

EXHIBIT 14

# PROPOSED REVISIONS

to the

# STANDARDS

for Counsel

Representing Individuals  
Pursuant to the Montana Public  
Defender Act

*For discussion at the December 6, 2006 meeting of  
the Montana Public Defender Commission.*

**Standards for Counsel**  
**Representing Individuals Pursuant to the Montana Public Defender Act**

**I. INTRODUCTION**

**A. Purpose:**

These standards are intended to encourage and allow attorneys representing indigent and all other persons entitled to ~~representation at government expense~~public legal representation to perform to a high standard of representation and to promote excellence and professionalism in the representation of those persons. The following standards are adopted to foster a legal representation system in which:

1. —The public legal representation function, including the selection, funding, and payment of counsel for indigent clients, is as independent from political influence and judicial supervision as possible given the geographic and demographic diversity of the State of Montana;

2. —Those persons entitled to public legal representation are adequately represented through a legal services delivery system consisting of defender offices, the active participation of the private bar, or both;

3. —Applicants requesting legal services based upon indigence are screened for eligibility based upon uniform standards, then assigned and notified of an appointment as soon as is practically possible;

4. —Counsel has sufficient time, confidential space, and confidential electronic communications to converse with the client;

5. —Counsel's workload matches counsel's capability;

6. —Counsel's ability, training, and experience match the complexity of the case;

7. —To the extent possible, the same attorney continuously represents the client until completion of the case;

8. —Counsel for a client entitled to ~~legal representation at public expense~~public legal representation has parity of resources with opposing counsel and is included as an equal partner in the justice system; and,

9. —Counsel is required to obtain continuing legal education and training.

### **B. Application:**

1. These standards are intended 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 counsel to determine the effectiveness of representation. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

2. These standards apply generally to all counsel who represent persons at state expense pursuant to the Montana Public Defender Act. In cases where these standards conflict with or contradict the standards established for representation in certain specific types of cases, the more specific standards shall apply.

### **C. Discrimination:**

1. No government ~~entity-agency~~ or any entity contracting with a government agency, in its selection of an attorney, firm, or agency to provide public ~~defense~~ legal representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the ~~grounds-basis~~ of race, color, religion, national origin, age, marital status, sex, sexual orientation or disability. Government entities, defender offices, contract counsel, and assigned counsel shall comply with all federal, state, and local non-discrimination ~~requirements~~ laws.

## **II. CASE SELECTION**

### **A. Nature of Case:**

1. Counsel may be assigned to represent persons in all cases as described in the Montana Public Defender Act and in any other case deemed appropriate by the Montana Supreme Court.

### **B. Publicizing of Services:**

1. The availability of public defender services should be publicized by the ~~Public Defender's Office~~ Office of the State Public Defender, Regional Offices ~~regional public defender offices,~~ and Local offices ~~local public defender offices~~. Reasonable efforts should be made to ensure that notices containing information about public defender services and how to access those services are posted conspicuously in police stations, jails and wherever else it is likely to give effective notice.

### III. THE ATTORNEY-CLIENT RELATIONSHIP

#### A. Nature of Representation:

**Goal: The paramount obligation of counsel is to provide quality- representation and diligent advocacy for to the client at all stages of the representation.**

1. To provide quality representation and diligent advocacy, counsel must preserve, protect, and promote the client's rights and interests, and be loyal to the client.

2. Public ~~Defenders~~defenders, contract counsel, shall provide services to all clients in a professional, skilled manner consistent with ~~these~~, the Montana Rules of Professional Conduct, case law, applicable court rules defining the duties of counsel and the rights of their clients, and these ~~standards~~Standards.

#### B. Initial Contact:

**Goal: Counsel shall be made available to indigent defendants at the earliest opportunity.**

1. Effective representation should be available to an eligible person; upon request of the person, or someone acting on the person's behalf, to a court, a public defender office, or contract counsel as soon as the person is under investigation, arrested, charged with a criminal offense, or becomes a party to any litigation in which the person is entitled to ~~publicly funded~~public legal representation, or when the interests of justice require representation. This ~~Standard~~standard does not create a duty of counsel to provide indigent legal representation to a person beyond those duties imposed by statutes and case law.

2. A person; not in custody; shall be advised of the right to representation and, if eligible, offered the services of counsel at the person's first appearance before a judicial officer ~~and offered the services of counsel~~. Assigned counsel shall make an appointment at counsel's earliest convenience, prior to the next court appearance, to personally meet with any prospective client. A person in custody who is not represented by retained counsel shall be entitled to consult with a public defender for not less than fifteen minutes prior to his or her first court appearance. If feasible, counsel should offer representation for the initial appearance for the purposes of making a bond argument. When a court incarcerates a person who appears before it and that person requests indigent representation, counsel shall make personal contact with the person within three working days.

3. When it is determined that a person is ineligible for ~~publicly provided~~public legal representation, counsel should decline the case and advise the person of how to appeal the determination of ineligibility. However, should immediate service be

necessary to protect that person's ~~interest~~interests, such service should be rendered until the person has had the opportunity to retain counsel. In that event, the ~~Public Defender's Office~~Office of the State Public Defender shall be reimbursed for counsel's services at the current hourly rate for contract counsel.

### **C. Duration of Representation:**

**Goal: Once a case is assigned to an attorney, continuous and uninterrupted representation by the same attorney is the most effective method of representation.**

1. Counsel shall provide continuous and uninterrupted representation to eligible clients from time of entry into the case through final disposition in the trial court. The Appellate Defender's Office shall provide appellate representation before the Montana Supreme Court.

2. In the event ~~the~~that counsel is no longer employed by a public defender office, or, counsel's contract has expired, and counsel's employment or contract has not been terminated for good cause, ~~either the Regional Deputy Public Defender~~Deputy Regional Public Defender, or Contract Coordinator, in his or her discretion, may direct that counsel shall continue to represent the client through final disposition of the case at the rate of compensation for assigned counsel set forth in these ~~standards~~Standards. Completion of a client's case shall not be required if counsel is unable to continue representation or is relocating to a residence outside the Region. These ~~standards~~Standards shall not prohibit counsel from withdrawing from a case in which a court has recognized a conflict of interest for counsel or in which a client is found to be ineligible for indigent legal services.

3. In the event that a ~~Court~~court should deem it appropriate to set an evidentiary hearing on a *pro se* petition for post-conviction relief, the ~~Public Defender's Office~~Office of the State Public Defender shall assign previously assigned counsel for the petitioner, unless the petition raises an issue of ineffective assistance of counsel. Ineffective assistance of counsel shall be handled by the ~~Appellate Defender's Office~~Office of the Appellate Defender.

### **D. Termination of Employment:**

1. ~~Public Defender Office standards~~The Office of the State Public Defender Standards, contracts for indigent legal services, and local guidelines for assigned counsel shall include the grounds for termination. Termination of employment or a contract, after any probationary period but before the expiration of the term of employment or contract, shall only be for good cause. Good cause shall include the failure of counsel to render adequate representation to clients,; the willful disregard of the rights and best interests of the client,; a violation of the Montana Rules of Professional Conduct,; or the willful disregard of these ~~standards~~Standards. Representation in an individual case establishes

an inviolable attorney-client relationship. ~~Therefore, Except as otherwise provided by these standards~~Standards, removal of counsel from representation, ~~therefore; normally~~ should not occur over the objection of the client and counsel.

#### **E. Conflicts of Interest:**

**Goal: The duty of loyalty to the client is paramount.**

1. Organization of the State Public Defender System: The State Public Defender System is made up of eleven Regional Public Defender Offices, the Office of the Appellate Defender, and various local offices, ~~and contract attorneys, and the Office of the Appellate Defender.~~ The Office of the Appellate Defender ~~Office~~ is independent from all trial division offices.

Each local office is under the direct supervision of a Regional Deputy Public Defender. The Regional Deputy Public Defenders are responsible for directing, coordinating, and evaluating the work of attorneys employed in the local office and any contract attorneys that are also ~~under assigned to his or her overall supervision.~~ The Regional Deputy Public Defenders are solely responsible for providing guidance to and determining litigation strategy for attorneys ~~under assigned to his or her~~ their supervision.

Each ~~Regional~~ regional office has its own support staff and investigators, separate from those employed by any other independent office. Each regional office is physically separate from the others. No supervisor or staff from one ~~independent~~ independent office has access to files or premises of another ~~independent~~ independent office. However, a supervisor or staff from a ~~Regional~~ regional office has access to the files and premises of a local office that is under that ~~Regional~~ regional office's supervision. Each regional office has its own phone numbers, facsimile equipment, and computers. Although computer networks will be linked for purposes of reporting statistical information, confidential client information shall be separated by appropriate firewalls or other screening ~~devises~~ devices.

Neither the ~~State~~ Chief Public Defender nor anyone assigned to the State Public Defender System administrative division exercises general control or influence over the handling of individual trial division or appellate division cases, has access to client files or client confidences, has keys to any independent office, or has unsupervised access to the premises of any independent office. The Chief Public Defender, the Training Officer, and the Contract Officer, will take cases as assigned. The only other exception to this rule is for major litigation cases in which the State Public Defender's office may provide assistance through its Serious Crimes Litigation Unit. While the Office of the State Public Defender must sign off on all expenditures and coordinate in advance on some expenditures for expert witnesses, certain other investigative assistance, and equipment

purchases, these requirements are only to ensure compliance with State disbursement procedures and promote sound fiscal practices; they do not dictate trial strategy, which remains the exclusive province of the Regional Public Defender's Office.

2. State Public Defender System Organization and Conflicts of Interest: Each independent ~~Regional~~ regional office, ~~(including any local office under its supervision,)~~ is a separate "firm" for purposes of representing clients. Accordingly, a client with a conflict of interest with one ~~Regional~~ regional office may be represented by another ~~Regional~~ regional office. In such an event, ~~the client~~ he shall be screened through appropriate devices and procedures from having contact with any confidential information concerning any other case in the ~~other~~ conflicting ~~Region~~ region. A local office may not represent a client in conflict with a client of its regional parent office, or vice versa.

The Office of the Appellate Defender is also a separate "firm" for purposes of client representation. The Office of the Appellate Defender may represent a client in conflict with a client of any regional or local office, or in conflict with any contract attorney. In representing the former client or a trial division office, the Office of the Appellate Defender may take the position that a ~~r~~Regional or local office attorney, or a contract attorney, did not provide the client constitutionally effective assistance of counsel.

3. Examination for Potential Conflicts of Interest: Early detection of a potential conflict of interest is crucial to its appropriate resolution. As soon as is practicable following appointment to represent a client, a ~~regional public defender office~~ Regional Public Defender Office must examine its records to determine whether it may have a conflict of interest involving another current ~~client,~~ ~~or~~ former client, or otherwise. A ~~regional public defender office~~ Regional Public Defender Office must promptly update this examination as it investigates the case and receives discovery, with particular attention paid to finding out if conflicts may exist with anticipated witnesses for the prosecution or defense. In the event that a potential conflict of interest develops, the matter shall be referred to the ~~training~~ Training Coordinator, ~~for determination.~~ ~~The Training Coordinator~~ who shall be provided sufficient facts to decide the issue.

Clients and potential witnesses may also have information that will assist in uncovering possible conflicts of interest. Accordingly, each local public defender office should use standard questions for its client intake interviews and witness interviews that are designed to uncover conflicts on forms developed by the State Public Defender's Office.

In a situation in which a public defender's office makes an initial appearance on behalf of co-defendants, the clients must be cautioned at the first opportunity not to disclose confidential information concerning the case until a determination can be made if a conflict exists.

