



INDIGENT DEFENSE COMMISSION

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DANA F. EDDY
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DIRECTOR

RESOLUTION

WHEREAS, pursuant to the provisions of Section 3(b) of Article 21 of Chapter 29 of the West Virginia Code, the Indigent Defense Commission was established to provide assistance to Public Defender Services with regard to general policies and procedures of the agency;

WHEREAS, pursuant to the provisions of Section 4 of Article 21 of Chapter 29 of the West Virginia Code, the principal purpose of Public Defender Services is the development and improvement of programs by which the State of West Virginia provides legal representation to indigent persons;

WHEREAS, in furtherance of its statutory purpose, the Indigent Defense Commission has reviewed the *Fourth Edition of the Criminal Justice Standards for the Defense Function* issued by the American Bar Association;

WHEREAS, after such review, the Indigent Defense Commission adapted the standards issued by the American Bar Association to develop the *Standards for the Indigent Defense Function in the State of West Virginia* (the "Standards");

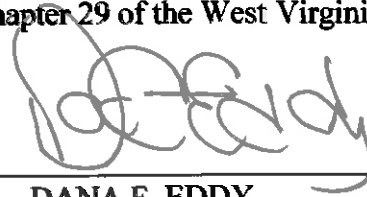
WHEREAS, the Standards were published on the website for Public Defender Services, provided to public defender corporations, and attached to an email addressed to panel attorneys throughout the State of West Virginia;

WHEREAS, comments were requested; and

WHEREAS, no comments have been received;

NOW, THEREFORE, BE IT RESOLVED on this 24th day of May, 2017, that the *Standards for the Indigent Defense Function in the State of West Virginia*, dated May 24, 2017,

are hereby adopted by the Indigent Defense Commission and are hereby submitted to Public Defender Services for issuance as the "best practices" for counsel engaged in the representation of eligible clients under the provisions of Article 21 of Chapter 29 of the West Virginia Code.



DANA F. EDDY
Chair

Dana F. Eddy	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Valena E. Betty	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
John L. Cummings	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Joshua L. Edwards	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Teresa McCune	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Jane Moran	Approved <input type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input checked="" type="checkbox"/>
Lawrence P. Shao	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Lonnie C. Simmons	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>
Karen B. Yost	Approved <input checked="" type="checkbox"/>	Dissented <input type="checkbox"/>	Did not vote <input type="checkbox"/>



**STANDARDS
for the
INDIGENT DEFENSE FUNCTION
in the
STATE OF WEST VIRGINIA**

**Adopted by the
INDIGENT DEFENSE COMMISSION
and
Issued by
PUBLIC DEFENDER SERVICES**

DATED: May 24, 2017

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**STANDARDS
for the
INDIGENT DEFENSE FUNCTION
in the
STATE OF WEST VIRGINIA**

Introduction: The following standards are issued by the Indigent Defense Commission which is established by the provisions of Section 3b of Article 21 of Chapter 29 of the West Virginia Code (W. Va. Code §29-21-3b). The standards are issued for the purpose of providing guidance to attorneys involved in the criminal defense of indigent clients in the State of West Virginia. The standards are derived from the *Fourth Edition of the Criminal Justice Standards for the Defense Function* issued by the American Bar Association. Notably, commentary has not yet been provided by the American Bar Association for this edition of the criminal justice standards, but, when provided, the commentary will be a valuable resource to resolve questions that might arise about the application of a standard.

Additionally, attorneys must consult the Rules of Professional Conduct promulgated by the Supreme Court of Appeals of West Virginia on June 20, 1988, and made effective on or after January 1, 1989, with respect to their obligations as defense counsel. The standards are intended to be a complement to the Rules of Professional Conduct by providing a more extensive discussion of, and a discrete compilation of, the specific obligations of criminal defense counsel. If any conflict arises between the standards and the Rules of Professional Conduct, the Rules would necessarily control.

**PART I
GENERAL STANDARDS**

Standard 1.1 Scope and Function of the Standards

(a) As used in these standards, "defense counsel" means "public defender," as defined by Section 2(5) of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §29-21-2(5), "assistant public defender," as defined by Section 2(6) of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §29-21-2(6), and "panel attorney" as described by Section 9 of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §29-21-9. The standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The standards are intended to serve the best interests of clients, and the standards should not be relied upon to justify any decision that is counter to the client's best interests.

(b) The standards are intended to provide guidance for the professional conduct and performance of defense counsel. The standards are not intended to modify a defense attorney's obligations under applicable rules, statutes or constitutional provisions, including the Rules of Professional Conduct promulgated by the Supreme Court of Appeals of West Virginia on June 20, 1988, and made effective on or after January 1, 1989 (the "Rules of Professional Conduct"). The standards are aspirational or describe "best practices" and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. The standards may be relevant, however, in a judicial evaluation of constitutional claims regarding the right to the effective assistance of counsel. For purposes of consistency, the standards sometimes include language taken from the Rules of Professional Conduct, but the standards often address

conduct or provide details beyond that governed by the Rules of Professional Conduct. No inconsistency is ever intended, and in any case a lawyer should always read and comply with the Rules of Professional Conduct and other authorities that are binding upon an attorney in the State of West Virginia.

(c) Because the standards are aspirational, the words "should" or "should not" are used in these standards, rather than mandatory phrases such as "shall" or "shall not," when describing the conduct of lawyers that is expected or recommended.

(d) The standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities upon attorneys practicing law in the State of West Virginia, including but not limited to the Rules of Professional Conduct.

Standard 1.2 Functions and Duties of Defense Counsel

(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including the judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

(b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their client, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

(c) Defense counsel should know and abide by the standards of professional conduct expressed in the Rules of Professional Conduct and opinions of the Supreme Court of Appeals of West Virginia. Defense counsel who disagree with a governing ethical rule should seek the rule's change if appropriate, and directly challenge the rule if necessary, but should comply with the rule unless relieved by court order.

(d) Defense counsel is the client's professional representative, not the client's alter-ego. Defense counsel should act zealously within the bounds of the law and the Rules of Professional Conduct on behalf of their clients, but have no duty to, and may not, execute any directive of the client which violates the law or such rules. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or rules if done openly.

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, defense counsel should stimulate and support efforts for remedial action. Defense counsel should provide services to the community, including involvement in State Bar activities, public education, community service activities, and State Bar governance. For public defenders or assistant public defenders, the budget for the employing public defender corporation should include funding and paid time for such activities. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

- (f) Defense counsel should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases and communicate these alternatives to the client.

Standard 1.3 Continuing Duties of Defense Counsel

Some duties of defense counsel run throughout the period of representation and even beyond. Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include:

- (a) a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends;
- (b) a duty of loyalty toward the client;
- (c) a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty;
- (d) a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes;
- (e) a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation;
- (f) a duty to continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review;
- (g) a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution; and
- (h) a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.

Standard 1.4 Defense Counsel's Tempered Duty of Candor

- (a) In light of defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in a criminal prosecution.
- (b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

- (c) Defense counsel should disclose to the court legal authority in the State of West Virginia or applicable to proceedings in the State of West Virginia which are known to defense counsel to be directly adverse to the position of the client and not disclosed by others.

