MISSISSIPPI PUBLIC DEFENDER TASK FORCE

2016 REPORT TO THE MISSISSIPPI LEGISLATURE

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COURT ADMINISTRATOR
AND COUNSEL

December 12, 2016

The Honorable Tate Reeves
Distinguished Members of the Senate
The Honorable Phillip Gunn
Distinguished Members of the House
The Capitol
Jackson, Mississippi

Dear Friends:

The Mississippi Public Defender Task Force was created in HB 602, 2015 Legislative Session, and is codified as §25-32-71. The Act took effect on passage and stands repealed July 1, 2018, providing the Task Force just over three years to complete its work.

The Act requires the Task Force report to the Legislature each year. As reported previously the Task Force believed that without a data based assessment of indigent defense caseloads and a more detailed evaluation of defense services across the state, the three duties of the Task Force could not be achieved.

The evaluation, being conducted by the Sixth Amendment Center with funding from the United States Department of Justice, will be completed by January 2017. It is anticipated that the report will be presented to the Task Force in February. This report will guide the further work of the Task Force.

The Office of State Public Defender was charged by the Task Force with collecting and presenting a caseload assessment. In the coming weeks the Task Force will meet to discuss the attached report from OSPD.

This study flows from the recommendations made in *Mississippi Indigent Defense Data Project: Recommendations for the Mississippi Public Defender Task Force*, included in the 2015 Task Force Report. The six recommendations from that report and the progress made toward each recommendation also are attached as part of this report.

On behalf of the Task Force I wish to express appreciation for the action taken by the 2016 Legislature in passing SB 2314 which will enhance the data collection capacity of OSPD and lead to a more efficient means of evaluating our indigent defense systems in the future.

Respectfully submitted,

Justice James W. Kitchens, Chairman
Mississippi Public Defender Task Force

Enabling legislation

§ 25-32-71. Creation of task force; members; officer; adoption of rules; reimbursement of expenses; duties [Repealed effective July 1, 2018]

(1) There is created the Mississippi Public Defender Task Force which shall be composed of thirteen (13) members as follows:

(a) The President of the Mississippi Public Defender Association, or his designee;

(b) The President of the Mississippi Prosecutors Association, or his designee;

(c) A representative of the Administrative Office of Courts;

(d) A representative of the Mississippi Supreme Court;

(e) A representative of the Conference of Circuit Judges;

(f) A representative of the Mississippi Attorney General's Office;

(g) A representative of the Mississippi Association of Supervisors;

(h) A representative of The Mississippi Bar;

(i) A representative of the Magnolia Bar Association;

(j) The Chairman of the Senate Judiciary Committee, Division B, or his designee;

(k) The Chairman of the Senate Appropriations Committee, or his designee;

(*l*) The Chairman of the House Judiciary En Banc Committee, or his designee;

(m) The Chairman of the House Appropriations Committee, or his designee.

(2) At its first meeting, the task force shall elect a chairman and vice chairman from its membership and shall adopt rules for transacting its business and keeping records. Members of the task force shall receive a per diem in the amount provided in Section 25-3-69 for each day engaged in the business of the task force. Members of the task force other than the legislative members shall receive reimbursement for travel expenses incurred while engaged in official business of the task force in accordance with Section 25-3-41 and the legislative members of the

task force shall receive the expense allowance provided for in Section 5-1-47.

(3) The duties of the task force shall be to:

(a) Make a comprehensive study of the needs by circuit court districts for state-supported indigent defense counsel to examine existing public defender programs, including indigent defense provided in the youth courts. Reports shall be provided to the Legislature each year at least one (1) month before the convening of the regular session.

(b) Examine and study approaches taken by other states in the implementation and costs of state-supported indigent criminal and delinquency cases.

(c) To study the relationship between presiding circuit and youth court judges and the appointment of criminal and delinquency indigent defense counsel.

(4) This section shall stand repealed on July 1, 2018.

HISTORY: SOURCES: Laws, 2015, ch. 424, § 2, eff from and after passage (approved March 29, 2015).

Task Force Membership

Demetrice Williams (President, Mississippi Defenders Association)

Hal Kittrell (President, Mississippi Prosecutors Association)

Ta'Shia Gordon (Administrative Office of Courts Director)

Justice James W. Kitchens (Mississippi Supreme Court)

Judge Prentiss Harrell (Conference of Circuit Judges)

Jerrolyn Owens (Office of the Attorney General)

Tony Sandrige (Mississippi Association of Supervisors)

Jennie Eichelberger (Mississippi Bar)

Tanisha Gates (Magnolia Bar Association)

Chairman Hob Bryan (Senate Judiciary Committee, Division B)

Chairman Eugene S. Clarke (Senate Appropriations Committee)

Chairman Mark Baker (House Judiciary En Banc Committee)

Chairman John Reed (House Appropriations Committee)

Indigent Defense Data Project Recommendations and Progress

At the request of the Task Force Chair, the National Legal Aid and Defender Association studied the indigent defense data collection and analysis capacity in Mississippi and reported their recommendations in *Mississippi Indigent Defense Data Project: Recommendations for the Mississippi Public Defender Task Force*. The full report was included in the 2015 Task Force Report. Below are the six recommendations with the progress made towards developing defense data capacity in Mississippi.

Recommendation 1: To facilitate uniform, statewide collection of indigent defense data in the short term, the Administrative Office of the Counts should add a check box on its Notice of Criminal Disposition Form to indicate in every criminal and juvenile delinquency case whether indigent defense counsel was appointed. This simple, no-cost mechanism will provide an immediate start to collecting critical data on indigent defense practice statewide. Over the long term, this information can be collected via the statewide Mississippi Electronic Courts (MEC) system.

> The 2016 Legislature passed SB 2314 amending Miss Code §9-1-46 to require clerks to include in the data collection and reporting whether counsel was appointed and requiring the reporting of all data to OSPD.