4. Policy and Guidance on Potential Conflicts of Interest: It is the policy of the Office of the State Public Defender that all State Public Defender Systems offices will comply with all legal requirements and ethical guidelines relating to conflicts of interest in the representation of clients. The Rules of Professional Conduct are mandatory authority. To the extent that this Standard may be interpreted as inconsistent with the Rules, the latter controls.

The difficulty in developing case-specific policies is that it is impossible to formulate rules that will apply in every situation. The following guidance contains examples of situations where conflicts are likely to result and others that are probably not conflicts of interest. This is not an exclusive list; however, this list contains many situations ~~we can expect to come up~~ in our cases. Any potential conflicts must be resolved on a case-by-case basis.

5. Codefendants: Public defender offices within a region will not represent codefendants except in rare situations when it is clear that each codefendant's interests are completely consistent with the others and each codefendant agrees ~~that is the case~~. Even so, the better course of action ~~is~~ would be to represent only one codefendant. If possible, the regional public defender should keep one of the cases. If the public defender can make a choice of codefendants before obtaining privileged information from ~~any~~ either one, ~~it~~ the choice should be the codefendant with the most serious or difficult case. Otherwise, the local public defender should keep the first codefendant to which the office is appointed and make arrangements for other counsel for the other codefendant.

6. Simultaneous representation of a defendant and a potential prosecution witness or alleged victim: There will almost always be a conflict of interest in this situation. There may not be a conflict if the prosecution ~~witness's~~ witness's credibility or the alleged victim's character is not ~~in~~ at issue, and the prosecution witness' testimony is not a crucial factor in the defendant's case. This issue should always be referred to the Training Coordinator.

7. A former client is a potential prosecution witness or alleged victim: This is not a *per se* conflict of interest, but a conflict will often exist in this situation. There may not be a conflict of interest if the prosecution ~~witness's~~ witness's credibility or the alleged victim's character is not ~~in~~ at issue, and the prosecution ~~witness's~~ witness's testimony is not a crucial factor in the defendant's case. In other cases, there may not be a conflict of interest if the local public defender's office has no privileged information about the former client that would be useful in representing the defendant.

~~Investigation reveals that another person may have committed the charged crime and that other person is a current client:~~ This will almost always be a conflict of interest.

8. Investigation reveals that another person may have committed the charged crime and that other person is a former client: This will almost always be a conflict of interest. This presents a conflict of interest if the local public defender's office has

privileged information about the former client that would further the theory that the former client is the perpetrator.

9. An employee of the local public defender's office is a potential prosecution witness or an alleged victim: Either situation is a conflict of interest.

10. The defendant was convicted in a previous case while represented by the local public defender's office and has a colorable claim of ineffective assistance of counsel in that case: This presents a conflict of interest as long as the ineffective assistance claim is unresolved.

911. Situations that do not present *per se* conflicts of interest: The following are not *per se* conflicts of interest. However, if the particular situation actually degrades the quality of client representation or creates an appearance from which a reasonable person would doubt that a local public defender's office can exercise independent professional judgment on behalf of a client, a conflict would exist. The individual circumstances control. They include:

- a. A dispute between client and attorney or other member of the local public defender's office staff.
- b. A client refuses to follow an attorney's advice, (unless it involves the commission of a future crime).
- c. A client files a grievance against the attorney with the attorney's supervisor or the Office of Disciplinary Counsel. A client should not be allowed to manipulate appointment of counsel by filing a frivolous grievance against an assigned attorney. However, a non-frivolous grievance may create a conflict of interest. A client complaint, even if not creating a conflict of interest, should usually justify the local public defender in changing assigned counsel as a matter of supervisory discretion.
- d. An alleged victim or potential prosecution witness has a friend or relative in the local public defender office.
- e. A witness for the defense is a present or former client, unless there is a reasonable possibility the testimony could turn adverse to the defendant or the theory of defense may implicate the present or former client.
- f. An employee of the public defender office is closely related by blood or marriage, is engaged to be married, or otherwise has a close relationship with an employee of a ~~state~~State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. Appropriate steps must be taken to disclose the relationship, ensure protection of privileged information, and reinforce confidence in the independent judgment and zealous representation of the public defender officer. A "close relationship" would include sharing a household and extended dating.
- g. An employee of the public defender office is a former employee of a ~~state~~State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. However, if the former employee that of

such office participated personally and substantially in a case, the public defender office would have a conflict of interest and be disqualified. If the former employee of ~~that~~ such office did not participate personally and substantially in the case, a timely deployed “ethical wall” will prevent disqualification of the public defender office.

- h. An employee of the public defender office is a former employee of another public defender office or other law firm that represented clients in conflict with the public defender office where the employee is now employed. This situation sometimes occurs when ~~public~~ Public Defender System employees transfer from one public Defender System office to another, and when ~~we hire people~~ personnel are hired from law firms that handle criminal or juvenile cases. Apply the same process as above.
- i. An employee of the prosecutor’s office is a former employee of the public defender’s office. ~~Presumably the same results~~ Apply the same process as above.
- j. A public defender appears before a judge who is a former associate in the public defender office. In such cases, appearances before former associates are proper when there has been full disclosure.
- k. An employee of the public defender office is closely related by blood or marriage, or is engaged to be married, to a judge before which the public defender office appears, or otherwise has a close relationship with a judge before which the public defender office appears. A “close relationship” would include sharing a household or extended dating. Such a relationship must be disclosed in any case where the public defender office appears before the judge and each party given the opportunity to request recusal.
- l. A public defender has applied for or been offered a job in a state, county, or city office that has prosecution, law enforcement, or child welfare responsibilities, or is running for election as a prosecutor or law enforcement officer. In such cases, the Office of the State Public Defender may give the public defender and his ~~or /her~~ supervisor guidance concerning campaign ethics laws, the public defender’s caseload, and other matters to ensure client and public confidence in the continued zealous advocacy by the public defender and the public defender office.
- m. A public defender has applied for appointment to a judgeship.

~~10~~12. Action identifying a possible conflict of interest: There is no one-size-fits-all solution here, either. However, there are a couple “must do’s” and several “maybe should do’s” when ~~you uncover~~ a possible conflict is uncovered. They include:

- 11a. Seek advice from supervisors and others: A “must do.”: ~~Your~~ The first source of advice should be the office supervisor. An office staff meeting is a good vehicle for hashing out these issues. In addition, the Training

\_\_\_\_ Coordinator of the Office of the State Public Defender Office is available to help

\_\_\_\_ answer questions of professional ethics.

b.

\_\_\_\_ 12. Full disclosure to the client: Another “must do,” even if ~~you do~~ the attorney does

\_\_\_\_ not think there is an actual conflict. If the situation doesn’t present a real conflict, the attorney should explain that to the client and obtain his or her acknowledgment that ~~your~~ continued representation is appropriate. If the client

\_\_\_\_ doesn’t agree and wants ~~you out~~ the attorney removed, or isn’t mentally competent, ~~you~~ the attorney can then make a decision on how to proceed.

But,

\_\_\_\_ the attorney must never withhold information from the client about any potential conflict. The attorney should document the disclosure and the client’s response. The attorney should inform the client of his or her right to file a grievance of the issue, and the right ~~for the client~~ to raise the issue to the court.

\_\_\_\_ 13c. Request for waiver from the defendant or other current client: If there is

\_\_\_\_ an actual conflict of interest, the client may want to waive the conflict and retain the attorney and, after full disclosure to the client of that the conflict and what it means to

\_\_\_\_ ~~your~~ continued representation by counsel, ~~the client may want to waive the conflict and keep you on.~~ The attorney should document ~~your~~ the disclosure and any waiver on the forms provided by the State Public Defenders Office Office of the

\_\_\_\_ State Public Defender. The attorney should use sound judgment in deciding whether to ask a current client to waive a conflict. Some conflicts are so serious that ~~you~~ the attorney should move to withdraw, even

\_\_\_\_ though ~~your~~ the client likes ~~you~~ the attorney so much that he or she would be

\_\_\_\_ willing to waive anything.

\_\_\_\_ 14d. Request for waiver from a prior client: If, for example, a prior client is a witness or an alleged victim in a current case, ~~you~~ the attorney can ask him or

\_\_\_\_ her to waive a conflict. This would most likely involve consent for disclosure of privileged information or use of the conviction for which ~~your a~~

\_\_\_\_ public defender office represented the prior client as impeachment or character attack. Again, the attorney should use sound judgment in deciding whether to ask for such a waiver, as some conflicts are so serious that waiver will not remove the appearance of impropriety. See

\_\_\_\_\_ also *Montana Rules of Professional Conduct*, Rules 1.9 (Duties to Former Clients), 4.3 (Dealing with Unrepresented Person). Again, the attorney should document your the disclosure and any waiver.

\_\_\_\_\_ 15e. Building an Ethical “ethical Wall-wall”: In rare cases, an Ethical “ethical Wall-wall” may cure a \_\_\_\_\_ conflict of interest. This type of procedure will always be used when an \_\_\_\_\_ attorney from another Region comes into a new Region, either to handle a \_\_\_\_\_ conflict matter, or as part of the Serious Crimes Litigation Unit. An \_\_\_\_\_ Ethical “ethical Wall-wall” will screen the attorney from information \_\_\_\_\_ except that \_\_\_\_\_ necessary for his case. The Ethical “ethical Wall-wall” shall screen the attorney from \_\_\_\_\_ both hard copies of other files, as well as any electronic information \_\_\_\_\_ concerning the other clients, whether in the case management software, \_\_\_\_\_ email, or other electronic data.

\_\_\_\_\_ 16f. Disclosure to the court and prosecutor: If ~~you are~~ the attorney is confident that \_\_\_\_\_ ~~your the~~ situation doesn't present an actual conflict, ~~your the~~ client agrees, and ~~you've the~~ \_\_\_\_\_ attorney documented ~~your the~~ client disclosure and acknowledgment, ~~you then the~~ \_\_\_\_\_ attorney may not need to disclose the situation to the court and \_\_\_\_\_ prosecutor. ~~You The~~ the attorney may not want to tell them inform others if doing so might \_\_\_\_\_ tip trial strategy, compromise privileged information, reveal attorney \_\_\_\_\_ work product, or cause undue invasion of someone's privacy. However, \_\_\_\_\_ if ~~your the~~ attorney's instincts ~~tell you indicate~~ that ~~this it~~ is too big of an issue to keep \_\_\_\_\_ under wraps, or might come back to haunt ~~you him or her~~, then it's time to \_\_\_\_\_ bring in the judge and ~~your opponent~~ opposing counsel. Certainly, any actual conflict of \_\_\_\_\_ interest should be brought to all parties' attention, even if ~~your the~~ client is \_\_\_\_\_ willing to waive it.

\_\_\_\_\_ 17g. Making a record: If the matter is disclosed to the court and prosecutor, \_\_\_\_\_ the attorney must make sure there is a record of it with all parties present. \_\_\_\_\_ ~~Your The~~ the client's on-the-record waiver or agreement that there is no actual \_\_\_\_\_ conflict of interest, after full disclosure that is also on the record, will \_\_\_\_\_ close the door on almost any controversy. If ~~your the~~ the attorney's position is that \_\_\_\_\_ there is no conflict, ~~you the~~ the attorney will be required to elaborate; a simple

\_\_\_\_\_ denial of a conflict is insufficient.