Standard 1.5 Preserving the Record

At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

Standard 1.6 Improper Bias Prohibited

(a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socio-economic status. Defense counsel should strive to eliminate implicit biases, and, within the scope of defense counsel's authority, defense counsel should act to mitigate any improper bias or prejudice when credibly informed that it exists.

(b) In all of defense counsel's work, defense counsel should be active in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race. A public defense corporation employing public defenders and assistant public defenders should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the public defender corporation's judicial circuit and eliminate those impacts that cannot be properly justified.

Standard 1.7 Conflicts of Interest

(a) Defense counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, including the Rules of Professional Conduct, and defense counsel should be sensitive to facts that may raise conflict issues. When a conflict requiring withdrawal exists and is non-waivable or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client's interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

(b) Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other former, or potential, clients; by client obligations of their law partners; or by their personal political, financial, business, property, or other interests or relationships.

(c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client's selection of unconflicted counsel or decision to continue defense counsel's representation. The disclosure of conflicts of interest that would otherwise be prohibited by applicable rules or law should be in writing and should be disclosed on the record to any court before which the matter comes. Disclosures to the client should include communication of information sufficient to permit the client to appreciate the material risks involved and available alternatives. Defense counsel should obtain informed

consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(d) Except where necessary to secure counsel for preliminary matters such as initial hearings or applications for bail, a defense counsel (or multiple counsel associated in practice) should not undertake to represent more than one client in the same criminal case. When there is not yet a criminal case, such multiple representations should be engaged in only when, after careful investigation and consideration, it is clear either that no conflict is likely to develop at any stage of the matter or that multiple representation will be advantageous to each of the clients represented and that foreseeable conflicts can be waived.

(e) In instances of permissible multiple representation:

(i) the clients should be fully advised that the lawyer may be unable to continue if a conflict develops and that confidentiality may not exist between the clients;

(ii) informed written consent should be obtained from each of the clients; and

(iii) if the matter is before a tribunal, such consent should be made on the record with appropriate inquiries by counsel and the court.

(f) Defense counsel who has formerly represented a client should not thereafter use information related to the former representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply, and defense counsel should not take legal positions that are substantially adverse to a former client.

(g) In accepting payment of fees by one person for the representation of another, defense counsel should explain to the payor that counsel's loyalty and confidentiality obligations are owed entirely to the person being represented and not to the payor and that defense counsel may not release client information to the payor unless applicable rules governing ethics allow. Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services. In addition, defense counsel should not accept such third-party compensation unless:

(i) the client gives informed consent after full disclosure and explanation;

(ii) defense counsel is confident there will be no interference with defense counsel's independence or professional judgment or with the client-lawyer relationship; and

(iii) defense counsel is reasonably confident that information relating to the representation of the client will be protected from disclosure as required by counsel's ethical duty of confidentiality.

(h) Defense counsel should not represent a client in a criminal matter in which counsel, or counsel's partner or other lawyer in counsel's law office or firm is the prosecutor in the same or a substantially related matter or is a prosecutor in the same jurisdiction.

(i) If defense counsel's partner or other lawyer in counsel's law office was formerly a prosecutor in the same or substantially related matter or was a prosecutor in the same

jurisdiction, defense counsel should not take on representation in that matter unless appropriate screening and consent measures under applicable ethics rules are undertaken and no confidential information of the client or of the government has actually been exchanged between defense counsel and the former prosecutor.

(j) If defense counsel is a candidate for a position, or seeking employment, as a prosecutor or judge, this should be promptly disclosed to the client and informed consent to continue should be obtained.

(k) Defense counsel who formerly participated personally and substantially in the prosecution or criminal investigation of a defendant should not thereafter represent any person in the same or a substantially related matter, unless waiver is obtained from both the client and the government. Defense counsel who acquired confidential information about a person when counsel was formerly a prosecutor should not use such information in the representation of a client whose interests are adverse to that other person, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply.

(l) Defense counsel whose current relationship to the prosecutor is parent, child, sibling, spouse, or sexual partner should not represent a client in a criminal matter in which defense counsel knows the government is represented by that prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter in which defense counsel knows the government is represented in the matter by such prosecutor, except upon informed consent by the client regarding the relationship.

(m) Defense counsel should not act as surety on a bond either for a client whom counsel represents or for any other client in the same or a related case, unless it is required by law or it is clear that there is no risk that counsel's judgment could be materially limited by counsel's interest in recovering the amount ensured.

(n) Except as may otherwise be permitted by law, defense counsel should not negotiate to employ any person who is significantly involved as an attorney, employee, or agent of the prosecution in a matter in which defense counsel is participating personally and substantially.

Standard 1.8 Appropriate Workload

(a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds appropriate levels.

(b) Public defender corporations should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads (including intake) when necessary and as permitted by law to ensure the effective and ethical conduct of the defense function.

Standard 1.9 Diligence, Promptness and Punctuality

- (a) Defense counsel should act with diligence and promptness in representing a client and should avoid unnecessary delay in the disposition of cases. But defense counsel should not act with such haste that quality representation is compromised. Defense counsel and public defender corporations should be organized and supported with adequate staff and facilities to enable them to represent clients effectively and efficiently.
- (b) When providing reasons for seeking delay, defense counsel should not knowingly misrepresent facts or otherwise mislead. Defense counsel should use procedural devices that will cause delay only when there is a legitimate basis for their use. Defense counsel should not accept a representation for the purpose of delaying a trial or hearing.
- (c) Defense counsel should not unreasonably oppose requests for continuances from the prosecutor.
- (d) Defense counsel should know and comply with timing requirements applicable to a criminal representation so as to not prejudice a client's right.
- (e) Defense counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in dealing with opposing counsel, witnesses and others. Defense counsel should emphasize to the client, assistants, and defense witnesses the importance of punctuality in court attendance.

Standard 1.10 Relationship with Media

- (a) For purposes of this standard, a "public statement" is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during the criminal proceedings or in court filings or correspondence with the court or counsel regarding the criminal proceedings.
- (b) Defense counsel's public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.
- (c) Defense counsel should not make, cause to be made, or authorize or condone the making of, a public statement that counsel knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding.
- (d) Defense counsel should not place statements or evidence into the court record to circumvent this standard.
- (e) Defense counsel should exercise reasonable care to prevent investigators, employees, or other persons assisting or associated with the defense from making an extrajudicial statement or providing non-public information that defense counsel would be prohibited from making or providing under this standard or other applicable rules or law.
- (f) Defense counsel may respond to public statements from any source in order to protect a client's legitimate interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case defense counsel should approach the prosecutor or the court

for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) In making any public statement regarding a representation, defense counsel should comply with ethical rules governing client confidentiality and loyalty and should not provide confidential information to the media, on or off the record, without authorization from the client.

(h) Defense counsel should not allow the client's representation to be adversely affected by defense counsel's personal interest in potential media contacts or attention.

(i) A defense counsel uninvolved in a matter who is commenting as a media source may offer generalized media commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. Defense counsel acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. Defense counsel should not offer commentary regarding the specific merits of an ongoing prosecution or investigation, except in a rare case to address a manifest injustice when defense counsel is reasonably well-informed about the relevant facts and law.