Recommendation 2: The Mississippi legislature should enact legislation authorizing the Office of the State Public Defender to collect indigent defense data from counties. The legislation should direct counties to supply this information on an annual basis to the OSPD. The OSPD should be responsible for identifying which data points are required and then implementing a statewide mechanism to collect accurate data using standardized case definitions.

> SB 2314 gives OSPD the needed authority to collect data. After meetings with AOC and review of data they are receiving from clerks particularly with the enhanced reporting implemented in HB 585 (2014) it was determined that with the addition of indigence the data points being collected are satisfactory.

Recommendation 3: The OSPD should hire a staff member who is experienced in both qualitative and quantitative analysis to oversee the data collection effort. In the short term, this research analyst staff member can spearhead a pilot project to collect and analyze indigent defense data from a sample of counties. In the long term, this person would oversee a refined process to collect indigent defense data from every county (and, ideally, eventually from every municipal and justice court) on an annual basis for a complete picture of indigent defense resources.

> OSPD has included in its FY 2018 budget request a data specialist position.

Recommendation 4: The state legislature will need to provide adequate information technology (IT) resources to the OSPD to support design and automation of indigent defense data collection and analysis. Continuous investment from the state legislature into IT capacity will be necessary to operationalize data assessment, similar to what is done for prosecutors. District attorneys are provided with a case-tracking system and receive training and support for its use through the Attorney General's Office. There is no analogous resource for attorneys who take indigent defendant appointments. No training, software or hardware is supplied to courts or defenders to enter and track data uniformly.

> OSPD has included in its FY 2018 budget request funding and a plan to begin a defender data collection project. Through the Training Division OSPD has begun introducing local defenders to data collection needs and practices.

Recommendation 5: There is a need for an OSPD-led education campaign that reaches all parties responsible for collecting or tracking indigent defense data, including providers, court clerks, court administrators, and county representatives. The campaign will include information on why it is important to collect data and should be followed by training on how data should be collected and reported. The net result will be a burgeoning culture of data collection and use that over time greatly improves resource allocation and understanding by multiple justice system stakeholders.

> The State Defender is on the agenda for the January Circuit Clerk training to present on the importance of data collection and reporting.

Recommendation 6: To identify and demonstrate the sort of data that should be collected and the process required to do so, the OSPD should undertake a data collection pilot project using the methodology spelled out in Chapter 4 of this report.

> After studying the data collection project proposed and consulting with NLADA, the Sixth Amendment Center which is conducting on-site evaluations around the state, and the AOC it was determined that OSPD attempting a pilot project would not be the most productive use of resources. This decision was based primarily on two factors: the Sixth Amendment Center evaluation would likely include a clear picture of how data collection and the local level could be enhanced and the data available from AOC, supplemented by public defenders and circuit clerks, would provide a basis to get an overview of caseloads statewide.

ASSESMENT OF CASELOADS IN STATE AND LOCAL INDIGENT DEFENSE SYSTEMS IN MISSISSIPPI

December 2016

ACKNOWLEDGEMENTS

The State Defender would like to express appreciation to the following people who helped direct and guide this effort as well as providing vital information to inform the final product.

Justice Jim Kitchens, chair of the Public Defender Task Force, and the entire Task Force for their direction regarding the need for caseload data and what they wanted to see to help guide their decision making as we move forward.

The National Legal Aid and Defender Association for their assistance in organizing the data based questions from the Task Force and providing clear recommendations for the short-term and long-term needs regarding a comprehensive indigent defense data project.

Kevin Lackey, director of the Administrative Office of the Courts, for his efforts to bring together the key members of his staff to work with us in identifying the available data and then compiling and providing this data.

Joseph Branson, a student intern majoring in Economics at Duke University and graduate of Madison Central High School. Joseph broke down and assimilated data and spent hours in telephone surveys of Circuit Clerks to ascertain reliable indigence rate estimates. And thanks to Ed Sivac for recruiting and guiding Joseph and Duke for providing the support for the internship.

The over 50 Circuit Clerks and staff who took time away from their other duties to answer all of Joseph's questions and follow-up questions.

Demetrice Williams, President of the Mississippi Public Defender Association, the MPDA Board of Directors and the many county-level public defenders who participated in surveys; answered our many questions; reviewed the first draft of this report and offered advice and suggestions.

WHY ASSESS CASELOADS?

The constitutions of the United States and of the State of Mississippi mandate that any person facing a criminal charge has the assistance of counsel and if financially unable to secure counsel to have counsel provided at public expense. The courts are authorized to appoint counsel in any case pursuant to *Miss. Code* § 99-15-15 or a board of supervisors may establish a public defender office in their county. *Miss. Code* § 25-32-1. These statutory provisions are the exclusive authority for counties to provide indigent defense services in Mississippi. The legislature has also created offices to provide representation in appeals and death penalty cases at trial and state post-conviction. *Miss. Code* §§ 99-18-1, 99-39-101, 99-40-1.

The purpose of establishing these offices is to provide the constitutionally mandated service in the most cost-effective manner. The cost efficiency and effectiveness of defender offices are recognized in both practice and empirical study.[1] Of Mississippi's 82 counties only 14 rely exclusively on an assigned counsel model. These counties comprise 7.8% of the state's population; 6.2% of total reported cases; and over 10% of spending.[2] *The State of the Right to Counsel in Mississippi, Report & Recommendations,* Mississippi, Office of the State Public Defender, September 2014.

All local systems operate with little oversight and no standards. In this environment no public official can say with any confidence that we are providing this essential governmental function in

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[1] For a study of Mississippi practice see: *Economic Losses and the Public System of Indigent Defense,* Brooking and Fox, June 2003 (available at http://www.ospd.ms.gov/Task%20Force/Economic%20Losses%20and%20the%20Public%20System%20of%20Indigent%20Defense.pdf). For more recent studies see *Improving Indigent Defense: Evaluation of the Harris County Public Defender*, Council of State Governments Justice Center, September 2013 (available at http://harriscountypublicdefender.org/wp-content/uploads/2013/10/JCHCPDFinalReport.pdf); *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes and Costs*, Public Policy Research Institute at Texas A&M, October 2012 (available at http://tidc.texas.gov/media/18620/wichitapdostudy101212.pdf).