\_\_\_\_\_ 18h. Moving to withdraw: If there is an actual conflict and there is no waiver,

\_\_\_\_\_ the office must withdraw. If multiple current clients are in conflict, ~~you~~the

\_\_\_\_\_ attorney may be able to keep one of the cases if ~~you've~~ he or she identified the

\_\_\_\_\_ conflict early enough. If so, the attorney should try to keep the most \_\_\_\_\_ serious or difficult case. If that is not feasible, then the attorney should \_\_\_\_\_ try to keep the first client in the door. Often, however, the conflicts \_\_\_\_\_ among current clients aren't discovered until the office is well into its \_\_\_\_\_ representation of all. If so, the office usually must withdraw from all \_\_\_\_\_ cases. If ~~you~~ the attorney must move to withdraw, keep in mind that, as a \_\_\_\_\_ general rule, ~~you don't~~ the attorney doesn't have to reveal the factual basis for the

\_\_\_\_\_ conflict. ~~You~~ The attorney should resist requests to reveal anything more than

\_\_\_\_\_ is necessary to articulate the conflict; and ~~you~~ must protect privileged \_\_\_\_\_ information.

\_\_\_\_\_ 19i. Resolve close cases in favor of the most conservative action: If ~~your~~ an

\_\_\_\_\_ attorney's instincts ~~tell you~~ indicate something is a potential conflict, then it

\_\_\_\_\_ probably is. If ~~you're~~ an attorney is uncertain whether a situation presents an

\_\_\_\_\_ actual conflict, then it likely does. If ~~you're~~ an attorney is ambivalent about

\_\_\_\_\_ telling the court about a possible conflict that ~~you~~ he or she thinks was \_\_\_\_\_ you've

\_\_\_\_\_ resolved, then ~~you~~ the attorney probably should.

2013. Joint Defense Agreements: In the event of a multiple defendant, cases involving a public defender office, or a contract attorney, and any outside counsel, the following guidelines should apply to any joint defense agreements entered into. A joint defense agreement should be in writing, signed by all counsel and clients, after consultation, and should provide the following:

- a. The agreement must not create any kind of an attorney-client relationship between co-defendants;
- b. Information that is shared under the agreement is privileged;
- c. Anyone who withdraws from the agreement remains bound by confidentiality as to any information obtained through the joint defense agreement;
- d. All parties agree that in the event one withdraws to cooperate with the government, any potential conflict of interest is waived by all parties. Anyone who withdraws from the agreement shall provide notice to all other parties

prior to withdrawing, and return all documents provided pursuant to the agreement prior to withdrawing. A log should be kept of all meetings attended under the joint defense agreement, as well as any information and documents shared pursuant to the agreement~~(Keep a log of all meetings attended under the joint defense agreement, as well as any information and documents shared pursuant to the agreement.);~~

- e. In the event that any defendant in the agreement testifies at trial, he or she agrees to waive the confidentiality provisions of the joint defense agreement to allow any other remaining party to the agreement to cross-examine him or her on the basis of information he or she has shared through the joint defense agreement;
- f. The agreement must recite a procedure for withdrawing from the agreement;
- g. All documents provided pursuant to the joint defense agreement must be returned upon the termination of the agreement.

#### **F. Conflicts Coordinator:**

1. The Conflicts Coordinator is retained on a contract basis by the Montana Public Defender Commission and is separate from, and independent of, the Chief Public Defender, the eleven regional public defender offices, local public defender offices, contract attorneys, conflicts attorneys, and the Office of the Appellate Defender. The Conflicts Coordinator, under the direct oversight of the Montana Public Defender Commission, is responsible for assisting conflict attorneys in securing payment for legal services directly relating to the delivery of case resources. The ~~Conflict~~ Conflicts Coordinator is compensated from funds as administered by the ~~State~~ Montana Public Defender Commission.

2. The Conflicts Coordinator shall file written financial reports with the Montana Public Defender Commission on a monthly basis and as directed by the ~~State Public Defender~~ Commission. Additionally, if requested by the Commission, the Conflicts Coordinator shall provide reports to the ~~Montana Public Defender Commission~~ to assist the Commission in evaluating the work of attorneys providing ~~conflict~~ conflicts services.

3. The ~~Conflict~~ Conflicts Coordinator shall provide its own support staff, separate from those employed by any individual, office, or entity associated with the Montana Public Defender System. The Office of the Conflicts Coordinator is physically separate from the ~~central office of the state public defender system~~ Office of the State Public Defender, regional public defender officer, and local public defender offices, ~~the offices of any public defenders~~, the Office of the Appellate Defender, and the ~~office of the~~ Montana Public Defender Commission.

4. The ~~Conflict~~ Conflicts Coordinator does not have access to files or premises of any public defender attorney or office, including ~~conflict~~ conflicts attorneys. The ~~Conflict~~ Conflicts Coordinator has its own phone number, facsimile equipment, and computer. The ~~Conflict~~ Conflicts Coordinator's computer may be linked to the financial

and accounting database maintained by the ~~central office of the Montana~~ Office of the State Public Defender system for purposes of reporting statistical and financial information. However, such connection must be appropriately screened from confidential client information by firewalls or other devices.

5. The ~~Conflict-Conflicts~~ Coordinator and ~~its~~ his or her staff handle only administrative functions unrelated to the direct provision of legal services to clients. Neither the ~~Conflict-Conflicts~~ Coordinator nor anyone assigned to the ~~office~~ Office of the ~~Conflict-Conflicts~~ Coordinator may:

- a. Exercise control or influence over the handling of individual public defender or ~~conflict-conflicts~~ cases;
- b. Have access to client files or client confidences;
- c. Have keys to any independent public defender office; or
- d. Have unsupervised access to the premises of any public defender or ~~conflict~~ conflicts office.

6. The individual ~~conflict-conflicts~~ attorneys are solely responsible for determining litigation strategy pertaining to ~~conflict-conflicts~~ cases, subject to the requirement that all bills for services provided or resources be submitted to, and verified by, the ~~Conflict-Conflicts~~ Coordinator.

7. While the Contract Coordinator must sign off on all expenditures requested by ~~conflict-conflicts~~ counsel, this requirement is only to ensure compliance with State disbursement procedures and promote sound fiscal practices; it does not dictate trial strategy, which remains the exclusive province of the individual ~~conflict-conflicts~~ attorney.

#### **IV. ADMINISTRATION OF DEFENDER SERVICES**

##### **A. Attorney-Client Communication:**

**Goal: Regular and confidential communication between attorneys and clients is a necessary part of effective representation.**

1. Effective representation of an accused client requires prompt and effective communication with the client. This communication includes personal and telephone contacts with a client in custody.

2. ~~The~~ To ensure the privacy essential for confidential communication between counsel, public defender staff, and client, adequate facilities should be available for private discussions ~~between counsel, or public defender staff and clients in jails, prisons, courthouses, healthcare facilities, and other places where accused persons~~ clients must confer with counsel.

3. Personnel of jails, prisons, custodial institutions, and health-care facilities should be prohibited from examining or otherwise interfering with any communication or correspondence between client, defense counsel, or public defender staff relating to legal action arising out of charges or incarceration.

4. Each jail or detention facility should make available an unmonitored and unrecorded toll-free ~~telephone~~ ~~phone~~ for purposes of allowing indigent clients to contact and confer with counsel and public defender staff on at least a daily basis. Counsel should be allowed personal contact with an incarcerated client at any time upon counsel's request.

5. A public defender office policy, contract for indigent defense services, and individual assignments of counsel shall include a requirement that a client in custody must speak with counsel either in person or by ~~phone~~ telephone at least weekly, unless otherwise agreed between the client and counsel.

6. The Regional Public Defender Offices shall take appropriate action to ensure these standards are implemented.

#### **B. Delivery of Services:**

**Goal: Counsel shall strive for excellence in the representation of the indigent client.**

1. Counsel representing indigent clients should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of counsel for specific cases should not be made by the judiciary, but should be arranged for by the administrators of the public defender office, assigned ~~counsel~~, and contract-for-service programs.

2. The Chief Public Defender and his or her staff should be compensated at a rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.

3. The ~~State Public Defender's Office~~ Office of the State Public Defender shall award contracts for indigent legal services only after determining that counsel or the firm chosen can meet the standards set forth herein. Under no circumstances should a contract be awarded based solely on the lowest bid or provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned. Counsel or firms bidding for contracts must demonstrate their ability to meet these standards. While the ~~State Public Defender's Office~~ Office of the State Public Defender may, in the sole discretion of the Chief Public Defender, choose to consult with judges, the Attorney General's Office, city attorneys, county prosecutors, and law enforcement officers in deciding who to select as attorneys ~~who will~~ to provide services as assigned counsel, those parties may neither select nor prohibit the selection of any counsel or law firm.

4. Contracts for ~~legal defense~~public legal representation services should be awarded for at least ~~one year~~one-year terms. Removal of the contracting counsel or firm ~~short of~~before the agreed term should be for good cause only. The contract shall define “good cause” as: “a failure by contracting counsel to comply with the terms of the contract that impairs the delivery of services to clients, or a willful disregard by contracting counsel of the rights and best interest of clients.”;

5. Contracts for services must be awarded on a competitive process and must involve the following considerations:

- a. ~~the~~The categories of cases in which contracting counsel is to provide services;
- b. ~~the~~The term of the contract and the responsibility of contracting counsel for completion of cases undertaken within the contract term;
- c. ~~identification~~Identification of counsel who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
- d. ~~allowable~~Allowable representation workloads for individual counsel, including the amount of private practice engaged in outside the contract, and measures to address excessive workloads, consistent with these ~~standards~~Standards;
- e. ~~minimum~~Minimum levels of experience and specific qualification standards for contracting counsel, including special provisions for complex matters, ~~including~~ compliance with standards established by the Montana Supreme Court in capital cases, and compliance with the standards of the Montana Public Defender Commission for capital cases;
- f. ~~a~~A policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
- g. ~~reasonable~~Reasonable compensation levels consistent with these standards and a designated method of payment;
- h. ~~sufficient~~Sufficient support services and provision for reasonable expenses, subject to prior approval as outlined by the ~~state public defender's office~~Office of the State Public Defender in ~~their~~its policy manual, for paralegal and investigative services, expert witnesses, and other litigation ~~expenses~~costs to be paid on an “as-needed” basis in addition to the contract compensation;
- i. ~~a~~A process for the professional development of assigned counsel, including supervision, evaluation, and training in accordance with standards set by ~~this commission and professional development of assigned counsel~~the Montana Public Defender Commission;
- j. ~~protection~~Protection of client confidences, attorney-client information, and work product related to contract cases, except under a legal court order to ~~do so~~divulge, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent attorney in the case;
- k. ~~a~~A system of case management and reporting ~~is as~~ required by the ~~State Public Defender's Office~~Office of the State Public Defender;

- l. ~~the~~ The grounds for termination of the contract by the parties;
- m. ~~a~~ A requirement that contracting counsel provide for retention of client files in a manner that affords protection of the client's confidentiality interest for three years from the date of conclusion of the matter in the trial court, or until the client is no longer subject to ~~state~~ State supervision, whichever is longer.

6. The Chief Public Defender and Regional Public Defenders shall provide for contract oversight and enforcement to assure compliance with these ~~standards~~ Standards and applicable Montana ~~Statutes~~ statutes. For conflict of interest cases, the ~~Conflict~~ Conflicts Coordinator shall provide such oversight.

**C. Accounting and Billing System:**

**Goal: A transparent standardized accounting and billing system that maintains client confidentiality is the best way to achieve financial accountability.**

**V. CASELOADS**

**Goal: Caseloads must not be oppressive, and should match counsel's experience, training, and expertise.**

**A. Governing Principle:**

Counsel caseloads should be governed by the following:

1. Individual Public Defender~~Counsel~~. Whenever a salaried or contracting counsel determines, in the exercise of counsel's best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases, will lead to furnishing representation lacking in quality or ~~to~~ the breach of professional obligations, the attorney is required to inform the Regional Public Defender's Office, who shall inform the Chief Public Defender. The Chief Defender will then inform the Montana Public Defender Commission.

