minority Reconciled Report dated July 14, 2008 (Report) is the appropriate manner in which to settle the unresolved dispute regarding the use of the terms "quality and high quality" in the Standards.
- 2) The Subcommittee offers no consensus opinion on the un-reconciled points in Standard 2-3(a) Training in Capital Cases, however wishes to comment that, while Subcommittee is in philosophical agreement that sufficient training must be made available to members of a capital case defense team, rural counties are unable to shoulder the burden of an unfunded mandate to provide that training at county expense in the case of non-employee, appointed counsel. The Subcommittee suggests that funding for such training be made available by the State, the Court, the State Bar, or through some other mechanism that does not place the burden on cash-strapped counties.
- 3) The subcommittee offers no consensus opinion regarding Section VII of the Report regarding Collateral Consequences
- 4) The Subcommittee offers no consensus opinion regarding Section IX of the Report regarding Standard 3-1 – Appellate Counsel, and the duty to advise clients of their right to appeal.

In both cases where the Subcommittee offers no consensus opinion regarding the major areas of unresolved dispute between the Majority and the Minority of the Commission, as identified by Franny Forsman and Nancy Becker, and the remaining Standards still unresolved, the Subcommittee offers the attached opinions of individual members, and relies on the judgment of the Court.

## **Rural Subcommittee Comments Regarding the Performance Standards**

***John Lambrose, Assistant Federal Public Defender and Co-Chair:***

I support the Majority position across the board.

***Judge Dan Papez, Seventh Judicial District Court and Co-Chair:***

1. I concur with the recommendation that defense counsel should advise the client of the right to appeal. In line with what Federal Courts do, I always advise a criminal defendant of his/her right to appeal during a plea canvass, even if that right has been severely curtailed upon a guilty plea. I believe this practice will assist in reducing post-conviction litigation.

2. I disagree with the recommendation that counsel be required to advise clients of collateral consequences of a guilty plea/criminal conviction. Nevada law and a majority of states do not require this practice presently as this area, (e.g. immigration issues), appears to be outside of the expertise of most criminal defense practitioners. Moreover, determining what constitutes a collateral consequence could be unduly subjective and be a part of an ever-expanding list.

3. Regarding the Standard for Initial Client Interview, It should be noted that it may be difficult for out of the area counsel to travel to a rural jurisdiction for an initial interview within 48 hours after appointment to the case. Regarding the recommendation that counsel/client meetings be conducted in a confidential setting, due to security issues or a lack of such a setting, it is sometimes difficult if not impossible to conduct such meetings in a confidential settings, e.g. within Ely State Prison or some rural courthouses where holding facilities do not allow for such settings. I agree with the suggested language that such meetings occur in a confidential setting "whenever possible."

***Judge Andrew Puccinelli, Fourth Judicial District Court:***

I have read the unresolved differences. I agree with Nancy Becker's position. I am not sure that Ms. Forsman understands the problems encountered in the rural counties. Thanks for your work John and keeping us informed.

***Jim Shirley, Pershing County District Attorney:***

See attached letter.

Office of  
**District Attorney**  
**Pershing County**  
P.O. Box 299/400 Main Street  
Lovelock, Nevada 89419

**JIM C. SHIRLEY**  
District Attorney

Telephone (775)273-2613  
Fax (775)273-7058

Friday, August 01, 2008

**John R. McCormick**  
**Rural Courts Coordinator**  
**Administrative Office of the Courts**  
**INDIGENT DEFENSE COMMISSION**  
**VIA E-MAIL**

**RE: RURAL SUBCOMMITTEE PERFORMANCE STANDARDS COMMENTS**

Dear John:

I would like to communicate my appreciation to Nancy and Franny for their hard work in making changes and compromises. The Standards are much better than they were when we started this process a few months ago. On behalf of Pershing County, there is still a desire to not have imposed standards, but to use the Standards as objectives for training. The County understands and recognizes that there is a wish by members of the Supreme Court to have standards in place. However, the County believes that funding for training would improve indigent defense services more significantly than any written set of detailed rules.

Many of the issues that were addressed in the initial pleadings that were filed on behalf of Pershing and Humboldt Counties have been addressed. As I have stated in previous meetings and in my correspondence, the unfunded mandate issue needs to be addressed. Language similar to that arrived at for training of individuals in Capital cases should be included the pre-amble as it relates to whether the standards are an unfounded mandate (i.e. that the standards are not designed to create an unfunded mandate upon the counties and that funding to implement the changes reflected in the standards should be provided by at the State level). The voters of this state have been clear that unfunded mandates on local government are not appropriate.

During our meetings, it was mentioned that the counties have added more law enforcement personnel to their offices. Pershing County has certainly not benefited from any additional law enforcement personnel (in fact this year, one position is being cut). The rural counties are truly facing severe problems with revenue. In a time where the local governments may be facing layoffs and other cutbacks, forcing the counties to spend more money where it is not constitutionally required seems out of line. If the Standards do in deed place an unfunded mandate on local government as the preamble indicates that they do, the County has to lodge its current objection to any unfunded mandate. If the Standards are not placing unfunded mandates upon the counties, there certainly is no basis for that objection.

The County has placed its objections on the record in previous pleadings and discussions. I leave it to the Court to decide the best way to deal with those issues and the unfunded mandate issue. Thank you for the opportunity to participate in this process.

Sincerely,

Jim C. Shirley  
Pershing County District Attorney