Standard 1.11 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Public Defenders or Assistant Public Defenders

(a) Strong professional qualifications and performance should be the basis for selection and retention for public defenders or assistant public defenders. Effective measures to retain excellent defenders should be encouraged, while recognizing the benefits of some turnover. Supervisory public defenders should select and promote personnel based on merit and expertise, without regard to partisan, personal or political factors or influence.

(b) In selecting personnel, a public defender corporation should also consider the diverse interests and makeup of the community it serves and seek to recruit, hire, promote and retain a diverse group of public defenders and assistant public defenders and staff that reflect that community.

(c) The function of indigent defense requires highly developed professional skills and a variety of backgrounds, talents and experience. A public defender corporation should promote continuing professional development and continuity of service, while providing public defenders and assistant public defenders the opportunity to gain experience in all aspects of the defense function.

(d) Compensation and benefits for public defenders and assistant public defenders should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel. Compensation for public defenders and assistant public defenders should be comparable to that of prosecutors in the same jurisdiction.

PART II

ACCESS TO DEFENSE COUNSEL

Standard 2.1 Duty to Make Qualified Criminal Defense Representation Available

The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In the State of West Virginia, this obligation is met by application of the provisions of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §§29-21-1, *et seq.* The statutory scheme establishes public defender corporations in each judicial circuit of the state, subject to activation, and complements the public defender corporations by a panel of attorneys maintained by the judges of the circuit court on a local or regional basis. For this reason, lawyers generally are relieved of the obligation to accept appointments without regard to the lawyers' qualifications or experience in criminal matters.

Standard 2.2 Confidential Defense Communication with Detained Persons

(a) Every jurisdiction should guarantee by statute or rule the right of a criminally-detained or confined person to prompt, confidential, affordable and effective communication with a defense lawyer throughout a criminal investigation, prosecution, appeal, or other quasi-criminal proceedings such as *habeas corpus*.

(b) All detention or imprisonment institutions should provide reasonable, affordable access to confidential and unmonitored telephonic and other communication facilities to allow effective confidential communication between defense counsel and their detained clients. This should include providing or allowing access to language translation or other communication services when necessary.

(c) All detention or imprisonment institutions should provide adequate facilities for private, unmonitored meetings between defense counsel and an accused. Private facilities should also be provided for the review of evidence and discovery material by counsel together with their detained clients.

(d) Absent a credible threat of immediate danger or violence, or advance judicial authorization, persons working in detention or imprisonment institutions should be prohibited from examining, monitoring, recording, or interfering with confidential communications between defense counsel and their detained clients.

Standard 2.3 Right to Counsel at First and Subsequent Judicial Appearances

A defense counsel should be made available in person to a criminally-accused person for consultation at, or before, any appearance before a judicial officer, including the first appearance.

PART III

LAWYER-CLIENT RELATIONSHIP

Standard 3.1 Establishing and Maintaining an Effective Client Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and defense counsel should explain what the client can do to help preserve confidentiality.

(b) At an early stage, defense counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused.

(c) Defense counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client's best interests.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

Standard 3.2 Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

(a) In every case where the client is detained, defense counsel should discuss with the client, as promptly as possible, the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions should be sought. Defense counsel should be aware of applicable statutes and rules and all alternatives less restrictive than full institutional detention. Defense counsel should investigate community and family resources that might be available to assist in implementing such alternatives.

(b) Defense counsel should investigate the factual predicate that has been advanced to support detention and custodial conditions, and not assume its accuracy.

- (c) Once defense counsel has sufficient command of the facts, defense counsel should approach the prosecutor to see if agreement to release or a change in release or custodial conditions can be negotiated and submitted for approval by the court.
- (d) If the prosecutor does not agree, defense counsel should submit to the court a statement of facts, legal argument, and proposed conditions if necessary to support the client's release or a reduction in release or custodial conditions.
- (e) If a court orders release, defense counsel should fully explain all conditions of release to the client, as well as the consequences of violation of the conditions. Defense counsel should assist the client and others acting for the client in properly implementing the release conditions.
- (f) If defense counsel is unable to secure the client's release, defense counsel should, after discussion with the client and with due regard to any relevant confidentiality concerns, alert the court and institutional personnel to any special medical, psychiatric, religious, dietary, or security needs of the client while in government custody and request that the court order the appropriate officials to take steps to meet such special needs.
- (g) Defense counsel should reevaluate the client's eligibility for release, or for reduced release or custodial conditions, at all significant stages of a criminal matter and when there is any relevant change in facts or circumstances. Defense counsel should request reconsideration of detention or modification of conditions whenever it is in the client's best interests.

Standard 3.3 Interviewing the Client

- (a) In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, and inquiring about the client's objectives for the representation. Defense counsel may also discuss available evidentiary materials with the client, seek information from the client as to the facts and other potential sources of information, and ask what the client's immediate objectives and needs are and how to fulfill them.
- (b) Defense counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with the client. Consultation with the client regarding available options, immediately necessary decisions, and next steps should be a part of every meeting.
- (c) As early as practicable in the representation, defense counsel should also discuss:
 - (i) and share with the client evidentiary materials relevant to the matter (consistent with the terms of any applicable protective order) and determine in depth the client's view of the facts and other relevant facts known to the client;
 - (ii) the likely length and course of the pending proceedings;
 - (iii) potential sources of helpful information, evidence, and investigation;
 - (iv) the client's wishes regarding, and the likelihood of and steps necessary to gain, release or reduction of supervisory conditions;

- (v) likely legal options such as motions, trial, and potential negotiated dispositions;
 - (vi) the range of potential outcomes and alternatives, and if convicted, possible punishment;
 - (vii) if appropriate, the possibility and potential costs and benefits of a negotiated disposition, including one that might include cooperation with the government; and
 - (viii) relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter.
- (d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.

Standard 3.4 Engagement Letter

- (a) Upon being appointed to take on a criminal representation, defense counsel should promptly provide a new client with an engagement letter, email, or other written communication, as described below, written in plain language that the particular client can understand. If material conditions of the representation change during the representation, defense counsel should, after consultation with the client, promptly and specifically communicate the changes in writing to the client.
- (b) While the content and level of detail may vary depending on the context, an engagement letter should include a description of:
- (i) the identity of the client and the scope of, and limitations on, the representation;
 - (ii) the fact that counsel's duties of confidentiality and loyalty are owed to the client;
 - (iii) material that counsel may retain although related to the representation (e.g., legal research for use in future cases); and
 - (iv) any other information that is particularly relevant to the specific representation.

Standard 3.5 Literary or Media Rights Agreements Prohibited

- (a) Before the conclusion of all aspects of a criminal representation in which defense counsel participates, defense counsel should not enter into any agreement or informal understanding by which the defense counsel acquires an interest in a literary or media portrayal or account based on or arising out of defense counsel's involvement in the matter.
- (b) Defense counsel should not allow the client's representation to be adversely affected by the possibility of future personal literary or other media rights.
- (c) In creating or participating in any literary or other media account of a matter in which defense counsel was involved, counsel's duty of confidentiality must be respected even after a matter is concluded or the client is deceased. When protected confidences are involved,

defense counsel should not make disclosure without consent from the client or the client's authorized representative.

Standard 3.6 Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government's physical evidence is preserved at least until the defense can examine or evaluate it.

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary and similarly adjust the investigative or defense strategy.