2. Chief Public Defender. Whenever the ~~chief~~ Chief public ~~Public~~ defender ~~Defender~~ determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to furnishing representation lacking in quality or ~~to~~ the breach of professional obligations, the ~~chief~~ Chief public ~~Public~~ defender ~~Defender~~ is required to inform the Montana Public Defender Commission, which in turn ~~who~~ will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

**B. Caseload Evaluation:**

1. The caseload of counsel should allow ~~each counsel~~ him or her to give each client the time and effort necessary to ensure effective representation. Regional public defender offices, contract counsel, and assigned counsel should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

2. A “case” consists of all charges against a single defendant arising out of a single event, transaction, or occurrence, or all charges arising out of a series of related incidents charged in a single information or complaint, (including collateral matters such as probation violations which do not require a separate dispositional hearing), and should be counted and reported as one case. If a separate probation revocation hearing is required, the probation hearing shall be counted as a separate misdemeanor case. If two or more defendants are charged in a single information or complaint, the charges against each defendant should be counted and reported as separate cases.

3. ~~Caseload~~ Caseloads should not exceed the following:

- a. 150 ~~Felony~~ felony cases, (excluding those in which the death penalty is being sought,) per attorney per year; or,
- b. 300 ~~Misdemeanor~~ misdemeanor ~~Cases~~ cases per attorney per year; or,
- c. 250 ~~Misdemeanor~~ misdemeanor ~~Juvenile~~ juvenile ~~Offender~~ offender ~~Cases~~ cases per attorney per year; or,
- d. 60 ~~Juvenile~~ juvenile ~~Dependency~~ dependency ~~Clients~~ clients per attorney per year; or,
- e. 100 ~~Civil~~ civil ~~Commitment~~ commitment ~~Cases~~ cases per attorney per year; or,
- f. 25 ~~Appeals~~ appeals to the Montana Supreme Court per attorney per year; or,
- g. 25 post-conviction matters per attorney per year; or,
- h. 12 petitions for *certiorari* to the United State Supreme Court per attorney per year.

4. The standard applicable to each category of cases is not a suggestion or guideline, but is intended to be a maximum limitation on the average annual ~~ease load~~ caseloads of each ~~lawyer~~ attorney employed as a public defender. These limits are not intended to be cumulative or aggregated, (e.g., an attorney may not represent defendants in 150 felonies *and* 300 misdemeanor cases per year), but should be applied proportionately in the case of an attorney whose ~~ease load~~ caseload includes cases in more than one category. For example, an attorney may not represent defendants in 150 felonies and 300 misdemeanor cases per year. Caseloads for attorneys practicing in rural areas may need to be reduced due to substantial amounts of required travel.

5. The Montana Public Defender Commission intends to review this Standard as soon as it is able to accumulate reliable statistical data that reflects the actual case loads (both numerical and hourly) of public defenders employed in each ~~regional~~ Regional Public Defender Office, and may modify these numerical limits or adopt weighting criteria as it deems appropriate.

## VI. QUALIFICATIONS AND DUTIES OF COUNSEL

**Goal: Counsel must meet these minimum standards before accepting a case. In order to provide effective representation, counsel must engage in regular and ongoing training.**

1. In order to assure that clients receive the effective assistance of counsel to which they are constitutionally and statutorily entitled, counsel providing ~~representation at public expense~~ public legal representation should meet the following minimum professional qualifications:

- a. Satisfy the minimum requirements for practicing law in Montana as determined by the Montana Supreme Court;
  - b. Complete twenty hours of continuing legal education within each calendar year from courses, offered or approved by the Office of the State Public Defender, in courses relating to public defender practice or representing persons whose liberty is at risk as a result of state~~State~~-initiated proceedings, ~~from courses offered or approved by the State Public Defender's Office;~~
  - c. Comply with all other training requirements established by the Training Coordinator of the ~~State Public Defender's Office~~Office of the State Public Defender and approved by the Public Defender Commission; including, but not limited to, mental health disabilities, cultural competency, and drug dependency.
  - d. In order to provide quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the State of Montana. Counsel has a continuing obligation to stay abreast of changes and developments in the law;
  - e. The foregoing requirements shall be deemed satisfied if counsel is representing clients pursuant to the Student Practice Rule and is being directly supervised by a supervising attorney who meets the standards required for felony defense set forth below.
2. Additional trial attorneys' qualifications according to type of case:
- a. Death Penalty~~penalty Representation~~representation. Each attorney acting as lead counsel in a death penalty case shall meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003);
  - b. Juvenile Cases~~cases.~~— See Standard Number 4;
  - c. Involuntary Commitments~~commitments.~~— See Standard Number 5, 6, 7, and 11;
  - d. Abuse and Neglect~~neglect cases.~~— See Standard Number 8;
  - e. Felony representation.— See Standard Number 1;

f. ~~All Other other Cases~~cases. Each attorney shall meet the requirements set forth herein and in the Montana Rules of Professional Conduct.

3. Counsel should only request or accept an assignment if counsel is able to provide quality representation and diligent advocacy for the client.

4. ~~Trial~~Trial Standards for Non-capital Cases.

**A. General Duties of Defense Counsel:**

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

2. Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. When appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

3. Counsel has the obligation to keep the client informed of the progress of the case.

4. If a conflict develops during the course of representation, counsel has a duty to notify the client and the court in accordance with the Rules of Professional Conduct and in accordance with the Disciplinary Rules of the State Bar of Montana.

**B. Obligations of Counsel Regarding Pretrial Release:**

1. Counsel has an obligation to meet with incarcerated defendants as stated ~~previously in these Standard Standards~~(~~currently III B~~)~~above~~, and shall take other prompt action necessary to provide quality representation, including:

- a. ~~Counsel shall invoke~~Invoking the protections of appropriate constitutional provisions, federal and ~~state~~State laws, statutory provisions, and court rules on behalf of a client, and revoke any waivers of these protections purportedly given by the client, as soon as practicable via a notice of appearance or other pleading filed with the State and court.
- b. ~~Counsel has an obligation to attempt~~Attempting to secure the pretrial release of the client.

**C. Counsel's Interview with Client:**

1. Preparing for the Interview. ~~After being assigned to a case and Prior prior to~~ conducting the initial interview, the attorney should, where possible, do the following:  
~~after being assigned to a case the attorney should, where possible:~~

- a. be familiar with the elements of the offense(s) and the potential punishment(s), where the charges against the client are already known; and,
  - b. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available. In addition, where the client is incarcerated, the attorney should:
    - i. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
    - ii. be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release; and,
    - iii. be familiar with any procedures available for reviewing the bail determination.
- iii.

2. Conducting the Interview. The attorney should, where possible, do the following:

- a. The purpose of the initial interview is to acquire information from the client concerning the case, the client, and pre-trial release, and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds, can be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, and prison records, or other records as may be pertinent.
- b. Counsel shall complete the interview form provided by the ~~State Public Defender's Office~~ Office of the State Public Defender for use at the initial interview. Information that should be acquired from the client, includes, but is not limited to, the following:
  - i. The client's version of arrest, with or without warrant; whether client was searched and if anything was seized, with or without warrant or consent; whether client was interrogated and, if so, ~~was~~ whether a statement given; client's physical and mental status at the time ~~the any~~ statement was given; whether any exemplars were provided and whether any scientific tests were performed on client's body or ~~body~~ bodily fluids;
  - ii. The names and custodial status of all co-defendants and the name of counsel for co-defendants, (if counsel has been appointed or retained);
  - iii. The names and locating information of any witnesses to the crime and/or the arrest, regardless of whether these are witnesses for the prosecution or for the defense; the existence of any tangible

- evidence in the possession of the State, ~~which (when appropriate, counsel should take steps to insure this evidence is preserved);~~
- iv. The client's ties to the community, including the length of time he or she has lived at the current and former addresses, any prior names or aliases used, family relationships, immigration status (if applicable), employment record and history, and social security number;
  - v. The client's physical and mental health, educational, vocational and armed services history;
  - vi. The client's immediate medical needs including the need for medication, detoxification programs and/or substance abuse treatment;
  - vii. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges or outstanding warrants from other jurisdictions or agencies and also whether he or she is on probation or parole and the client's past or present performance under supervision;
  - viii. The names of individuals or other sources that counsel can contact to verify the information provided by the client; ~~(counsel should obtain the permission of the client before contacting these individuals);~~
  - ix. For clients who are incarcerated, ~~the ability of the client to meet any financial conditions of release (for clients who are incarcerated);~~ and
  - x. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense, including releases from the client for any records ~~for~~ of treatment or testing for mental health or developmental disability; and
  - xi. The client's citizenship status.

3. Information to be provided to the client; includes, but is not limited to, the following:

- a. a general overview of the procedural progression of the case, where possible;
- b. an explanation of the charges and the potential penalties;
- c. an explanation of the attorney-client privilege and instructions not to talk to anyone, including prisoners, about the facts of the case without first consulting with the attorney;
- d. the names of any other persons who may be contacting the client on behalf of counsel; ~~and,~~
- e. any potential impact of Federal prosecution;:-
- e.

**For clients who are incarcerated:**

- f. an explanation of the procedures that will be followed in setting the conditions of pretrial release;

- g. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
- h. ~~warn a warning the client~~ of the dangers with regard to the search of a client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials.

4. Counsel must be alert to ~~a~~ potential issues concerning the client's incompetency, mental illness or developmental disability. If counsel or the client raises a potential claim based on any of these conditions, counsel should consider seeking an independent psychological evaluation. Counsel should be familiar with the legal criteria for any plea or defense based on the defendant's mental illness or developmental disability, and should become familiar with the procedures related to the evaluation and to subsequent proceedings. Also:

- a. Counsel should be prepared to raise the issue of incompetency during all phases of the proceedings, if counsel's relationship with the client reveals information that presents genuine issues of competency;
- b. Where appropriate, counsel should advise the client of the potential consequences of raising questions of competency, as well as the defense of mental disease and defect, both as it relates to guilt and to sentencing. Prior to any proceeding, counsel should consider interviewing any professional, who has evaluated the client. Counsel, should be familiar with all aspects of the evaluation and should seek additional expert advice where appropriate. Counsel has an issue to raise legitimate issues of competency even over the objection of the client.

5. If special conditions of release have been imposed, such as ~~(e.g. random drug screening),~~ or other orders restricting the client's conduct have been entered, such as ~~(e.g. a no contact order),~~ the client should be advised of the legal consequences of failure to comply with such conditions. In the event the ~~Court~~ court orders routine contact with the attorney is a condition of release, the attorney shall not waive attorney-~~client~~ privilege as to contact with the client.

6. If counsel is meeting with the client before his assignment to the case pursuant to ~~Standard IIB-2 above~~ these Standards, counsel should only obtain information necessary to advise the client concerning the initial hearing and advise the client not to discuss confidential information concerning the merits of the case.

#### **D. Counsel's Duty in Pretrial Release Proceedings:**

1. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, ~~to~~ make a proposal concerning conditions of release.

2. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

3. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. ~~Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.~~

4. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation between counsel and the client. In the event that the client and counsel decided that it would be in the best interests of the client to testify regarding bond, counsel should instruct his/ or her client not to answer any questions that do not pertain strictly to the issue of bond.

#### **E. Counsel's Duties at Preliminary Hearing:**

1. ~~Where~~ If the client is entitled to a preliminary hearing, ~~the attorney~~ counsel should take steps to see that the hearing is conducted in a timely fashion, unless there are strategic reasons for not doing so.