[2] "The Federal Public Defender is central to the government's obligations under the Sixth Amendment, handling approximately 75% of all indigent defenses. Judges, prosecutors, and defenders are in agreement that the high overall quality of representation provided by the federal defenders offices helps ensure speedy, just resolution of criminal cases. Quality representation not only promotes the rule of law and safeguards constitutional rights, it also saves money by reducing pre-trial and post-trial incarceration costs. It has been suggested that the judiciary may be able to save money by reducing the percentage of cases going to the public defender by assigning those cases to Criminal Justice Act panel attorneys. While we are grateful for the work of CJA panel attorneys to complement the work of the federal public defenders, we are deeply concerned about the capacity of the CJA panels to handle increased caseloads. In addition, shifting the workload to CJA panel attorneys is not cost effective, as CJA panel attorneys are consistently more costly than federal defenders." August 5, 2013, letter from U.S. Senators Chris Coons (D-Del.) and Jeff Sessions (R-Ala.), chair and ranking member of the Senate Judiciary Subcommittee on Bankruptcy and the Courts, to the Honorable William B. Traxler, Jr., Chair, Executive Committee of the Judicial Conference of the United States regarding funding of the Office of Defender Services.

the most cost effective manner.[3] Moreover, where cost is low, there is no assurance that it is not at the expense of adequate representation. Inadequate representation both increases imprisonment rates with a human and fiscal cost and also raises ethical concerns for the attorneys in the system. *Securing Reasonable Caseloads, Ethics and Law in Public Defense,* Lefstein, ABA SCLAID, www.indigentdefense.org; ABA Ethics Opinion 06-441.

The Public Defender Task Force, created to study the needs of public defender programs at the local level, cannot begin an assessment of existing systems without objective standards on which to compare. *Minutes, Mississippi Public Defender Task Force*, July 27, 2015. The Task Force Chair requested the National Legal Aid & Defender Association to provide technical assistance to the Task Force. NLADA produced a report in December 2015. *MISSISSIPPI INDIGENT DEFENSE PROJECT: Recommendations for the Mississippi Public Defender Task Force*. These recommendations and additional technical support from NLADA and others guided OSPD's efforts in compiling this assessment.

We now propose a first step in rectifying the problems associated with data collection and reporting within the indigent defense systems and facilitating a comprehensive study of existing systems by utilizing objective caseload standards for indigent defense offices at the state and county level to formulate an assessment of needs.[4]

Relevant Mississippi Code Sections on Public Defense and questions raised:

§ 25-32-1. Establishment of office by board of supervisors

Should the board of supervisors of any county or the boards of supervisors of two (2) or more counties in the same circuit court district determine by order spread upon their minutes that the county or counties have a sufficient number of indigent defendant cases to establish an office of public defender, the board of supervisors or boards of supervisors are authorized and empowered, in their discretion, to establish the office, provide office space, personnel and funding for the office, and to perform any and all functions necessary for the efficient operation of such an office to the end that adequate legal defense for indigent persons accused of crime shall be provided at every critical stage of their cases as an alternative to court appointed counsel. Said order shall specify whether the public defender shall be fulltime or part-time.

§ 25-32-3. Circuit judge shall appoint public defender for county; assistant public defender

(2) Assistant public defenders may be authorized by the board of supervisors, or boards of

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[3] In Governor Bryant's Executive Budget Recommendation for FY 2018 he observed in a section on Reorganizing Government that in many areas our government is "woefully fragmented;" a "model of inefficiency." All these "fiefdoms" are designed for a "feudal society" not an "effective 21st Century government." EBR at page 7. This observation characterizes our public defender "system" precisely.

[4] This assessment is limited to felony level matters in keeping with the Task Force's incremental approach to reform recommendations.

supervisors if two (2) or more counties are acting jointly. The public defender shall appoint all assistant public defenders. Such assistant public defenders may be compensated in such an amount as may be authorized by the respective board of supervisors; provided, however, that in no case may such assistant public defenders receive compensation in an amount greater than that received by the public defender.

HOW DOES A BOARD DETERMINE THAT THERE ARE A SUFFICENT NUMBER OF CASES TO ESTABLISH AN OFFICE OF PUBLIC DEFENDER IF IT DOESN'T HAVE AN OBJECTIVE CASELOAD STANDARD?

HOW DOES IT DETERMINE HOW MANY ASSISTANT PUBLIC DEFENDERS, IF ANY, ARE NEEDED?

§ 25-32-71. Creation of task force; members; officer; adoption of rules; reimbursement of expenses; duties

(3) The duties of the task force shall be to:

(a) Make a comprehensive study of the needs by circuit court districts for state-supported indigent defense counsel; to examine existing public defender programs, including indigent defense provided in the youth courts.

HOW DOES THE TASK FORCE ACCESS "NEEDS"?

§ 99-18-1. Office of State Public Defender created; personnel; funding sources; qualifications, duties, removal of state defender

(5) The Office of State Public Defender shall be responsible for the administration, budget and finances of the Divisions of Capital Defense Counsel, Indigent Appeals and Public Defender Training, which shall be divisions of the Office of State Public Defender.

(7) The State Defender shall coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force and to act as spokesperson for all matters relating to indigent defense representation.

TO FACILITATE THE WORK OF THE STATE DEFENDER AND THE PUBLIC DEFENDER TASK FORCE AS WELL AS ENSURE COUNTY SUPERVISORS ARE COMPLYING WITH THE CONSTITUTIONAL MANDATES IN A COST EFFICIENT MANNER, CASELOAD STANDARDS MUST BE SET.