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether going to the prosecution with such evidence is in the client's best interests and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's best interests. Counsel should timely act in accordance with such decisions.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used or because such action might incur criticism or disfavor. Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

Standard 3.7 Anticipated Unlawful Conduct

(a) If defense counsel anticipates that a client may engage in unlawful conduct, defense counsel should advise the client concerning the meaning, scope and validity of the law and the possible consequences of violating the law and should advise the client to comply with the law.

(b) Defense counsel should not knowingly propose, advise, or assist in a course of conduct which defense counsel knows to be criminal or fraudulent, but defense counsel may discuss the legal consequences of a proposed course of conduct with a client and may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

(c) When unlawful conduct by a client is anticipated or has taken place, defense counsel should be aware of and follow applicable ethical rules, including provisions that require confidentiality and provisions that mandate or permit disclosures. See, e.g., Rule 1.6(b) of the Rules of Professional Conduct.

Standard 3.8 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of, or access to, relevant documents, unless the client's access to such information is restricted by law or court order. Defense counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, a good reason exists not to do so.

Standard 3.9 Maintaining Continuity of Representation; Relationship with Successor Counsel

(a) Defense counsel who withdraws from a representation at any stage of a criminal matter before its resolution should make reasonable efforts to assist the client in securing competent defense counsel, as successor counsel, and to not leave the client unrepresented, unless the client otherwise directs.

(b) Defense counsel should make reasonable efforts to establish and maintain a cooperative relationship with any prior, or successor, defense counsel in the representation.

(c) When successor counsel enters a representation, prior defense counsel should still act to protect the client's privileges, confidences and secrets, and obtain consent (express or implied) from the client before providing such information to the new counsel.

Standard 3.10 The Client's File

(a) When a representation ends, if the client requests the client's file, defense counsel should provide it to the client or, with the client's consent, to successor counsel or other authorized representative. Defense counsel should provide the client with notice of the file's disposition. Unless rules or statutes require otherwise, public defender corporations may retain client's files unless a client requests the file. If the client's file remains with defense counsel, defense counsel should retain copies of essential portions until the client provides further instructions or for at least the length of time consistent with statutes and rules of the State of West Virginia.

(b) During representation, defense counsel should provide the client with the client's file upon request.

(c) Not everything in defense counsel's files on a matter is the client's, and the definition of the contents of "the client's file" should be determined by reference to the laws or rules of the State of West Virginia or in accordance with opinions of the Supreme Court of Appeals of West Virginia. Original documents and property delivered to the defense counsel by the client are part of the client's file as are correspondence and court filings in the client's matter.

(d) When representation ends, defense counsel may seek a release from the client regarding the representation, but may not unreasonably withhold the client's file pending such release.

PART IV

INVESTIGATION AND PREPARATION

Standard 4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others as well as independent investigation. Defense counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

Standard 4.2 Illegal and Unethical Investigation Prohibited

Defense counsel should not use illegal or unethical means to obtain evidence or information or employ, instruct, or encourage others to do so.

Standard 4.3 Relationship with Witnesses

- (a) "Witness" in this standard means any person who has or might have information about a matter, including victims and the client.
- (b) Defense counsel should know and follow the law and rules regarding victims and witnesses. In communicating with witnesses, defense counsel should know and abide by law and rules governing ethics regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.
- (c) Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.
- (d) Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden and should not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.
- (e) Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness' testimony.
- (f) Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.
- (g) It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.
- (h) Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules. Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give. Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of providing information, but only if done in a manner that does not discourage communication.

(i) Defense counsel should give their witnesses reasonable notice of when their testimony at a proceeding is expected and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at the time or their presence is required by law. When witnesses' attendance is required, defense counsel should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense counsel should ensure that defense witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.

(j) Defense counsel should not engage in any inappropriate personal relationship with any victim or other witness.

Standard 4.4 Relationship with Expert Witnesses

(a) An expert may be engaged to prepare an evidentiary report or testimony or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) Defense counsel should evaluate all expert advice, opinions, or testimony independently and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Defense counsel should not promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should

be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

Standard 4.5 Compliance with Discovery Procedures

Defense counsel should timely respond to legally proper discovery requests and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the prosecution makes requests for specific information, defense counsel should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case, and "boilerplate" requests and responses should be disfavored.

Standard 4.6 Preparation for Court Proceedings, and Recording and Transmitting Information

(a) Defense counsel should prepare in advance for court proceedings. Adequate preparation depends on the nature of the proceeding and the time available and will often include: reviewing available documents; considering what issues are likely to arise and the client's position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If defense counsel has not had adequate time to prepare and is unsure of the relevant facts or law, defense counsel should communicate to the court the limits of the defense counsel's knowledge or preparation.

(b) Defense counsel should appear at all hearings in cases assigned to him or her, unless with good cause a substitute counsel is arranged. An attorney who substitutes at a court proceeding for another attorney should be adequately informed about the case and issues likely to come up at the proceeding and should adequately prepare.

(c) Defense counsel handling any court appearance should document what happens at the proceeding to aid counsel's own memory and the client's future reference and so that necessary information will be available to counsel who may handle the case in the future.

(d) Defense counsel should take steps to ensure that any court order issued to the defense is transmitted to the appropriate persons necessary to effectuate the order.

Standard 4.7 Handling Physical Evidence with Incriminating Implications

(a) *Counseling the client:* If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, defense counsel should examine and comply with the law and rules of the State of West Virginia on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. Defense counsel should then competently advise the client about lawful options and obligations.

(b) *Permissible actions of the client:* If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Defense counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in

conduct that counsel knows is unlawful and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) *Confidentiality:* Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client's possession or disposition of, such physical evidence.

(d) *Receipt of physical evidence:* Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence, which may include:

(i) when defense counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when defense counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when defense counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and defense counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) *Compliance with legal obligations to produce physical evidence:* If defense counsel receives physical evidence that might implicate a client in criminal conduct, defense counsel should determine whether there is a legal obligation to return the evidence to its source or owner or to deliver it to law enforcement or a court and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

(f) *Retention of producible item for examination.* Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

(g) *Testing physical evidence.* If defense counsel determines the effective representation of the client requires that such physical evidence be submitted for forensic examination and testing, defense counsel should observe the following practices:

(i) the item should be properly handled, packaged, labeled and stored, in a manner to document its identity and ensure its integrity;

(ii) any testing or examination should avoid, when possible, consumption of the item, and a portion of the item should be preserved and retained to permit further testing or examination;

(iii) any person conducting such testing or examination should not, without prior approval of defense counsel, conduct testing or examination in any manner that will consume the item or otherwise destroy the ability for independent re-testing or examination by the prosecution;

(iv) before approving a test or examination that will entirely consume the item or destroy the prosecution's opportunity and ability to re-test the item, defense counsel should provide the prosecution with notice and an opportunity to object and seek an appropriate court order; and

(v) if a motion objecting to consumptive testing or examination is filed, the court should consider ordering procedures that will permit independent evaluation of the defense's analysis, including but not limited to:

(A) permitting a prosecution expert to be present during preparation and testing of the evidence;

(B) video recording the preparation and testing of the evidence;

(C) still photography of the preparation and testing of evidence; and

(D) access to all raw data, notes and other documentation relating to the defense preparation and testing of the evidence.