2. In preparing for the preliminary hearing, ~~the attorney~~ counsel should become familiar with:

- a. the elements of each of the offenses alleged;
- b. the law of the jurisdiction for establishing probable cause;
- c. factual information which is available concerning probable cause;
- d. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings; and,
- e. the potential impact on the admissibility of any witness' testimony if they are later unavailable at trial.

#### **F. Duty of Counsel to Conduct Investigation:**

1. Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client's wish to admit guilt, ~~insure~~ ensure that the charges and disposition are factually and legally correct and that the client is aware of potential defenses to the charges.

2. Sources of investigative information and relevant procedures may include the following:

- a. Arrest warrant, accusation, complaint and/or information, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific charges that have been brought against the accused;

- b. The relevant criminal statutes and case law precedents should be examined to identify:
  - i. the elements of the offense(s) with which the accused is charged;
  - ii. the defenses, ordinary and affirmative, that may be available;
  - iii. any lesser included offenses that may be available; and,
  - iv. any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.
- c. Interviewing witnesses. Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses should be conducted in a manner that permits counsel to effectively impeach the witness with statements made during the interview.
- d. The police and prosecution reports and documents. Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain CJIN (NCIC ~~or other states~~ or criminal history records from other states) records for the client and for the prosecution witnesses.
- e. Physical evidence. Where appropriate, counsel should make a prompt request for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.
- f. The scene of the incident. Where appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident, including the same (e.g., weather, time of day, and lighting conditions).
- g. Securing the assistance of experts. Counsel should secure the assistance of experts where it is necessary or appropriate to:
  - i. the preparation of the defense;
  - ii. adequate understanding of the prosecution's case; or
  - iii. rebut the prosecution's case.

**G. Formal and Informal Discovery:**

- 1. Counsel should consider seeking discovery, at a minimum, of the following items by written motion:
  - a. Potential exculpatory information;
  - b. Potential mitigating information;
  - c. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  - d. All oral and/or written statements by the accused client, and the details of the circumstances under which the statements were made;

- e. The prior criminal record of the ~~accused~~client and any evidence of other misconduct that the government may intend to use against the ~~accused~~client;
- f. All books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
- g. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
- h. Statements of co-defendants;
- i. All investigative reports by all law enforcement and other agencies involved in the case;
- j. All records of evidence collection and retained by law enforcement; and,
- k. Counsel shall file with the court a receipt of all materials received.

#### **H. Development of a Theory of the Case:**

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. ~~Counsel, during the investigatory stages of the case preparation must understand~~ and develop strategies for advancing the appropriate defenses on behalf of the client.

#### **I. The Duty to File Pretrial Motions:**

1. Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the defendant is entitled to relief which the court has discretion to grant.
2. The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of each case.
3. Counsel should withdraw or decide not to file a motion only after careful consideration, and ~~only after~~ determining whether the filing of a motion may be necessary to protect the defendant's rights, including later claims of waiver or procedural default.
4. Counsel should consider the advisability of disqualifying or substituting the presiding judge. This consideration should include any information about the judge's history in aligning himself with the prosecution on bail issues, motion rulings, and trial rulings; any routine refusals of plea bargains, the client's experience with the judge, and any specific dislike of counsel, other public defenders, or public defenders in general.
  - a. Prior to filing a motion to disqualify or substitute the judge, counsel shall consult with the managing attorney in his office and/or his or her ~~Regional deputy~~ Deputy public ~~Public defender~~ Defender.
  - b. The decision to disqualify a judge shall only be made when it is a reasoned, strategic decision and in the best interest of the client. The final decision rests with counsel.

**J. Preparing, Filing, and Arguing Pretrial Motions:**

1. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.
2. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
  - a. investigation, discovery, and research relevant to the claim advanced;
  - b. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
  - c. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and potential consequences of having the client testify; and
  - d. familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial.
3. In every case, counsel should examine whether it is appropriate to file a motion to suppress evidence or statements.
4. In every case that proceeds to trial, counsel should file timely and appropriate motions in limine to exclude any improper evidence or prosecutorial practices.

**K. Continuing Duty to File Pretrial Motions:**

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

**L. Duty of Counsel in Plea Negotiation Process:**

1. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial and, in doing so, should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
2. Counsel should keep the client fully informed of any continued plea discussion and negotiations and promptly convey to the accused any offers made by the prosecution for a negotiated settlement.

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

4. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.

**M. The Process of Plea Negotiations:**

1. In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of the following:

- a. the maximum term of imprisonment, ~~and~~ fine or restitution that may be ordered, and any mandatory sentence, as well as the possible adverse impact on those with a guilty ~~and counsel should make the client aware that a guilty plea may have adverse impact upon plea~~;
- b. the possibility of forfeiture of assets;
- c. other consequences of conviction including, ~~but not limited to,~~ deportation, the forfeiture of professional licensure, the ineligibility for various government programs including, student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, ~~and~~ the loss of the right to hold public office, and potential federal prosecutions;
- d. any possible and likely sentence enhancements or parole consequences, and the actual possibility of programs from the Department of Corrections;

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

- a. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to, the following:
  - i. not to proceed to trial on merits of the charges;
  - ii. to decline from asserting or litigating any particular pretrial motions;
  - iii. an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
  - iv. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
- b. benefits the client might obtain from a negotiated settlement, including, but not limited to, an agreement that provides:
  - i. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
  - ii. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
  - iii. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

- iv. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence, ~~or sanction~~ one within a specified range;
  - v. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;
  - vi. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, certain information; and,
  - vii. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the ~~accused's~~ client's place and/or manner of confinement and/or release on parole, and the information concerning the ~~accused's~~ client's offense and alleged behavior that may be considered in determining the ~~accused's~~ client's date of release from incarceration, taking into consideration availability of probation from Department of Corrections.
- c. the position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:
- i. consider whether interviewing the alleged victim or victims is appropriate and, if so, who ~~is~~ the best person to do so is and under what circumstances;
  - ii. consider to what extent the alleged victim or victims might be involved in the plea negotiations;
  - iii. be familiar with any rights afforded the alleged victim or victims under Montana law; and,
  - iv. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.
3. In conducting plea negotiations, counsel should be familiar with:
- a. the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, and a plea in which the defendant is not required to personally acknowledge his or her guilt - see (North Carolina v. Alford plea);
  - b. the advantages and disadvantages of each available plea according to the circumstances of the case;
  - c. whether the plea agreement is binding on the court, ~~and~~ prison, and parole authorities; and,
  - d. possibilities of pre-trial diversion.
4. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and probation department which may affect the content and likely results of negotiated plea bargains.

**N. The Decision to Enter a Plea of Guilty:**

1. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, ~~and as~~ well as the advantages and disadvantages of the potential consequences of the agreement.

2. The decision to enter a plea of guilty rests solely with the client, ~~and~~ counsel should not tempt to unduly influence that decision.

3. If the client is a juvenile, being prosecuted as an adult, consideration should be given to the request that a guardian be appointed to advise the juvenile if an adult family member is not available to act in a surrogate role.

4. A negotiated plea should be committed in writing.

**O. Entering the Negotiated Plea before the Court:**

1. Prior to the entry of the plea, counsel should:

- a. make certain that the client understands the rights he or she will waive by entering the plea and that the ~~clients~~ client's decision to waive those rights is knowing, voluntary and intelligent;
- b. make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea;
- c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and,
- d. make certain that if the plea is non-binding, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.

2. Counsel must become familiar with the consequences of a plea or finding of guilty in state court upon any current or future federal prosecution. These consequences include, without limitation, the following:

- a. Federal Lacey Act prosecutions for fish and game violations;
- b. Federal firearms charges, including those resulting in mandatory minimum sentences when firearms are associated with the possession or distribution of dangerous drugs;
- c. The possibility of a separate federal prosecution based upon the same transaction, without the defense of double jeopardy, in charges alleging dangerous drug distribution, possession and sale of drug paraphernalia, bank robbery, fraud, environmental crimes, arson, intimidation, kidnapping, murder, civil rights violations, bribery, and child pornography;

- d. The impact of a conviction on the United States Sentencing Guidelines when determining the client's criminal history category;
- e. Racketeering Influenced and Corrupt Organization (RICO) prosecutions for engaging in a pattern of conduct which includes state crimes stemming from violence or gambling;
- f. Money laundering prosecutions for engaging in financial transactions associated with or involving income derived from certain criminal conduct;
- g. Hobbs Act prosecutions for state crimes of intimidation, arson, and violent crimes impeding or affecting interstate commerce;
- h. Firearm restrictions on those convicted of felonies and certain misdemeanor convictions;
- i. Immigration consequences of convictions of re-entry into the United States after certain felony convictions.
- j. Impact of the Adam Walsh Act

3. When entering the plea, counsel should make sure that a written plea agreement containing the full content and conditions of the plea agreement are placed on the record before the court.

4. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

**P. Counsel's Duty of Trial Preparation:**

1. The decision to proceed to trial with or without a jury rests solely with the client after consultation with counsel. Counsel should discuss the relevant strategic considerations of this decision with the client, and maintain a record of the advice provided to the client, as well as ~~and~~ the client's decision concerning trial.

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

- a. copies of all relevant documents filed in the case;
- b. relevant documents prepared by investigators;
- c. *voir dire* questions;
- d. outline or draft of opening statement;
- e. cross-examination plans for all possible prosecution witnesses;
- f. direct examination plans for all prospective defense witnesses;
- g. copies of defense subpoenas;

- h. prior statements of all prosecution witnesses, such as ~~(e.g.,~~ transcripts, or police reports); and counsel should have prepared transcripts of any audio or video taped witness statements;
- i. prior statements of all defense witnesses;
- j. reports from defense experts;
- k. a list of all defense exhibits, and the witnesses through whom they will be introduced;
- l. originals and copies of all documentary exhibits;
- m. proposed jury instructions with supporting case citations;
- n. ~~where appropriate, consider and~~ a list ~~list of~~ the evidence necessary to support the defense requests for jury instructions;
- o. copies of all relevant statutes and cases; and,
- p. outline or draft of closing argument.

3. Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the trial process; counsel, ~~and~~ should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

4. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial, such as the ~~(e.g.,~~ use of prior convictions to impeach the defendant); and, where appropriate, ~~counsel should~~ prepare motions and memoranda for such advance rulings.

5. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should ~~insure~~ ensure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review, unless there are strategic reasons for not doing so.

6. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should ~~insure~~ that the client has appropriate clothing and that the court personnel follow appropriate procedures so as not to reveal to jurors that the defendant is incarcerated. Counsel should ~~and~~ ensure that the client is not seen by the jury in any form of physical restraint.

7. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

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

9. Counsel shall take necessary steps to ~~insure~~ ensure full official recordation of all aspects of the court proceeding.

**Q. Jury Selection:**

**A. Preparing for Voir Dire:**

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

2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

3. Prior to jury selection, counsel should obtain a prospective juror list, and the standard jury questionnaires. Counsel should also consider requesting ~~that use of a~~ separate questionnaire that is tailored to the client's case.

4. Counsel should develop *voir dire* questions in advance of trial. ~~Counsel and should~~ tailor *voir dire* questions to the specific case. *Voir dire* should be integrated into, and advance, counsel's theory of the case. Among the purposes *voir dire* questions should be designed to serve are the following:

- a. to elicit information about the attitudes of individual jurors, which will inform counsel and ~~defendant-client~~ defendant-client about peremptory strikes and challenges for cause;
- b. to convey to the panel certain legal principles which are critical to the ~~defense-client's~~ defendant-client's case;
- c. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
- d. to present the client and ~~the defense~~ his or her case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and,
- e. to establish a relationship with the jury.