To establish the most reliable caseload standards for Mississippi a comprehensive assessment of Mississippi practice in light of accepted performance standards for Mississippi would be ideal.

Texas in 2015 conducted such a study. The proposals below are therefore not ideal but considering the minimal constitutional standards for performance apply equally to all states, adapting standards from the most recent Texas Study to our structure is an excellent starting point. Because the Texas study did not include appellate practice or death penalty cases the DOJ produced *Compendium of Standards for Indigent Defense Systems, A Resource Guide for Practitioners and Policymakers*, December 2000, is used. Other standards relevant to death penalty cases are also utilized as well as study of available Mississippi data.

The definition of "case" used in all studies relied upon is consistent with the definition used by the Mississippi Administrative Office of Courts – the data source for evaluations of local systems. Generally, a single indictment or information is considered one case under the category of the most serious offense charged regardless of the number of "counts" in the charge.

CASELOAD/WORKLOAD ASSESSMENT FOR CAPITAL DEFENSE COUNSEL

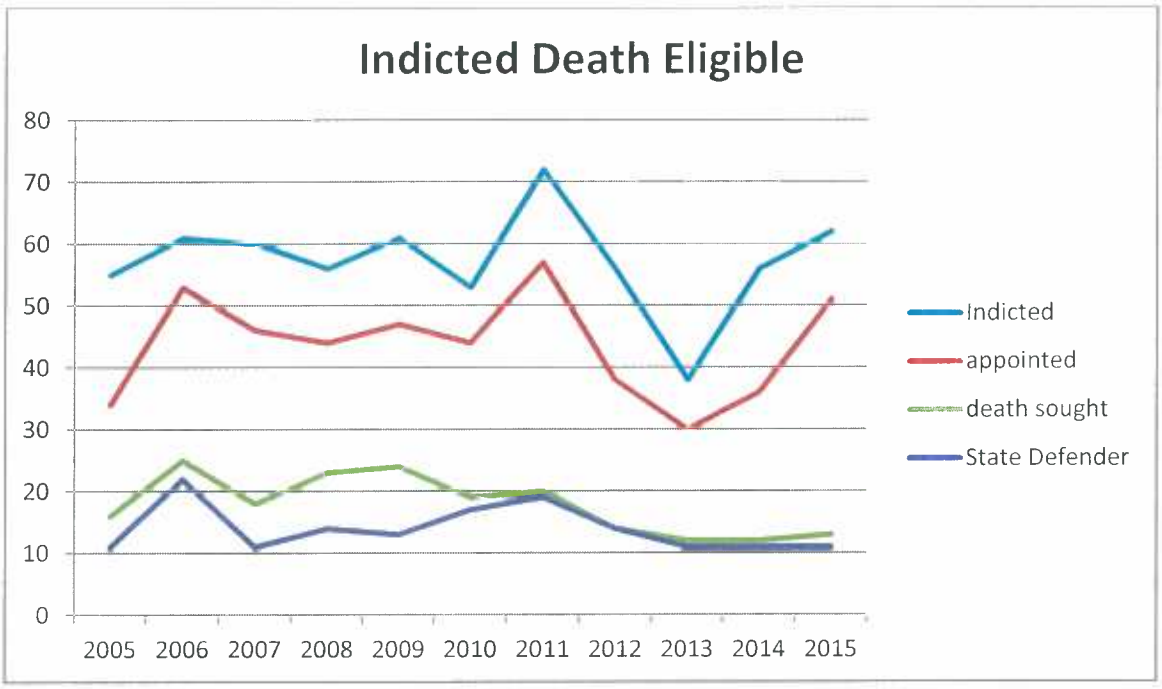
The Office of Capital Defense Counsel was established by the 2000 Legislature and began operation in July 2001. It became a division of the State Public Defender in 2011. The office was established to provide representation in indicted death penalty eligible cases and to provide representation in death penalty cases on direct appeal.

The office adopted internal caseload standards for trial of 3-5 cases per attorney per year assuming local co-counsel. This is based on generally accepted standards from across the country, compiled in the USDOJ Compendium of Standards for Indigent Defense Systems, and particularly the standards set in Arkansas. The standard for appeals is 2-3 appeals per attorney per year was based on a 1989 National Center for State Courts study. This is consistent with other jurisdictions as reported in *Lethally Deficient, Direct Appeals in Texas Death Penalty Cases*, Texas Defender Services 2016 at pages 25-26.

The office was initially authorized 4 attorneys and 5 support staff, 9 total employees. The office did not operate at full staffing until 2005. Staff increased to eleven (11) with addition of 1 attorney and 1 support person in 2010. As caseloads have declined and remained steady {CHART BELOW} staff has been reduced to 8, including 4 attorneys.

This standard has proven reliable over fifteen years as evidenced by the relative timeliness of dispositions and absence of any finding of ineffective assistance of counsel in over 250 cases handled by the office.

The office currently has 19 trial level cases and 5 appellate level cases, having opened 52 trial and 8 appeal cases in the past five years.



CASELOAD/WORKLOAD ASSESSMENT FOR MISSISSIPPI INDIGENT APPEALS

The Office of Indigent Appeals, now a division of the State Defender, was established in 2005 and began operating in January 2007. The office was authorized to have 6 attorneys, roughly mirroring the Attorney General's Criminal Unit. The office increased staffing to 7 attorneys and has operated at this level since 2010. By comparison the AG's Criminal Unit now has 9 attorneys.

The last district to handle its indigent appellate caseload in the local system has now begun to send cases to Indigent Appeals. A review of the Supreme Court on-line docket, internal data and the AOC data indicates an average caseload of 120 cases per year. Four cases a year will need to be assigned to conflict counsel and the Appeals Clinic is expected to handle four cases per year, down from eight just a few years ago. Professor Broadhead attributes the decrease to decrease in students in the program resulting from increased clinical opportunities on campus.