(h) *Client consent to accept a physical item.* Before voluntarily taking possession from the client of physical evidence that defense counsel may have a legal obligation to disclose, defense counsel should advise the client of potential legal implications of the proposed conduct and possible lawful alternatives and obtain the client's informed consent.

(i) *Retention or return of item when law permits.* If defense counsel reasonably determines that there is no legal obligation to disclose physical evidence in counsel's possession to law enforcement authorities or others, the lawyer should deal with the physical evidence consistently with ethical and other law and rules. If defense counsel retains the evidence for use in the client's representation, the lawyer should comply with applicable law and rules, including rules on safekeeping property, which may require notification to third parties with an interest in the property. Defense counsel should maintain the evidence separately from privileged materials of other clients and preserve it in a manner that will not impair its evidentiary value. Alternatively, defense counsel may deliver the evidence to a third-party lawyer who is also representing the client and will be obligated to maintain the confidences of the client as well as defense counsel.

PART V

CONTROL AND DIRECTION OF LITIGATION

Standard 5.1 Advising the Client

- (a) Defense counsel should exercise independent professional judgment when advising a client.
- (b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decisions and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely, as well as possible, outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.
- (c) Defense counsel should promptly communicate to the client every plea offer and all significant developments, motions, and court actions or rulings and provide advice as outlined in this standard.
- (d) In rendering advice to the client, defense counsel should consider the client's desires and views and may refer not only to law but also to other considerations such as moral, economic, social or political factors that may be relevant to the client's situation. Defense counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.
- (e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options and should avoid unnecessarily rushing the accused into decisions.
- (f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client's decisions regarding a plea.
- (g) Defense counsel should advise the client to avoid communication about the case with anyone, including victims or other possible witnesses, persons in custody, family, friends, and any government personnel, except with defense counsel's approval, although when the client is a minor, consultation with parents or guardians may be useful. Defense counsel should advise the client to avoid contact with jurors or persons called for jury duty and to avoid either the reality or the appearance of any other improper activity.
- (h) Defense counsel should consider and advise the client of potential benefits as well as negative aspects of cooperating with law enforcement or the prosecution.
- (i) After advising the client, defense counsel should aid the client in deciding on the best course of action and how best to pursue and implement that course of action.

Standard 5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by defense counsel is highly contextual, and defense counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

- (i) whether to proceed with counsel;
- (ii) what pleas to enter;
- (iii) whether to accept a plea offer;
- (iv) whether to cooperate with or provide substantial assistance to the government;
- (v) whether to waive a jury trial;
- (vi) whether to testify in his or her own behalf;
- (vii) whether to speak at sentencing;
- (viii) whether to appeal; and

(ix) any other decision that has been determined by law, rule or decision of a court with jurisdiction to belong to the client.

(c) If defense counsel has a good faith doubt regarding the client's competence to make important decisions, defense counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, to what stipulations if any to agree, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client and defense counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.

Standard 5.3 Obligations of Stand-By Counsel

(a) An attorney whose assigned duty is to actively assist a *pro se* criminally accused person should permit the accused to make the final decision on all matters, including strategic and

tactical matters relating to the conduct of the case, while still providing the attorney's best advice.

(b) An attorney whose assigned duty is to assist a *pro se* criminally accused person only when the accused requests assistance may bring to the attention of the accused steps that could be potentially beneficial or dangerous to the accused, but should not actively participate in the conduct of the defense unless requested by the accused or as directed by the court.

(c) In either case, the assigned attorney should respect the accused's right to develop and present the accused's own case, while still advising the accused of potential benefits or dangers the attorney perceives in the course of the litigation. Such an attorney should be fully prepared about the matter in order to offer such advice and in case the court and the accused determine that the full representation role should be transferred to defense counsel at some point during the criminal proceedings.

Standard 5.4 Consideration of Collateral Consequences

(a) Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial or choose other dispositions.

(b) When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for this consequence.

(c) Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding possible dispositions and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed.

Standard 5.5 Special Attention to Immigration Status and Consequences

(a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.

(b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances.

(c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences and

determine with the client the best course of action in furtherance of the client's interests and how to pursue this course.

(d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.

PART VI

DISPOSITION WITHOUT TRIAL

Standard 6.1 Duty to Explore Disposition without Trial

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Defense counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interests.

Standard 6.2 Negotiated Disposition Discussions

(a) As early as practicable, and preferably before engaging in disposition discussions with the prosecutor, defense counsel should discuss with and advise the client about possible disposition options.

(b) Once discussions with the prosecutor begin, defense counsel should keep the accused advised of relevant developments. Defense counsel should promptly communicate and explain to the client any disposition proposals made by the prosecutor, while explaining that presenting the prosecution's offer does not indicate counsel's unwillingness to go to trial.

(c) Defense counsel should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences.

(d) Defense counsel should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense, or is likely to reduce punishment.

(e) Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.

(f) Defense counsel should not knowingly make false statements of fact or law in the course of disposition discussions.

(g) Defense counsel should be aware of possible benefits from early cooperation with the government, but should also consider possible disadvantages. Counsel should fully advise the client about the client's overall interests before recommending any cooperation-dependent disposition.

(h) Defense counsel should not negotiate an aggregate disposition for multiple clients, even if joint representation was initially appropriate under applicable conflict provisions.

(i) Defense counsel should not recommend concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case, unless both clients give their informed consent.

Standard 6.3 Plea Agreements and Other Negotiated Dispositions

(a) Defense counsel should ensure that any written disposition agreement accurately and completely reflects the precise terms of the agreement, including the prosecution's promises and the client's obligations and whether any dismissal of charges will be with or without prejudice to later reinstatement.

(b) During any court hearing regarding a negotiated disposition, defense counsel should ensure that all relevant details of the negotiated agreement are placed on the record, and that the record fully reflects any factors necessary to protect the client's best interests. Although the presumption is that the record will be public, in some cases the record (or a portion) may be sealed for good cause or as required by applicable rule or statute.

(c) Defense counsel should fully prepare the client for any hearing before a court related to entering or accepting a negotiated disposition and for any pre-disposition or post-disposition interview conducted by the prosecution or by court agents such as presentence investigators or probation officers. Counsel should ordinarily be present at any such interview to protect the client's interests.

(d) In appropriate cases counsel should consider, and with the consent of the client seek, entry of a disposition and immediate sentencing without a presentence investigation.

(e) Defense counsel should investigate and be knowledgeable about sentencing procedures, law and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge, and defense counsel should advise the client on these topics before permitting the client to enter a negotiated disposition. Defense counsel should also consider and explain to the client the manner in which specific terms of an agreement are likely to be implemented.

(f) If defense counsel believes that prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced the client's disposition decision, defense counsel should bring the circumstances to the attention of the court on the record, unless after consultation with the client, it is agreed that the risk of losing the negotiated disposition outweighs other considerations.

Standard 6.4 Opposing Waivers of Rights in Disposition Agreements

(a) Defense counsel should not accept disposition agreement waivers of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of

evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, defense counsel should ensure that the defendant has consulted with independent counsel regarding the waiver before agreeing to the disposition.