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

6. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

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

**B. Examination of the Prospective Jurors:**

1. Counsel should personally *voir dire* the panel.
2. Counsel should take all steps necessary to protect the *voir dire* record for appeal, including, where appropriate, filing a copy of the proposed *voir dire* questions or reading proposed questions into the record.
3. If the *voir dire* questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the other jurors and ~~counsel should consider requesting that the court, rather than counsel, conduct the *voir dire* as to those sensitive questions.~~
4. In a group *voir dire*, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

**C. Challenging the Jurors for Cause:**

~~1.~~ Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

**R. Opening Statement**

1. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
2. Counsel should be familiar with the ~~law~~ laws of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
3. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case. It should only be in exceptional circumstances that the opening statement is not made at the first opportunity.
4. Counsel's objective in making an opening statement may include the following:
  - a. to provide an overview of the defense case;
  - b. to identify the weaknesses of the prosecution's case;
  - c. to emphasize the ~~prosecutions~~ prosecution's burden of proof;
  - d. to summarize the testimony of witnesses, and the role of each in relationship to the entire case;
  - e. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - f. to clarify the jurors' responsibilities;

- g. to state the ultimate inferences which counsel wishes the jury to draw; and,
- h. to establish counsel's credibility with the jury.

5. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

6. Whenever the prosecutor oversteps the bounds of proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise.

### **S. — Preparation for Challenging the Prosecution's Case**

1. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

3. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

4. In preparing for cross-examination, counsel should:
- a. consider the need to integrate cross-examination, the theory of the defense, and closing argument;
  - b. consider whether cross-examination of each individual witness is likely to generate helpful information;
  - c. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. consider a cross-examination plan for each of the anticipated witnesses;
  - e. be alert to inconsistencies in a witness' testimony;
  - f. be alert to possible variations in witness' testimony;
  - g. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - h. have prepared a transcript of all audio or video tape recorded statements made by the witness;
  - i. where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records, and department regulations for possible use in cross-examining police witnesses;
  - j. be alert to issues relating to witness credibility, including bias and motive for testifying; and,
  - k. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified

copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

5. Counsel should consider conducting a *voir dire* examination of potential prosecution witness who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

6. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should consider making appropriate motions or sanctions and, at a minimum, request adequate time to review these documents before commencing cross-examination.

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

#### **T. — Presenting the Defendant's Case**

1. 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. Counsel should also consider the tactical advantage of having final closing argument when making the decision whether to present evidence other than the defendant's-client's testimony.

2. 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.

3. 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.

4. In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

a. develop a plan for direct examination of each potential defense witness;

- b. determine the implications that the order of witnesses may have on the defense case;
- c. determine ~~what~~ which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
- d. consider the possible use of character witnesses;
- e. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
- f. review all documentary evidence that must be presented; and,
- g. review all tangible evidence that must be presented.

5. ~~In~~ In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

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

7. Counsel should conduct redirect examination as appropriate.

8. At the close of the defense case, counsel should renew the motion for a directed verdict of acquittal on each charged count.

#### **U. — Preparation of the Closing Argument**

1. Counsel should be familiar with the substantive limits on both prosecution and defense summation.

2. Counsel should be familiar with the court rules, applicable statutes and law, and the individual judge's practice concerning time limits and objections during closing argument, ~~and~~ as well as provisions for rebuttal argument by the prosecution.

3. In developing closing argument, counsel's argument should reflect ~~counsel's~~ his or her theory of the case. Counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

- a. highlighting weaknesses in the prosecution's case;
- b. describing favorable inferences to be drawn from the evidence;
- c. incorporating into the argument:
  - i. helpful testimony from direct and cross-examinations;
  - ii. verbatim instructions drawn from the jury charge; and,
  - iii. responses to anticipated prosecution arguments;
- d. and the effects of the defense argument on the prosecutor's rebuttal argument.

4. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to, the following:

- a. whether counsel believes that the case will result in a favorable verdict for the client;
- b. the need to preserve the objection for appellate review; or,
- c. the possibility that an objection might enhance the significance of the information in the jury's mind.

#### **V. — Jury Instructions**

1. Counsel should be familiar with the appropriate rules of court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.

2. Counsel should always submit proposed jury instructions in writing.

3. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.

4. Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

5. 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.

6. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

7. 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.

8. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.

#### **W. — Obligations of Counsel at Sentencing Hearing**

1. Among counsel's obligations in the sentencing process are the following:
  - a. where a ~~defendant~~ client chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications;
  - b. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
  - c. to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
  - d. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
  - e. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful, or is otherwise improper, is stricken from the text of the pre-sentence investigation report before distribution of the report; and,
  - f. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever warranted and possible ~~and warranted~~.

## **X. — Sentencing Options, Consequences and Procedures**

1. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
  - a. any minimum sentences and any exceptions;
  - b. deferred sentences, suspended sentences, and diversionary programs;
  - c. the effect of confidential criminal justice information;
  - d. probation or suspension of sentence and permissible conditions of probation;
  - e. the potential of recidivist sentencing;
  - f. fines, associated fees, court costs;
  - g. victim restitution;
  - h. reimbursement of attorneys' fees;
  - i. imprisonment including any mandatory minimum requirements;
  - j. the effects of mental disease or defect, or the implication of MCA §46-14-311,312, ("Guilty but ~~But~~ developmentally ~~Developmentally~~ disabled/Disabled"); and,
  - k. civil forfeiture implications of a guilty plea.
  
2. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

- a. credit for pre-trial detention and credit against fines imposed;
  - b. parole eligibility and applicable parole release ranges (if applicable);
  - c. place of confinement, ~~and~~ level of security, and classification criteria used by Department of Corrections;
  - d. eligibility for correctional and educational programs;
  - e. availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;
  - f. deportation and other immigration consequences;
  - g. loss of civil rights;
  - h. impact of a fine or restitution and any resulting civil liability;
  - i. possible revocation of probation or possible revocation of parole status if client is subject to a prior sentence;
  - j. suspension of a motor vehicle operator's permit;
  - k. prohibition of carrying a firearm;
  - l. other consequences of conviction including, but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, registration as a sex offender and/or violent offender, loss of public housing, and the loss of the right to hold public office; and,
  - m. potential federal consequences.
3. Counsel should be familiar with the sentencing procedures, including:
    - a. the effect that plea negotiations may have upon the sentencing discretion of the court;
    - b. the availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;
    - c. the use of "Victim Impact" evidence at any sentencing hearing;
    - d. the right of the defendant to speak prior to being sentenced;
    - e. any discovery rules and reciprocal discovery rules that apply to sentencing hearings;
    - f. the use of any minimum sentences;
    - g. any restrictions that may be placed on parole or other early release; and,
    - h. the possibility of any increases in sentencing due to a persistent felony offender notice and any possible challenges to such notice.
  4. Where the Court uses a pre-sentence report, counsel should be familiar with:
    - a. the practices of the officials who prepare the pre-sentence report and the defendant's rights in that process;
    - b. the access to the pre-sentence report by counsel and the defendant;
    - c. the prosecution's practice in preparing a memorandum on punishment; and,
    - d. the use of a sentencing memorandum by the defense.
  5. Counsel shall, where appropriate, attend any interview with ~~defendant~~the client, shall review any pre-sentencing homework, and shall review the pre-sentence investigation report with the client.

## **Y. — Preparation for Sentencing**

1. In preparing for sentencing, counsel should consider the need to:
  - a. ~~inform~~ Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
  - b. ~~maintain~~ Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
  - c. ~~obtain~~ Obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, ~~and financial status, and family obligations, and obtain from the client~~ as well as sources through which the information provided can be corroborated;
  - d. ~~inform~~ Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the any statement, ~~if any,~~ to be made to the court, ~~considering~~ taking into consideration the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial, or trial on other offenses;
  - e. ~~inform~~ Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
  - f. ~~prepare~~ Prepare the client to be interviewed by the official preparing the ~~pre-sentence~~ sentencing report, and be present during any such interview. Counsel shall also review any pre-sentence investigation report with the client sufficiently in advance of the sentencing hearing to allow adequate time to rebut any inaccurate information in the PSI report.
  - g. Inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
  - h. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence; and,
  - i. Inform the client of the operation of the Sentence Review Division and the procedures to be followed in submitting any possible sentence to them for review, if applicable.

## **Z. — The Prosecution's Sentencing Position**

~~1. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so,~~ whether the prosecution will advocate that a particular type or length of sentence be imposed, unless there is a sound tactical reason for not doing so.

#### **AA.—The Sentencing Process:**

1. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
2. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
3. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant-client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
4. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
5. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, probation or suspension of part or all of the sentence, psychiatric treatment, or drug rehabilitation.
6. Where appropriate, counsel should prepare the client to personally address the court.

#### **BB.—A Motion for a New Trial:**

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

#### **CC.—The Defendant's Right to an Appeal:**

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

2. Where the defendant-client takes an appeal, trial counsel should cooperate in providing information to appellate counsel (where new counsel is handling the appeal) concerning the proceedings in the trial court.

**DD. —Defendant’s Right to Apply to the Sentence Review Panel:**

Where applicable, 1. ~~C~~counsel should ensure that the Defendant-client is informed of the procedure available (~~where applicable~~) for requesting a review of his or her sentence by the Sentence Review Division of the Montana Supreme Court, as well as the advantages and disadvantages of seeking such review.

**EE. —Defendant’s Right Post Conviction Relief (see Standard 4)**

Where applicable, 1. ~~C~~counsel should ensure that the Defendant-client is informed of the procedure available (~~where applicable~~) for requesting post conviction relief, as well as the advantages and disadvantages of seeking such review.

**VII. STANDBY COUNSEL IN CRIMINAL CASES.**

**Goal: To provide standby assistance to criminal defendants who are proceeding pro se while insuring their individual dignity and autonomy. Standby counsel’s participation shall never destroy the jury’s perception that the defendant is representing himself and the defendant shall personally manage and conduct his own defense. Attorneys providing standby assistance shall comply with the general standards for public defenders as well as these specific standards.**

**A. —Defense counsel acting as standby counsel shall:**

1. Permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
2. If the defendant requests assistance, bring to the attention of the defendant matters beneficial to him;
3. Not actively participate in the conduct of the defense unless specifically asked to do so by the defendant.
4. Assist the defendant in overcoming routine procedural or evidentiary obstacles that the defendant has clearly shown he wishes to complete.

5. Help to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.

**B. — Standby counsel shall be prepared to assume representation of the Defendant at any stage of the proceedings.**

**VIII. — FACILITIES AND SUPPORT SERVICES:**

1. ~~Public Defender~~ defender offices should have a budget for operating expenses that provides for a professional quality office, library, and equipment comparable to the prosecutor's office.

2. ~~Public Defender~~ defender office budgets should include funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis, and for the procurement of other necessary services.

3. In all assigned cases, reasonable compensation for expert witnesses necessary to preparation and presentation of the case shall be provided, subject to prior approval by the ~~State Public Defender's Office~~ Office of the State Public Defender. Expert witness fees should be maintained and allocated from funds separate from those provided for legal services.

4. All public defender offices, and all contract attorneys, shall make arrangements to maintain the confidentiality of client information. This includes physical security for confidential documents, exhibits, and electronic communications. Part of this obligation includes requiring outside contractors that may have access to confidential information to sign a confidentiality agreement on a form provided by the ~~State Public Defender's Office~~ Office of the State Public Defender. Examples of personnel who might be required to sign such an agreement are IT personnel who have access to Counsel's counsel's computer system, and janitorial personnel who have physical access to Counsel's-counsel's office.

## IX. COMPENSATION.

**Goal: Parity of resources with the Prosecution is an essential part of effective representation. This includes parity in salaries for full time staff attorneys, and a reasonable hourly rate for contract attorneys.**

1. Counsel providing ~~representation at public expense~~public legal representation and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be equal to those of attorneys and staff in prosecutorial offices in the area.