HB 772 (2016 Regular Session) may increase the appellate caseload coming from Youth Court in both child protection and delinquency cases. IAD attorneys also assist in Training with appellate court case summaries and technical assistance to trial level defenders.

The office never adopted a caseload standard. Nearly all Standards found in the *Compendium* use the *National Advisory Commission* (1973) limit of 25 cases per year. As discussed in Lefstein, these numbers are not an accurate assessment of need. A more recent Missouri study which used the Delphi method established a caseload for fulltime appellate attorney at 18-22 cases per year. This difference demonstrates Lefstein's point. The NLADA formula for determining staffing

needs, also found in the *Compendium,* is a more accurate method of assessment in that it is weighted by factors like briefs filed, rehearing and cert petitions filed and transcript length.

Based on number of estimated cases, the length of transcripts, the type of cases handled and the frequency of cert petitions filed the unit total would be 145. The formula recommends twenty-two (22) work units per attorney or 6.6 FTE attorneys.

CASELOAD/WORKLOAD ASSEESSMENT FOR MISSISSIPPI OFFICE OF CAPITAL POST-CONVICTION COUNSEL

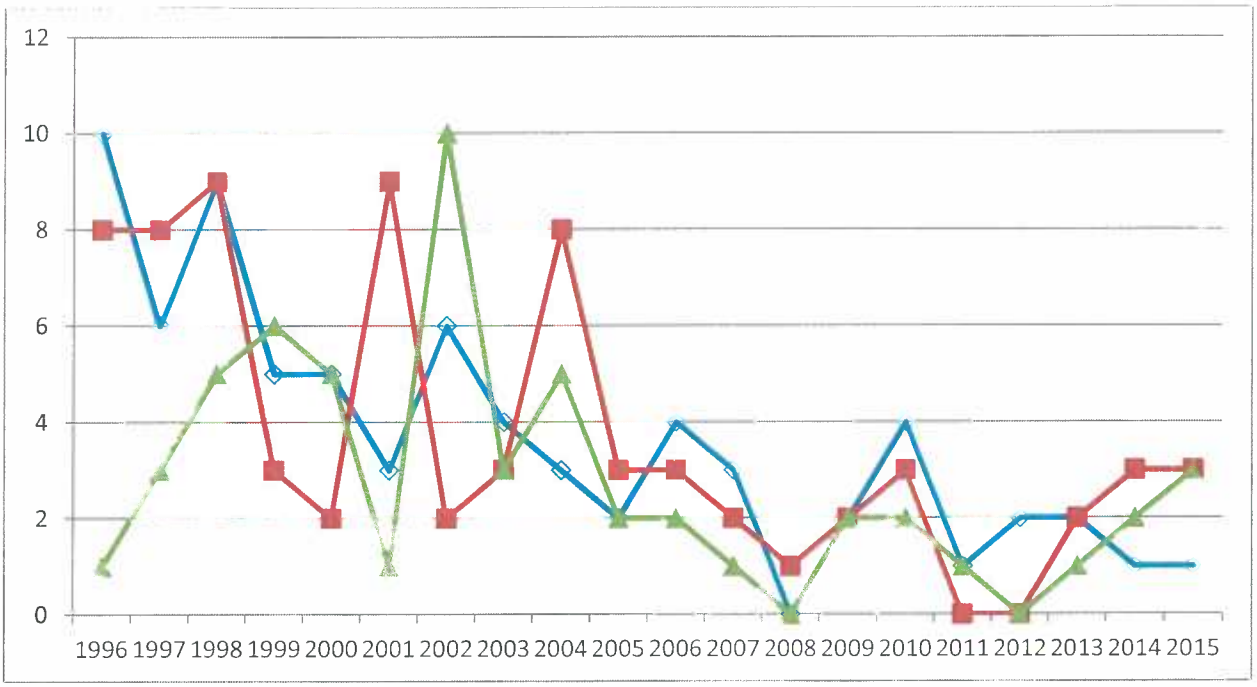
There are no universally accepted caseload standards for death penalty post-conviction defender offices. The 2003 ABA Guidelines, relied on by the Mississippi Office of Capital Post-Conviction Counsel (MOCPCC) in requesting staffing for their office, cites to a 1998 study from Florida. The study set an average hours/case number at 3300 which translates to significantly less than one (1) new case per lawyer per year.

Various state caseload recommendations adopted prior to the ABA Guideline revision coincide with the standards for death penalty direct appeal standards adopted by the Center for State Courts. Clearly that standard is too low for post-conviction cases which are substantially more time consuming than a direct appeal just as the Florida study appears too high.

Time spent by private counsel in Mississippi death penalty post-conviction cases (based on fees approved and paid) since 2009 range from 1600 to 2000 hours. Using the NLADA unit based assessment method a range of 22 to 28 units per case or 1700 to 2100 hours per case is estimated. These estimates are further validated by the experience in Texas. In 2010 Texas created the Office of Capital Writs to handle state court death penalty post-conviction cases. Additional responsibilities were added in 2015 but the workload to staffing from 2010-15 are comparable with what should be expected in MOCPCC. Based on information from the annual reports of the Texas Courts OCW maintained a 1:1 new case to lawyer ratio.

ASSESSING STAFFING NEED BASED ON CASE DATA

The starting point for assessing staff level need is the anticipated caseload. The number of new death sentences, death sentences affirmed and cases opened by MOCPCC have declined in the past decade from the prior decade and have remained low in recent years. {CHART BELOW}Since 2003, there have been no more than four new death sentences imposed in any year and a 10-year average of two new sentences imposed per year. Since 2005, there have been no more than three death sentences affirmed by the state supreme court in any year and a 10-year average of 1.9 death sentences affirmed per year. Accordingly MOCPCC has opened no more than three new cases in any year since 2005. With four cases currently on direct appeal – two sentenced in 2013, one in 2014, and one in 2015 – it is anticipated that MOCPCC will continue to open no more than three cases per year.