(b) In addition to claims addressed in (a), defense counsel should not agree to waivers of any other important defense rights such as the right to appeal (including sentencing appeals), to receive *Brady* discovery, or to contest the conviction or sentence in collateral proceedings, unless after consultation with the client it is agreed that the risk of losing the negotiated disposition outweighs other considerations. In negotiations, defense counsel should request the prosecution to provide specific, individualized reasons for the inclusion of such waivers. Defense counsel should also consult with the client about whether to object to such waivers in court.

(c) Defense counsel should not recommend acceptance of any disposition agreement waivers without fully assessing and discussing with the client the impact of any waiver on the defendant's individualized circumstances. Defense counsel should demand that any such waiver include at the very least an exception for a subsequent showing of manifest injustice based on newly discovered evidence or actual innocence.

(d) Even if the client wishes to agree to such waivers after a fully informed consultation, defense counsel should consider challenging the legitimacy of any such waiver if the challenge can be made without harming the client's interests.

PART VII COURT HEARINGS AND TRIAL

Standard 7.1 Scheduling Court Hearings

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When defense counsel is aware of facts that would affect scheduling, defense counsel should advise the court and, if the facts are case-specific, the prosecutor.

Standard 7.2 Civility with Courts, Prosecutors, and Others

(a) As an officer of the court, defense counsel should support the authority and dignity of the court by adherence to codes of professionalism and by manifesting a courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors, courtroom staff and others. In court as elsewhere, the defense counsel should not display or act out of any improper or unlawful bias.

(b) In all contacts with judges, defense counsel should maintain a professional and independent relationship. Defense counsel should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case management or administrative matters), defense counsel should invite a representative prosecutor to join in the discussion to the extent practicable.

- (c) When *ex parte* communications or submissions are authorized, defense counsel should inform the court of material facts known to counsel (other than those protected by a valid privilege), including facts that are adverse, that are sufficient to enable the court to make an informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless permitted.
- (d) When court is in session, unless otherwise permitted by the court, defense counsel should address the court and should not address other counsel directly on any matter relating to the case.
- (e) In written filings, defense counsel should respectfully evaluate and respond as appropriate to opposing counsel's arguments and representations and avoid unnecessary personalized disparagement.
- (f) Defense counsel should comply promptly and civilly with a court's order or seek appropriate relief from such order. If defense counsel considers an order to be significantly erroneous or prejudicial, counsel should ensure that the record adequately reflects the events. Defense counsel has a right to make respectful objections and reasonable requests for reconsideration and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, counsel may take other lawful steps to protect the client's rights.
- (g) Defense counsel should develop and maintain courteous and civil working relationships with judges and prosecutors and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system.
- (h) Defense counsel should be familiar with, and comply with, the Standards of Professional Conduct adopted by the Supreme Court of Appeals of West Virginia on the date of November 22, 1996, and made effective on the date of January 1, 1997.

Standard 7.3 Selection of Jurors

- (a) Defense counsel should be aware of legal standards that govern the selection of jurors and be prepared to discharge effectively the defense function in the selection of the jury, including raising appropriate issues concerning the method by which the jury panel was selected and exercising challenges for cause and peremptory challenges.
- (b) Defense counsel should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, or applicable rules of the State of West Virginia or the United States or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. Defense counsel should consider challenging a prosecutor's peremptory challenges that appear to be based on such criteria.
- (c) In cases in which defense counsel conducts a pretrial investigation of the background of potential jurors, the investigative methods should not harass, intimidate, unduly embarrass, or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. Defense counsel should not seek to commit jurors on factual issues likely to arise in the case or to suggest facts or arguments that the defense counsel reasonably should know are likely to be barred at trial. *Voir dire* should not be used to argue counsel's case to the jury or to unduly ingratiate counsel with the jurors.

(e) During *voir dire*, defense counsel should seek to minimize any undue embarrassment or invasion of privacy of potential jurors while still enabling fair and efficient juror selection.

(f) If the court does not permit *voir dire* by counsel, defense counsel should provide the court with suggested questions in advance if possible and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If defense counsel has reliable information that conflicts with a potential juror's responses or that reasonably would support a "for cause" challenge by any party, defense counsel should inform the court and, unless the court orders otherwise, the prosecutor.

Standard 7.4 Relationship with Jurors

(a) Defense counsel should not communicate with persons the defense counsel knows to be summoned for jury duty or impaneled as jurors, prior to or during trial, other than in the lawful conduct of courtroom proceedings. Defense counsel should avoid even the appearance of improper communications with jurors and minimize any out-of-court proximity to, or contact with, jurors. Where out-of-court contact cannot be avoided, counsel should not communicate about or refer to the specific case.

(b) Defense counsel should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, defense counsel should avoid contacts that may harass or embarrass the juror, that criticize the jury's actions or verdict, or that express views that could otherwise adversely influence a juror's future jury service. Defense counsel should know and comply with applicable rules and law governing the subject.

(d) Defense counsel who has reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on the client's judgment of conviction should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, to the prosecution.

Standard 7.5 Opening Statement at Trial

(a) Defense counsel should be aware of the importance of an opening statement and, except in unusual cases, should give an opening statement immediately after the prosecution's opening statement and before the presentation of evidence begins. Any decision to defer the opening statement should be fully discussed with the client, and a record of the reasons for such decision should be made for the file.

(b) Defense counsel's opening statement at trial should be confined to a fair statement of the case from defense counsel's perspective and a discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted. A deferred opening should focus on the defense evidence and theory of the case and not be a closing argument.

(c) Defense counsel's opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion, or personal attacks on opposing counsel.

(d) When defense counsel has reason to believe that a portion of the opening statement may be objectionable, counsel should raise that point with opposing counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that defense counsel intends to use during opening statement should be shown to the prosecutor in advance.

Standard 7.6 Presentation of Evidence

(a) Defense counsel has no obligation to present evidence and should always consider, in consultation with the client, whether a decision not to present evidence may be in the client's best interests. In making this decision, defense counsel should consider the impact of any evidence the defense would present and the potential damage that the prosecution's cross-examination or a rebuttal case could do, as well as the quality of the prosecution's evidence.

(b) Defense counsel should not knowingly offer false evidence for its truth, whether by documents, tangible evidence, or the testimony of witnesses or fail to take reasonable remedial measures upon discovery of material falsity in evidence offered by the defense, unless the court or applicable authority otherwise permits.

(c) If defense counsel reasonably believes that there has been misconduct by opposing counsel, a witness, the court or other persons which affects the fair presentation of the evidence, defense counsel should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues and not by engaging in retaliatory conduct that defense counsel knows is improper.

(d) Defense counsel should not bring to the attention of the trier of fact matters that defense counsel knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If defense counsel is uncertain about the admissibility of evidence, counsel should seek and obtain resolution from the court before the hearing or trial if possible or, otherwise, reasonably in advance of the time for proffering the evidence before a jury.

(e) Defense counsel should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the client and not make every possible objection. Defense counsel should not make objections without a reasonable basis or for improper reasons such as to harass or to break the flow of opposing counsel's presentation. Defense counsel should make an adequate record for appeal and consider the possibility of an interlocutory appeal regarding a significant adverse ruling.

(f) Defense counsel should not display tangible evidence (and should object to such display by the prosecutor) until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although counsel may seek permission to display admissible evidence during opening statement. Defense counsel should avoid displaying even admitted evidence in a manner that is unduly prejudicial.