Compensation should be computed as follows:

- a. Regional Public Defenders shall be compensated at no less than the rate and with the same adjustments, including experience and longevity, as the salary for the County Attorneys of the largest county in which the Regional Public Defender Office is located, including all retirement funding and benefits.
- b. ~~A~~The Chief Public Defender shall be compensated at a rate commensurate with the position's duties and responsibilities, taking into account the compensation paid to prosecutors with similar responsibilities.
- c. In contracts for ~~legal services at public expense~~public legal representation, the contracting firm or counsel shall affirmatively represent in its contract that, in compensating counsel providing services pursuant to the terms of the contract, consideration has been given to the rate commensurate with an equally experienced assistant public defender in that county or the nearest county seat in which a ~~Public~~public ~~Defender~~Defender ~~Office~~office is located.

2. Contracts not awarded on an hourly basis should ~~provide~~ provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, death penalty cases, and cases resulting in extended trials.

3. When compensating counsel providing services on an hourly basis, the ~~State Public Defender's Office~~Office of the State Public Defender shall pay at an hourly rate to be established by the Montana Public Defender Commission. The ~~Public Defender~~ Commission shall review the rate at least annually to determine whether it is a reasonable amount. In the event the rate should be increased, requests shall be made to the appropriate funding authorities for additional funds.

4. Funding shall be sought for Fiscal year ~~Year~~ 2008 to increase the contract rate.

## REPRESENTATION STANDARDS FOR APPELLATE ADVOCACY

**Goal:** To actively and effectively represent clients in the appellate process by presenting for appellate review all legal issues that have a reasonable probability of resulting in reversal of the client's conviction or commitment, or improving his or her legal position. Attorneys representing appellants shall comply with the general standards for public defenders as well as these specific standards Standards.

### I. TRAINING.

1. The attorney will receive a minimum of ~~Twenty~~ twenty (20) hours of training specific to the Rules of Appellate Procedure, including acceptable pleadings, deadlines, and citations to the record and authority, procedural and substantive legal issues, and applicable rules of professional conduct.

2. Counsel shall reserve regular time to keep current with the statutes, rules, and cases regarding both procedural and substantive legal issues.

3. Counsel shall participate, whether as an instructor or student, in regular training events as directed by the Chief Appellate Defender ~~—whether as an instructor or student—~~ and shall endeavor to improve ~~grow~~ professionally to the benefit of his or her clients.

### II. HANDLING THE CASE<sup>1</sup>

1. As soon as feasible after conviction, or commitment, appellate counsel should confer personally with the ~~Appellant~~ appellant to discuss the case. Counsel should explain the meaning and consequences of the court's judgment as well as the right to an appeal and a general outline of the appellate process.

2. Counsel shall, within the time frame set forth in the Rules of Appellate Procedure, request all transcripts and case records.

3. Counsel shall promptly review all transcripts and case records and discuss the matter with trial counsel.

4. After reviewing the record, counsel should confer with the appellant and discuss, whether, in his or her professional judgment, there are meritorious grounds for appeal and the probable results of an appeal. Counsel should explain the advantages and disadvantages of an appeal. The decision whether to proceed with the appeal must be the ~~defendant's~~ client's own.

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<sup>1</sup> These standards assume that trial counsel has filed all appropriate post-trial motions as well as a Timely Notice of Appeal

5. Counsel shall be diligent in expediting the timely submission of the appeal and shall comply with all applicable rules regarding conduct, pleadings, deadlines, and citations to authority.

6. Counsel shall not abandon an appeal solely on the basis of his or her own determination that the appeal lacks merit, but rather should advance any sound basis for changing the law. If, after conscientious analysis, counsel determines that there are no non-meritorious grounds for appeal, counsel should follow the procedures outlined in Anders v. California, 386 U.S. 738 (1967) and §46-8-103 MCA. Counsel shall discuss with the client the termination that counsel has made and give due consideration to the wishes of the client.

7. If counsel, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, and those facts appear on the record, he or she should seek appellate relief for the client on that ground. If counsel is satisfied that a prior attorney did not provide effective assistance and the facts do not appear on the record, counsel should advise the client regarding post-conviction rights and, if the appeal is not successful, file the appropriate post-conviction petitions.

8. After exercising independent professional judgment, which may include omitting issues too weak or tenuous to secure relief or distracting of superior claims, counsel should assert claims which are supported by the record and which will benefit the client if successful.

9. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the briefing and oral argument.

10. Counsel should seek editing assistance and legal feedback from at least one other attorney before filing a brief or a substantial motion. If oral argument is granted, counsel should prepare appropriately, including participating in a moot court session.

11. Counsel shall periodically apprise the client of the progress of the case and copy the client on all pleadings filed or received.

12. When an opinion is issued, counsel shall promptly communicate the outcome to the client and explain remaining remedies, — including the right to post-conviction relief, — and the scope of further representation. This information, with particular emphasis on applicable deadlines, should be memorialized in a letter to the client.

13. Counsel shall apply professional judgment when determining whether to file a petition for re-hearing or a petition for *certiorari* to the United States Supreme Court. If counsel believes that the client has a valid claim of ineffective assistance of counsel, ~~he~~ counselor ~~she~~ should conduct the appropriate investigation and file a timely petition for post-conviction relief.

14. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the records, transcripts, files, and other information pertinent to post-conviction proceedings.

## REPRESENTATION STANDARDS FOR POST-CONVICTION PROCEEDINGS

**GOAL:** To actively and effectively represent clients in post-conviction proceedings by evaluating the case, conducting the appropriate investigation, and presenting all factual and legal issues that have a reasonable probability of resulting in the vacation of the client's conviction or materially improving his or her legal position. Attorneys representing clients in post-conviction proceedings shall comply with the general standards for public defenders as well as these specific standards ~~standards~~Standards.

### I. TRAINING

1. The attorney will receiving a minimum of ~~Twenty~~twenty (20) hours of training specific to the representation of clients in the post-conviction process.
2. Counsel shall become familiar with the applicable statutes and case law including civil, pretrial discovery, and motions rules. Counsel shall be familiar with deadline issues, acceptable pleadings, as well as the procedural issues and substantive legal issues relating to the post-conviction process.
3. Counsel shall reserve regular time to keep current with the statutes, rules, and cases regarding both procedural and substantive legal issues.
4. Counsel shall participate, whether as an instructor or student, in regular training events ~~—whether as an instructor or student—~~ and shall endeavor to grow professionally to the benefit of his or her clients.

### II. HANDLING THE CASE

1. As soon as feasible after appointment, counsel should confer personally with the client to discuss the case. Counsel should explain the scope of and procedures applicable to the post-conviction process.
2. Counsel shall promptly request all transcripts and case records. Counsel shall request appropriate releases from the client and promptly request complete attorney files. Counsel shall conduct an appropriate investigation and interview relevant witnesses.
3. Counsel shall promptly review all transcripts and case records and discuss the matter with trial counsel as well as appellate counsel and conduct other appropriate investigation into matters that are not of record.
4. After reviewing the record and conducting the appropriate investigation, counsel should confer with the client and discuss, whether in his or her professional judgment there are meritorious grounds for filing a petition for post-conviction relief,

including a petition for DNA testing, and probable results of pursuing this avenue. Counsel should explain the advantages and disadvantages of pursuing post-conviction relief, as provided by these ~~standards~~Standards.

5. If counsel, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, ~~he or she~~counsel should seek post-conviction relief for the client on that ground.

6. After exercising independent professional judgment, which may include omitting issues too weak or tenuous to secure relief or distractive of superior claims, counsel should assert claims which are supported by the record and which will benefit the client if successful.

7. Counsel shall be diligent in expediting the timely submission of the petition for post-conviction relief, keeping in mind the corresponding federal requirements for *habeas corpus* relief, and shall comply with all applicable rules regarding conduct, pleadings, submission of supporting evidence, deadlines, and citations to authority.

8. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the briefing and oral argument.

9. Counsel should seek editing assistance and legal feedback from at least one other attorney before filing a brief or a substantial motion and shall prepare appropriately for hearings, including interviewing and subpoenaing witnesses and locating, obtaining, and preparing to present the appropriate evidence.

10. Counsel shall appear with the client at ~~his or her~~the client's hearing for post-conviction relief, and/or DNA testing. ~~Counsel shall~~and present the witnesses, ~~and~~

~~Exhibits~~exhibits, and arguments that, in his or her professional judgment, are most likely to result in relief for the client.

12. Counsel shall periodically apprise the client of the progress of the case and copy the client on all pleadings filed or received.

13. When an opinion is issued, counsel shall promptly communicate the outcome to the client and explain remaining remedies and the scope of further representation. This information, with particular emphasis on subsequent deadlines, should be memorialized in a letter to the client. Counsel has a continuing duty to represent the client on appeal.

14. Counsel shall apply professional judgment when determining whether to file an appeal, a petition for *habeas corpus* relief in federal court, or a petition for *certiorari* to the United States Supreme Court. Any decision shall be reviewed by the Chief Appellate Defender.

15. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

## REPRESENTATION STANDARDS FOR SENTENCE REVIEW

### GOALS:

**To actively and effectively represent clients in the sentence review process by evaluating the case and giving the client appropriate advice as to whether to pursue sentence review and, if the client elects to proceed, to present all information and arguments supporting the imposition of a more favorable sentence. Attorneys representing clients in sentence review proceedings shall comply with the general standards for public defenders as well as these specific standards.**

### I. TRAINING:

1. The attorney will receive a minimum of \_\_\_\_\_twenty (20) hours of training specific to the representation of clients in the sentence review process.

2. Counsel shall become familiar with the rules of the Sentence Review Division as well as the applicable statutes and case law.

3. Counsel shall become familiar with the range of sentences imposed for a particular offense and the factors that have affected the imposition of a particular sentence within that range, as well as with methods of accessing that information.

### II. HANDLING THE CASE:

1. If a client receives a qualifying sentence, trial counsel shall advise the client of the right to sentence review and give the client appropriate advice as to whether to pursue sentence review.

2. Counsel shall advise the client that, upon review and within the limits fixed by law, his or her sentence may be raised, lowered, or remain the same. Counsel shall discuss with the client whether in his or her professional judgment there is a reasonable chance of obtaining a more or less severe sentence. Counsel should explain the advantages and disadvantages of proceeding to sentence review. The decision whether to proceed with the sentence review must be the defendant's-client's own.

3. If the client decides to proceed to sentence review, counsel shall assist him or her in filing a timely application for sentence review.

4. Counsel shall gather and review all information relevant to the sentencing determination including, pre-sentence reports, and any other records, documents, or exhibits relevant to the review proceedings.

5. Counsel shall conduct an appropriate investigation and interview relevant witnesses.

6. Counsel shall make an evaluation as to whether the client's sentence is more or less harsh than sentences for similar offenses and shall determine what factors distinguish the client's case, either positively or negatively.

7. Counsel shall appear with the client at his or her sentence review hearing and present the witnesses, exhibits, and arguments that, in his or her professional judgment, are most likely to result in a sentence reduction.

## **STANDARDS FOR REPRESENTATION OF YOUTH IN YOUTH COURT PROCEEDINGS**

### **GOALS:**

- A. To zealously defend youth charged with delinquency offenses and to protect their due process rights.**
- B. To serve the stated interest of the youth, be independent from the court and other participants in the litigation, including the youth's parents or guardians, and be unprejudiced and uncompromised in representing the youth.**
- C. To exercise independent and professional judgment in carrying out \_\_\_\_\_the duties assigned by the court and to participate fully in the case on \_\_\_\_\_behalf of the youth. Attorneys representing youth a client subject to youth \_\_\_\_\_court proceedings shall comply with the general standards for public \_\_\_\_\_defenders providing representation of an adult charged with violations of \_\_\_\_\_the criminal law, as well as the specific standards Standards contained herein.**
- D. To recognize that youth are at a critical stage of development and that skilled juvenile defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.**

### **I. TRAINING:**

1. To be eligible for assignment to represent youth in youth court, counsel shall receive a minimum of ~~Twenty~~ twenty (20) hours of training in representing youth in youth court, and complete a minimum of ~~Ten~~ ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing youth in youth court.