Using the caseload standard above, the proper attorney staffing at MOCPCC to handle the future caseload would be three attorneys. However the current caseload must also be considered. At present the MOCPCC has 17 open cases. This number is considerably higher than should be expected but results from ineffective representation under a previous administration. The courts responded to this failure by allowing second or successor motions to be filed. This increased the caseload of the MOCPCC over the past several years. {Successor cases are not reflected in the chart above}

The current and projected caseload could require four fulltime attorneys with continued assistance from the private attorneys serving as co-counsel in a limited number of pending cases. Adequate support staff for a four lawyer death penalty post-conviction office would include an administrative assistant, paralegal, investigator and mitigation specialist. The total staff of MOCPCC at present should be eight (8) with a possible reduction of one lawyer in the near future.

CASELOAD/WORKLOAD ASSESSMENT FOR FELONY REPRESENTATION BY LOCAL PUBLIC DEFENDERS

The Texas study, *Guidelines for Indigent Defense Caseloads,* Texas A&M Public Research Institute, 2014, established trial level caseload standards based on type of case with different weights assigned to levels of misdemeanor and felony cases. Using the established standards for

the three felony level categories[5] Mississippi offenses can be similarly categorized and workloads assigned.[6]

Level 1 - maximum punishment of more than 20 years – 77 cases per lawyer per year (27 hours/case)

Level 2 – maximum punishment up to 20 years – 105 cases per lawyer per year (20 hours/case)

Level 3 – maximum punishment less than 20 years – 144 cases per lawyer per year (14 hours/case)

(Texas Guidelines at pages 14 and 34)

Texas Performance Standards adopted by their Public Defender Commission were used as a guide in setting Mississippi Standards accompanying this assessment. The time estimate per case assumes the attorney is meeting minimum performance standards and counsel is being assigned to the case in timely compliance with Mississippi Law.

Using AOC data from 2011-2014 an assessment of each counties average annual caseload was conducted. AOC data has known limitations that may cause an undercount of caseloads. The data only counts dispositions of cases reaching circuit court. There are felonies disposed of prior to circuit court that constitutionally require counsel services and some dispositions would be for a lower level charge than initially brought.

There is no AOC data on indigent status. To determine indigence rate a survey of every county circuit clerk was conducted. Fifty-two clerks responded. The state average was 80%. This is consistent with a Public Defender Task Force survey conducted in 2004 which included fewer responses. Estimates were made for non-responding counties using similarly situated counties based on population, geography, and district.[7]

The level of services and delivery systems currently provided in each county is based on *The State of the Right to Counsel in Mississippi, Report & Recommendations,* Mississippi Office of the State Public Defender, September 2014, updated with surveys of local public defenders and court personnel conducted in July and August 2016. There are 184 salaried and contract public defender positions including some contract-conflict positions in fulltime counties. Because some attorneys work in multiple jurisdictions the number of attorneys serving in these positions is only 167. Thirty-three are fulltime positions.[8]

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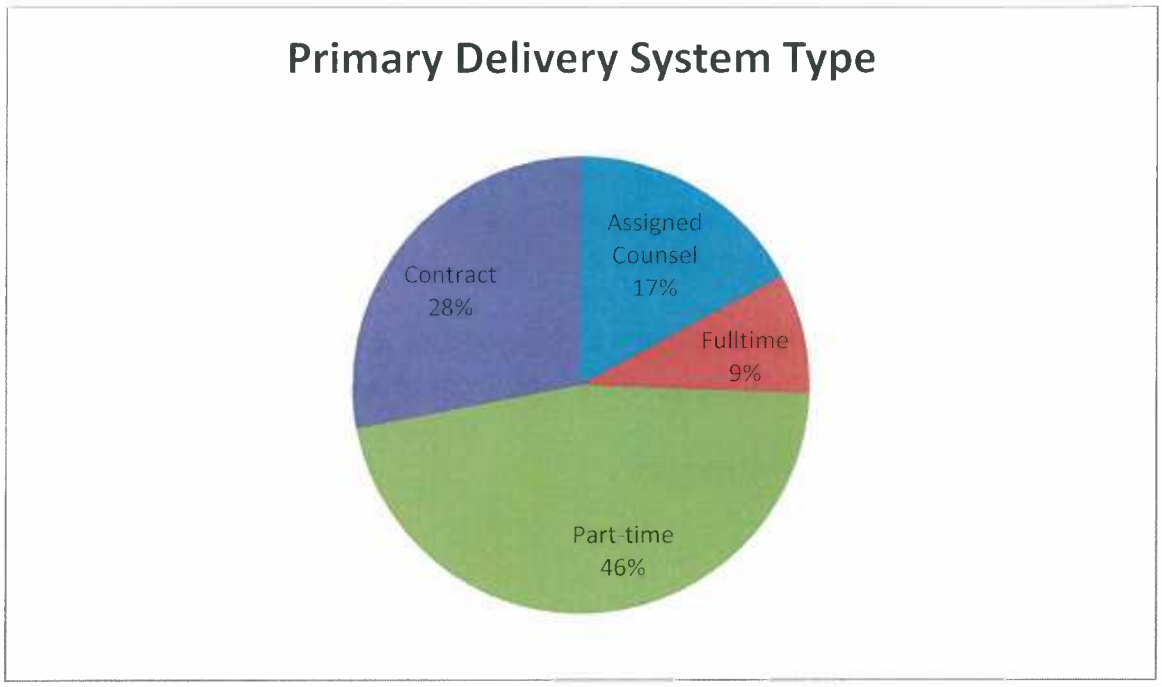
[5] Texas has a fourth felony level, "State Jail Felony" that does not correspond to any Mississippi felony punishment.
[6] Notwithstanding sentence range, violations of §41-29-139(b) are Level 2 and §41-29-139(c) are Level 3.
[7] Each of these data limitations will be reduced for future assessments based on legislative changes to data collection and reporting requirements in HB 585 (2014) and SB 2314 (2016).
[8] The part-time/contract positions do not have time expectations in employment agreements. Some public defenders report working far more than the State Personnel Board definition of part-time as twenty hours per week or eighty hours per months (20/80 rule). For purposes of this assessment the non-fulltime positions are considered half-time.