Standard 7.7 Examination of Witnesses in Court

- (a) Defense counsel should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns and without seeking to intimidate or humiliate a witness unnecessarily.
- (b) Defense counsel's belief or knowledge that a witness is telling the truth does not preclude vigorous cross-examination, even though defense counsel's cross-examination may cast doubt on the testimony.
- (c) Defense counsel should not call a witness in the presence of the jury when counsel knows the witness will claim a valid privilege not to testify. If defense counsel is unsure whether a particular witness will claim a privilege to not testify, counsel should alert the court and the prosecutor in advance and outside the presence of the jury.
- (d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

Standard 7.8 Closing Argument to the Trier of Fact

- (a) In closing argument to a jury (or to a judge sitting as trier of fact), defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should, to the extent time permits, review the evidence in the record before presenting closing argument. Defense counsel should not knowingly misstate the evidence in the record or argue inferences that counsel knows have no good-faith support in the record.
- (b) Defense counsel should not argue in terms of counsel's personal opinion and should not imply special or secret knowledge of the truth or a witness' credibility.
- (c) Defense counsel should not make arguments calculated to appeal to improper prejudices of the jury.
- (d) Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law.
- (e) Defense counsel may respond fairly to arguments made in the prosecution's initial closing argument. Defense counsel should object and request relief from the court regarding prosecution arguments believed to be improper, rather than responding with arguments that counsel knows are improper.
- (f) If the prosecution is permitted to rebuttal argument, defense counsel should craft the defense closing argument to anticipate the government's rebuttal. If defense counsel believes the prosecution's rebuttal closing argument is or was improper, defense counsel should timely object and consider requesting relief from the court, including an instruction that the jury disregard the improper portion of the argument or an opportunity to reopen argument and respond before the factfinder.

Standard 7.9 Facts Outside the Record

When before a jury, defense counsel should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based

on ordinary human experience or are matters of which a court clearly may take judicial notice or are facts that counsel reasonably believes will be entered into the record at that proceeding. In a non-jury context, defense counsel may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

Standard 7.10 Comments by Defense Counsel after Verdict or Ruling

(a) Defense counsel may publicly express respectful disagreement with an adverse court ruling or jury verdict and may indicate that the defendant maintains innocence and intends to pursue lawful options for review. Defense counsel should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) Defense counsel may publicly praise a favorable court verdict or ruling, compliment participants, supporters, and others who aided in the matter and note the social value of the ruling or event. Defense counsel should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

Standard 7.11 Motions for Judgment of Acquittal During Trial

Defense counsel should move, outside the presence of the jury, for a judgment of acquittal after the close of the prosecution's evidence and at the close of all evidence and be aware of applicable rules regarding waiver and preservation of issues when no or an inadequate motion is made.

PART VIII POST-TRIAL MOTIONS AND SENTENCING

Standard 8.1 Post-Trial Motions

(a) Defense counsel should know the relevant rules governing post-trial motions and, if the trier of fact renders a judgment of guilty, timely present all motions necessary to protect the client's rights, including the defendant's right to appeal all aspects of the case. A motion for judgment of acquittal should be filed absent rare and unusual circumstances, and counsel should consider the strategic value of a motion for a new trial. Defense counsel should file only those motions that have a non-frivolous legal basis.

(b) Unless contrary to the client's best interests or otherwise agreed or provided by law, defense counsel should ordinarily represent the client in post-trial proceedings in the trial court. Defense counsel should consider, however, whether the client's best interests would be served by substitution of new counsel for post-trial motions.

(c) If a post-trial motion is based on ineffective assistance of counsel, defense counsel should seek to withdraw in accordance with the law regarding withdrawal and aid the client in obtaining substitute counsel.

Standard 8.2 Sentencing

(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

(b) Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused. Defense counsel should ensure that the accused understands the nature of the presentence investigation process and in particular the significance of statements made by the accused to probation officers and related personnel. Defense counsel should cooperate with the court's presentencing officers unless, after consideration and consultation, it appears not to be in the best interests of the client. Unless prohibited, defense counsel should attend the probation officer's presentence interview with the accused and meet in person with the probation officer to discuss the case.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(e) If a presentence report is made available to defense counsel, defense counsel should seek to verify the information contained in the report and should supplement or challenge the report if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel's knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

(f) Defense counsel should alert the accused to the right of allocution. Counsel should consider with the client the potential benefits of the judge hearing a personal statement from the defendant as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge's decision or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court's assistance, including an on-the-record statement by the court if possible, recommending the

appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.

(i) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.

PART IX

APPEALS AND POST-CONVICTION REMEDIES

Standard 9.1 Preparing to Appeal

(a) If a client is convicted, defense counsel should explain to the client the meaning and consequences of the court's judgment and the client's rights regarding appeal. Defense counsel should provide the client with counsel's professional judgment as to whether there are meritorious grounds for appeal and the possible, and likely, results of an appeal. Defense counsel should also explain to the client the advantages and disadvantages of an appeal including the possibility that the government might cross-appeal and the possibility that if the client prevails on appeal, a remand could result in a less favorable disposition. Counsel should also be familiar with, and discuss with the client, possible interactions with other post-conviction procedures such as *habeas corpus* rules and actions.

(b) The ultimate decision whether to appeal should be the client's.

(c) Defense counsel should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of appeal in the trial court, even if counsel does not expect to continue as counsel on appeal.

(d) Defense counsel should explain to the client that the client has a right to counsel on appeal (appointed, if the client is indigent), and that there are lawyers who specialize in criminal appeals. Defense counsel should candidly explore with the client whether trial counsel is the appropriate lawyer to represent the client on appeal or whether a lawyer specializing in appellate work should be consulted, added or substituted.

Standard 9.2 Counsel on Appeal

(a) Appellate defense counsel should seek the cooperation of the client's trial counsel in the evaluation of potential appellate issues. A client's trial counsel should provide such assistance as is possible, including promptly providing the file of the case to appellate defense counsel.

(b) When evaluating the case for appeal, appellate defense counsel should consider all issues that might affect the validity of the judgment of conviction and sentence, including any

that might require initial presentation in a trial court. Counsel should consider raising on appeal issues not objected to below or waived or forfeited, if in the best interests of the client.

(c) After examining the record and the relevant law, appellate defense counsel should provide counsel's best professional evaluation of the issues that might be presented on appeal. Appellate defense counsel should advise the client about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.

(d) Even if a client has agreed to a waiver of appeal, defense counsel should follow a client's direction to file an appeal if there are non-frivolous grounds to argue that the waiver is not binding or that the appeal should otherwise be heard.

(e) Appellate defense counsel should not file a brief that counsel reasonably believes is devoid of merit. However, counsel should not conclude that a defense appeal lacks merit until counsel has fully examined the trial court record and the relevant legal authorities. If appellate defense counsel does so conclude, appellate defense counsel should fully discuss that conclusion with the client and explain Rule 10(c)(10) of the Rules of Appellate Procedure before the Supreme Court of Appeals of West Virginia. Defense counsel should endeavor to persuade the client to abandon a frivolous appeal and to eliminate appellate contentions lacking in substance. Appellate defense counsel shall follow the provisions of the aforementioned Rule or other applicable authority if the client persists in the pursuit of a frivolous appeal.