- 2. Counsel shall be knowledgeable in the following areas:
  - a. Titles 41 (Montana Youth Court Act), 45 (Crimes) & 46 (Criminal Procedure), Montana Code Annotated;
  - b. Child and adolescent development;
  - c. The services and treatment options for youth both locally and statewide;
  - d. The role and makeup of youth placement committees and kids' management authorities (KMAs);
  - e. Local and state experts who are available to consult on youth court cases as well as perform evaluations of youth;
  - f. Pre-dispositional and dispositional services and programs available through the court and probation;
  - g. Brain development and the effect of neglect and trauma on brain development;
  - h. The juvenile justice and child welfare systems;
  - i. Substance abuse issues;
  - j. Mental health issues;

- k. Special education laws, rights and remedies;
- l. School related issues including school disciplinary procedures and zero tolerance policies.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers and other experts who understand the public defender's advocacy role to investigate the various health and social services that may be available to the youth in the community.

2. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the youth.

3. Counsel shall advise the youth of all available options, as well as the practical and legal consequences of those options.

4. Counsel shall advocate the youth's express wishes and shall not substitute his or her judgment about what is in the best interests of the youth. The primary role of counsel is to represent the perspective of the youth alone, and not that of the youth's best interests or of the youth's parents or guardian. Appointment of a guardian-ad-litem to investigate the best interests of the child is a matter within the exclusive province of the court.

5. Counsel shall ensure that children do not waive appointment of counsel. Counsel should be assigned at the earliest possible stage of the youth court proceeding. Furthermore, counsel shall actively represent the youth at all stages of the proceeding. When the public defender becomes aware of the assignment, the public defender shall meet with the youth as soon as possible and sufficiently before any scheduled hearing or proceeding, including the probable cause or detention hearing, to permit effective preparation.

6. When meeting with the youth for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention, facility, or a mental health, or facility, or other health care/healthcare facility, counsel shall explain that he/ or she is not a member of the facility staff. Counsel shall inform the youth their conversation is confidential, and that the matters they discuss should not be revealed to facility staff or others, including the youth's parent or guardian, in order to preserve that the attorney-client confidentiality. Counsel shall also inform the youth and that s/he or she has a right to remain silent.

7. Counsel shall maintain the attorney/youth-client privilege with the understanding that the attorney represents the youth alone and not the youth's parents or guardians. The potential for a conflict of interest between the accused juvenile client and

his or her parents should be clearly recognized and acknowledged. Counsel should inform the parent that he or she is counsel for the youth and that in the event of a disagreement between a parent or guardian and the youth, counsel is required to serve exclusively the interest of the youth.

8. During the conference, counsel shall:
  - a. Explain the charges and possible dispositions;
  - b. Explain the juvenile-youth court process, timelines, and the role of all the parties involved, such as judge, prosecutor, probation staff, ~~GAL~~guardian ad-litem, counsel, youth and parent;
  - c. Inform the youth and parent not to make statements to anyone concerning the offense;
  - d. Obtain signed releases by the youth and parent for medical and mental health records, school records, employment records, ~~etc~~and other necessary records. Counsel should advise the youth of the potential use of this information and the privileges that attach to this information;
  - e. Obtain information from the youth concerning the facts of arrest and charges and whether there were any statements made, witnesses, co-defendants, and other relevant information.

9. If the youth is detained, counsel must focus upon obtaining information relevant to the determination of pre-adjudication conditions of release. Such information should generally include:

- a. Youth's residence and length of time at the residence;
- b. Youth's legal custodian and physical custodian with names, addresses, and phone numbers;
- c. Mental and physical health and employment background, if any;
- d. School placement, status, attendance, and whether the youth qualifies for special education;
- e. Whether the youth or the youth's family has had previous contact with the youth court system and the outcome of that contact;
- f. Adults possibly willing to assume responsibility for the youth;
- g. Useful social information, including the youth's home behavior, school performance, involvement with special education services, past or present employment, and other information concerning the youth's ability to stay out of trouble if released, and the parent's ability to control and discipline the youth.

10. If counsel is unable to communicate with the youth because of language or other disability, counsel shall secure the assistance of such experts as are necessary to communicate with the youth.

11. Whenever the nature and circumstances of the case permit, counsel should explore the possibility of informal adjustment under § 41-5-130, MCA.

12. Counsel shall actively prepare the youth for any interview with the youth probation officer and accompany the youth at any such interview.

13. If the court requires the posting of a bond, counsel should discuss with the youth and his or her parent or guardian the procedures that must be followed. Where the youth is not able to obtain release under the conditions set by the court, counsel should consider pursuing modifications of those conditions.

### **III. HANDLING THE CASE:**

1. In preparation for the probable cause hearing, counsel should:
  - a. Review all evidence to identify relevant and meritorious pretrial motions;
  - b. Be fully informed of the rules of evidence, court rules, and the law with relation to all stages of the hearing process ~~and~~; be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the adjudicatory hearing;
  - c. Be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review;
  - d. Be aware of the confidentiality provisions that pertain to youth court proceedings;
  - e. Prepare the youth and, when appropriate, the youth's parent or guardian, for the proceeding by explaining the process; ~~explain to the parent or guardian and~~ that the probation officer may contact them to get information; ~~and~~ stress the importance of providing the probation officer with factually accurate information.
2. During the probable cause hearing, counsel should use the testimony at the hearing as a discovery tool and elicit as much information as possible about the facts and circumstances of the case.
3. If probable cause is found, counsel shall argue for the least restrictive placement for the youth pending arraignment.
4. Counsel shall promptly investigate the case. Regardless of whether the youth wishes to admit guilt, counsel shall ensure that the charges in the disposition are factually and legally correct and that the youth is aware of any potential defense to the charges.
5. When conducting the investigation, counsel should:
  - a. Obtain the arrest warrant, petition, and copies of all charging documents in the case to determine the specific charges that have been brought against the youth;
  - b. Obtain the police reports and any other records, documents, and statements;

- c. Research relevant law to determine the elements of the offenses charged, and defenses available,; interview all witnesses favorable and adverse and obtain any criminal or juvenile history of the witnesses;
- d. Ascertain if there is physical evidence and make prompt requests to examine and view the crime scene if possible;
- e. Determine whether an expert is needed to assist in preparation of the defense or to rebut the prosecution's case.

6. In preparation for the adjudicative hearing, counsel should review all statements, reports, and other evidence to determine whether motions are appropriate.

7. At the adjudicative hearing, counsel shall, where it benefits the youth, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence.

8. Counsel shall offer evidence favorable to the youth's case and present lay and expert witnesses, if available.

9. Prior to engaging in plea negotiations, counsel must ensure that the youth and parent understand the concept of plea bargaining in general, as well as the details of any specific plea offer made to him or her.

10. Counsel should make it clear to the youth that the ultimate decision to enter the plea has to be made by the youth.

11. Counsel should investigate and candidly explain to the youth the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication of delinquency.

12. Counsel should also ascertain and advise the youth of the court's practices concerning disposition, ~~and advise the youth of the court's practices concerning disposition, recommendations, and withdrawal of pleas or admissions.~~

13. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the youth's situation. Such advice should not be based solely on the youth's acknowledgement of guilt or solely on a favorable disposition offer.

14. The youth shall be kept informed of the status of the plea negotiations.

15. Where counsel believes that the youth's desires are not in the youth's best interest, counsel may attempt to persuade the youth to change his or her position. If the youth remains unpersuaded, however, counsel should assure the youth that he or she will defend the youth vigorously.

16. Notwithstanding the existence of ongoing plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to an adjudicatory hearing on the merits.

17. Counsel should make sure that the youth is carefully prepared to participate in the procedures required and used in the particular court.

18. Counsel must also be satisfied that the plea is voluntary, that the youth understands the nature of the charges, that there is a factual basis for the plea or admission, that the witnesses are or will be available, and that the youth understands the right being waived.

19. Counsel must consider whether an admission will compromise the youth or the youth's family's public assistance or immigration status. If it does, the youth may need to reconsider the decision to plead.

20. Counsel should be aware of the effect the youth's admission will have on any other court proceedings or related issues, such as probation or school suspension.

21. In preparation for the disposition hearing, counsel should:

- a. Explain to the youth and parent or guardian, if applicable, the nature of the dispositional hearing, the issues involved, and the alternatives open to the court;
- b. Explain fully and candidly the nature, obligations, and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the youth's responsibilities under the proposed dispositional plan.

22. Counsel should be familiar with and consider:

- a. The dispositional alternatives available to the court and any community services that may be useful in the formation of a dispositional plan appropriate to the youth's circumstances;
- b. The official version of the youth's prior records, if any;
- c. The position of the probation department with respect to the youth;
- d. The prosecutor's sentencing recommendation;
- e. Using a creative interdisciplinary approach by collaborating with educational advocates, social workers, and civil legal service providers;
- f. The collateral consequences attaching to any possible disposition;
- g. Any victim impact statement to be presented to the court;
- h. Requesting a continuance for disposition at a later date; and,
- i. Securing the assistance of psychiatric, psychological, medical, or other expert personnel needed for the purposes of evaluation, consultation, or testimony with respect to the formation of a dispositional plan.

23. Counsel shall provide the youth with continuous legal representation throughout the youth court process including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement, and sealing of records.

24. If counsel withdraws from representation of a youth following adjudication and disposition, counsel shall make all reasonable efforts to ensure that the youth is well represented in matters that stem from the youth's adjudication. This includes ensuring a smooth transfer of responsibility to new counsel or monitoring of the detention status, probation, treatment, and services provided an adjudicated youth.

#### **IV. YOUTH WHO ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT:**

1. To be eligible for assignment to represent youth who are prosecuted either under Section 41-5-206, MCA (filing in district court prior to formal proceedings in youth court) or Section 41-5-1602, MCA, (extended jurisdiction juvenile prosecution), counsel shall be qualified to represent adults charged with similar offenses and shall, in addition, have received a minimum of ~~Ten~~ten (10) hours of training and a minimum of ~~Five~~five (5) hours of supervised on-the-job training on the handling of juvenile transfer cases.

2. In preparing for the transfer hearing or for a designation of extended jurisdiction, counsel of record shall:

- a. Be aware of the statutory findings the court must make before transferring jurisdiction; and the case law governing these findings;
- b. Fully advise the youth of ~~the youth's~~this or her right to a hearing and the possible consequence of transfer to youth court or remaining in the district court;
- c. Investigate the offense with which the youth is charged sufficiently to address the question of whether the nature of the offense warrants prosecution in district court;
- d. Investigate the issue of community protection by interviewing the youth's agents, teachers, counselors, psychologists, community members, probation officers, religious affiliates, employers, or any others who have knowledge of the youth and can speak to his or her lack of dangerousness;
- e. Investigate the needs and stated interest of the youth, as well as the youth's circumstances;
- f. Provide the youth with full information and legal advice sufficient for the youth to make decisions concerning the transfer issue;
- g. Prepare to present evidence and testimony to prevent transfer, including testimony by people who can provide helpful insight into the youth's character, and who have a positive personal and/or professional view of the youth; and,
- h. Consider obtaining an independent evaluation from a defense expert.