(f) If the client chooses to proceed with a non-frivolous appeal against the advice of counsel, counsel should present the appeal. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(g) Appellate counsel should discuss with the client the arguments to present in appellate briefing and at argument and should diligently attempt to accommodate the client's wishes. If the client desires to raise an argument that is colorable, counsel should work with the client to an acceptable resolution regarding the argument. If appellate counsel decides not to brief all of the issues that the client wishes to include, appellate counsel should inform the client of *pro se* briefing rights in accordance with Rule 10(c)(10) of the Rules of Appellate Procedure before the Supreme Court of Appeals of West Virginia and proceed accordingly.

(h) If trial defense counsel will not remain as appellate defense counsel, trial defense counsel should notify the client of any applicable time limits, act to preserve the client's appellate rights if possible, and cooperate and assist in securing qualified appellate defense counsel. If appellate defense counsel's representation ends but further appellate review is possible, appellate defense counsel should advise the client of further options and deadlines, such as for a petition for *certiorari*.

(i) When the prosecution appeals a ruling that was favorable to the client, defense counsel should analyze the issues and possible implications for the client and act to zealously protect the client's interests. If the prosecution is appealing, defense counsel should consider adding or consulting with an appellate expert about the matter.

(j) When the law permits the filing of interlocutory appeals or writs to challenge adverse trial court rulings, defense counsel should consider whether to file an interlocutory appeal and, after consultation with the client, vigorously pursue such an appeal if in the client's best interests. If the prosecution files an interlocutory appeal, defense counsel should act in accordance with the foregoing paragraphs.

Standard 9.3 Conduct of Appeal

- (a) Before filing an appellate brief, appellate defense counsel should consult with the client about the appeal and seek to meet with the client unless impractical.
- (b) Appellate defense counsel should be aware of opportunities to favorably affect or resolve a defendant's appeal by motions filed in the appellate court, before filing a merits brief.
- (c) Defense counsel should understand the complex rules that govern whether arguments listed or omitted on direct appeal can limit issues available in later collateral proceedings and not unnecessarily or unknowingly abandon arguments that should be preserved. Defense counsel should explicitly label federal constitutional arguments as such in order to preserve later federal litigation options.
- (d) Appellate defense counsel should be aware of applicable rules relating to securing all necessary record documents, transcripts, and exhibits, and ensure that all such items necessary to effectively prosecute the appeal are properly and timely ordered. Before filing the brief, appellate defense counsel should ordinarily examine the docket sheet, all transcripts, trial exhibits and record documents and not just those designated by another lawyer or the client. Appellate defense counsel should consider whether, and how, to augment the record with any other matters, documents or evidence relevant to effective prosecution of the client's appeal. Appellate defense counsel should seek by appropriate motion, filed in either the trial or the appellate court, to make available for the appeal any necessary, relevant extra-record matters.
- (e) Appellate defense counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts, and appellate defense counsel should be familiar with and follow all applicable appellate rules while also protecting the client's best interests on appeal.
- (f) Appellate defense counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument. Appellate defense counsel should present directly adverse authority in the controlling jurisdiction of which counsel is aware and that has not been presented by other counsel in the appeal.
- (g) Appellate defense counsel should not intentionally refer to, or argue on the basis of, facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or are other matters of which the court properly may take judicial notice.
- (h) If the appeal is set for oral argument, appellate defense counsel should explain to an out-of-custody client that the client is permitted to attend and that attending the argument may have certain strategic advantages and disadvantages.
- (i) Appellate defense counsel should be aware of rules and practices that may apply to oral arguments, including, for example, rules that apply to submission of subsequent authorities or the use of demonstrative aids or exhibits during argument.
- (j) If appellate defense counsel's study of the record reveals that an ineffective assistance of trial counsel claim should be made, appellate defense counsel should weigh the advantages

and disadvantages of raising an ineffective assistance claim on the existing record versus pursuing such a claim in the trial court either before, or after, the appeal is heard. Appellate defense counsel should consult the decisions of the Supreme Court of Appeals of West Virginia regarding the raising of an ineffective assistance claim on appeal and the consequences that may result.

(k) Appellate defense counsel should consider, in preparing the appellate briefing, whether there might be any potential grounds for relief using other post-conviction remedies (such as a writ of *habeas corpus*) and consult with the client regarding timing and who might represent the client in such actions.

Standard 9.4 New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence

(a) When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, defense counsel has a duty to act. This duty applies even after defense counsel's representation is ended. Defense counsel must consider, and act in accordance with, duties of confidentiality. If such a former client currently has counsel, former defense counsel may discharge the duty by alerting the client's current counsel.

(b) If such newly discovered evidence or law (whether due to a change in the law or not) relevant to the validity of the client's conviction or sentence or of if such newly discovered evidence or law tending to show actual innocence of the client comes to the attention of the client's current defense counsel at any time after conviction, defense counsel should promptly:

(i) evaluate the information, investigate if necessary, and determine what potential remedies are available;

(ii) advise and consult with the client; and

(iii) determine what action if any to take.

(c) Defense counsel should determine applicable deadlines for the effective use of such evidence or law, including federal *habeas corpus* deadlines, and timely act to preserve the client's rights. Defense counsel should determine whether – and if so, how best – to notify the prosecution and court of such evidence.

Standard 9.5 Post-Appellate Remedies

(a) Once a defendant's direct appellate avenues have been exhausted, appellate defense counsel is not obligated to represent the defendant in a post-appellate collateral proceeding unless counsel has agreed, or has been appointed, to do so. But appellate defense counsel should still reasonably advise and act to protect the client's possible collateral options.

(b) If appellate defense counsel believes there is a reasonable prospect of a favorable result if collateral proceedings are pursued, counsel should explain to the client the advantages and disadvantages of pursuing collateral proceedings and any deadlines that apply. Appellate defense counsel should assist the client to the extent practicable in locating competent counsel for any post-appellate collateral proceedings.

(c) Post-appellate defense counsel should seek the cooperation of the client's prior counsel in the evaluation and briefing of potential post-conviction issues. Prior defense counsel should provide such assistance as is possible, including providing the file or copies of the file to post-appellate counsel.

Standard 9.6 Challenges to the Effectiveness of Counsel

(a) If appellate or post-appellate defense counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.

(b) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the client. Unless the client clearly wants defense counsel to continue, defense counsel in this situation should seek to withdraw from further representation of the client with an explanation to the court of the reason, consistent with the duty of confidentiality to the client. Defense counsel should recommend that the client consult with independent counsel if the client desires defense counsel to continue with the representation. Defense counsel should continue with the representation only if the client so desires after informed consent and such further representation is consistent with applicable conflict of interest rules.

(c) Defense counsel whose conduct in a criminal case is drawn into question is permitted to testify concerning the matters at issue and is not precluded from disclosing the truth concerning the matters raised by his former client, even though this involves revealing matters which were given in confidence. Former counsel must act consistently with applicable confidentiality rules, and ordinarily defense counsel may not reveal confidences unless necessary for the purposes of the proceeding and under judicial supervision.

(d) In a proceeding challenging defense counsel's performance, defense counsel should not rely on the prosecutor to act as defense counsel's lawyer in the proceeding and should continue to consider the former client's best interests.

Adopted: May 24, 2017

INDIGENT DEFENSE COMMISSION

By: 

DANA F. EDDY
Executive Director
Public Defender Services

Its: Chair