There are 14 "assigned counsel" counties and these are not assessed for caseload. As mentioned above these systems on average have a significantly higher cost per case. These counties account for 6.2% of total cases but 10.3% of expenditures. This finding is to be expected as the move to "regular public defender" delivery systems is driven in large part by cost savings. It is the opinion of OSPD that assigned counsel appointments should be limited to conflict cases to control cost and assure performance.

There are 68 counties utilizing some form of public defender system. With the addition of Forrest County on October 1, 2016, there are five fulltime offices with support staff including investigators. Lamar and Pearl River counties have recently hired full-time attorneys to serve as primary public defender with continued support from independent part-time attorneys. The full-time attorneys do not have investigators or other support staff. Thirty-eight use part-time attorneys as the primary public defender. Twenty-three use contract defenders. OSPD distinguishes between part-time and contract based on whether or not the attorney is in PERS.



OSPD determined a fulltime equivalent (FTE) need for each county by multiplying the hours needed per case by level and reducing for indigence rate. Conflict rates for the fulltime offices were calculated using data from Harrison and Washington Counties, the only counties that collected this data. Factoring for retained counsel and conflicts Harrison handles 67% of cases and Washington 69%.

The FTE need was then compared to the reported positions funded and counties characterized as:

1. "Within standard";
2. "Moderately above standard";
3. "Significantly above standard"; and
4. "In crisis."

"Moderately above" indicates the county could come into compliance without adding additional staff. The most efficient way to come into compliance would be to use a "safety valve" procedure such as assigned counsel appointment when caseloads are approaching capacity. Counties "significantly above" standard would need to add one or more attorneys to meet need. Counties "in crisis" are at twice the standard per attorney or greater.

Forty (40) of the 68 counties are "within standard."[9]

Hinds County which is assessed "within standards" also handles probation revocations which are not counted in this assessment and has a vacant attorney position that will not be filled in FY 2017. The criminal justice system in Hinds County was evaluated by an independent research firm on contract with the Attorney General. The BOTEC report raised concerns about the validity of data reported to the AOC by the circuit clerk. We have reviewed that study and like BOTEC cannot conclude additional staff is the answer. A shift to "vertical" representation, increase in salaries and overall systemic reforms seem to be the solution.

Forrest County has returned to a fulltime system with investigative and other support staff. This improvement, effective October 1, 2016, brings them "within standards".

Fourteen counties are moderately above standard:

[9] This study does not assess attorneys for adherence to performance standards or systemic issues such as representation prior to indictment. Counties are not assessed for compliance with statutory mandates such as early notification to public defender of new clients, provision of support staff, or factors like experience of counsel matched to complexity of case. Factors like staff turnover, often linked to low salaries, are not considered. Thus even some counties "within standards" may need additional support.

Alcorn	Leake	Oktibbeha
Chickasaw	Marion	Scott
Copiah	Monroe	Sunflower
George	Neshoba	Tate
Harrison	Newton	

The 8th District (Leake, Neshoba, Newton and Scott counties) have reorganized under a new senior judge. Scott County is in negotiations to settle a pending federal lawsuit alleging systemic right to counsel violations.[10] Final resolution of that matter and the change in administration may result in these four counties moving to "within standards."

Sunflower County is placed in the "moderately above" category but may be "within standards" depending on the number of reported cases being "Parchman" cases. Cases arising at Parchman are prosecuted in Sunflower County but are handled by assigned counsel outside the regular public defender system.

Harrison County could be considered "within standards" if the office were allowed to declare conflicts based on caseload; it must also be noted that the office has only one investigator for eight attorneys. As a general rule an office should have one investigator for every three attorneys; this 1:3 ration is established in statute for District Attorney Offices. *Miss. Code* §§ 25-31-5 and 25-31-10.[11]

[10] Scott is one of three counties brought to federal court over Sixth Amendment issues, Choctaw and Lauderdale counties have also faced scrutiny.

[11] Lack of investigator support is a problem across the state. There are only 8 fulltime defense investigators compared to forty-four (44) district attorney investigators. Moreover, there are no social workers serving in defender offices. Over 75% of people brought into the criminal justice system have a substance abuse disorder and over 20% have a serious mental illness. Competent representation requires attorneys be able to asses these issues and meet the needs of all of their clients.

Four counties are significantly above standard:

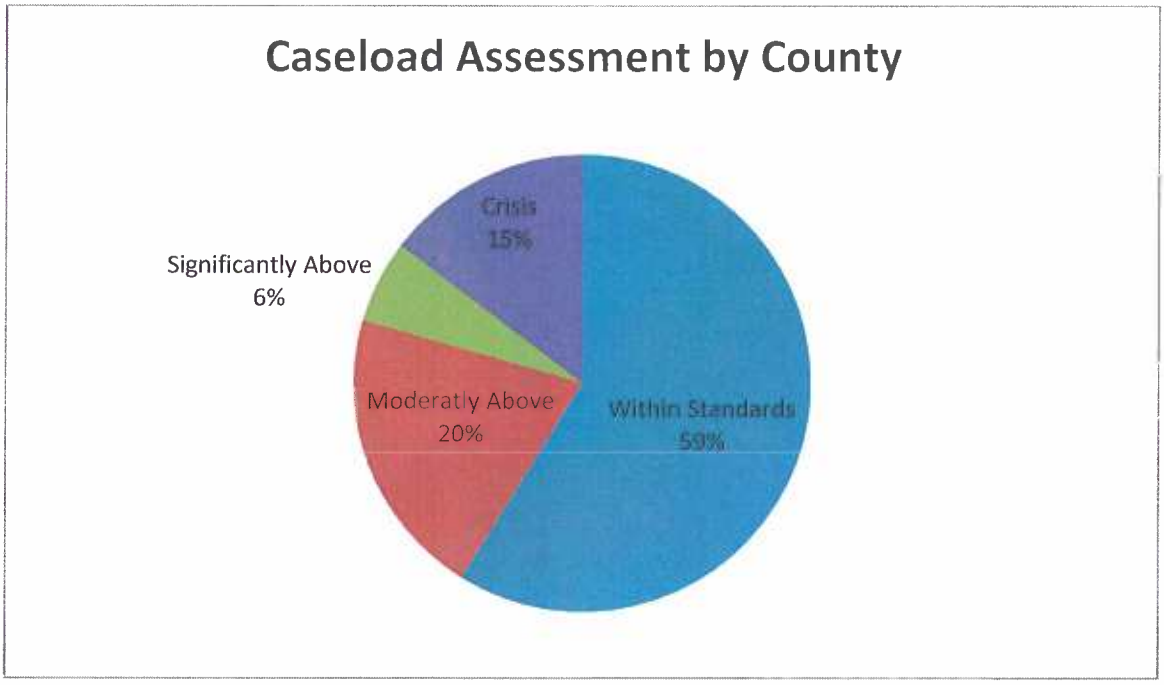
Jackson	Madison
Lafayette	Pike

Jackson County has added a full-time assistant public defender effective October 1, 2016. Like Hinds County, Jackson County provides representation in probation revocations. Even with the additional attorney they will probably remain in the "significantly above" category. Pike County is the only part-time system that has a staff investigator.

Ten Counties are in crisis:

DeSoto	Marshall	Rankin
Lee	Panola	Tishomingo
Lamar	Pearl River	
Lauderdale	Prentiss	

The 10 "crisis counties" handle 30.5% of the total state caseload; only 23% of Level 1 cases but 37% of Level 2 and 30% of Level 3. They have an indigence rate of 82% compared to the state average of 80%. Lamar and Pearl River counties have made progress with the hiring of a fulltime defender to replace a part-time position in each county.



CONCLUSIONS

The structure of the state level programs with gubernatorial appointment of directors charged with hiring and supervision of staff and legislative oversight through the budget process assures accountability of these programs.

At the county level there is no uniformity. It appears indigent defense systems are functioning at about 90% of attorney need. Support staffs, particularly investigators are almost non-existent. While most counties are meeting need for attorneys, ten are operating at 50% of need or worse.

These disparities in caseloads indicate a need for caseload standards and a state level effort to ensure caseloads allow for the delivery of constitutionally effective representation while maintaining fiscal efficiency.

PERFORMANCE STANDARDS FOR THE DEFENSE OF FELONY CASES IN THE COURTS OF MISSISSIPI

PURPOSE AND SCOPE OF THE PERFORMANCE STANDARDS

The Standards are intended to serve several purposes. The foremost purposes are to encourage defense attorneys to perform to a high standard of representation meeting the dictates of the state and federal constitutions and to promote professionalism in the representation of indigent defendants. The Standards are intended to alert defense counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist counsel in deciding upon the particular actions that must be taken in each case to provide the client the best representation possible. The Standards also are intended to provide a measure by which the performance of individual attorneys may be evaluated and to assist in training and supervising attorneys.

The language of the Standards is general, implying flexibility of action appropriate to the particular situation at issue. Use of judgment in deciding upon a particular course of action is reflected by the phrases "should consider" and "when appropriate." When a particular course of action is appropriate in most circumstances, the Standards use the word "should." When a particular action is absolutely essential to providing quality representation, the Standards use the words "shall" or "must." Even when the Standards use the words "should" or "shall," or "must," in certain situations the lawyer's best informed professional judgment and discretion may indicate otherwise. Variations from the Standards also may be appropriate to accommodate local court procedures; however, counsel should protect a client's rights and, when necessary, preserve error when local practices conflict with the client's rights under state and federal law or counsel's ethical obligations to the client.

The Standards are not criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. The Standards may or may not be relevant to such a judicial determination, depending upon all of the circumstances of the individual case. The Standards specifically apply to practice in Mississippi state court from the time of arrest or initial representation in trial level proceedings to the exhaustion of direct review. In any particular case, the Standards begin to apply at the time an attorney-client relationship is formed. The Standards may require counsel to advise clients of their rights to seek collateral state court or federal court review in appropriate circumstances but do not extend to representation of defendants in collateral matters.

Guideline 1.1 Role of Defense Counsel

A. The primary and most fundamental obligation of defense counsel is to provide zealous and effective representation for the client at all stages of the criminal process. Counsel's role in the criminal justice system is to fully protect and advance the client's interests and rights. If personal matters make it impossible for counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the client. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney.

B. Counsel also has an obligation to uphold the ethical standards of the State Bar of Mississippi and to act in accordance with the rules of the court.

Guideline 1.2 Education, Training and Experience of Defense Counsel

A. To provide competent, quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction, including changes and developments in the law. Counsel must maintain research capabilities necessary for presentation of relevant issues to the court. Counsel should participate in skills training and education programs in order to maintain and enhance skills.

B. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept more serious and complex criminal cases only after having had experience or training in less complex criminal matters. When appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

C. If representing a client with mental illness or a developmental disability, counsel should become familiar with the symptoms of the client's mental impairment and those symptoms' potential impact on the client's culpability in the case and potential use as a mitigating factor during sentencing. Counsel also should be familiar with the side effects of any medication the client may be taking to treat the client's mental impairment and the impact those side effects may have on the client's culpability in the case or use as a mitigating factor during sentencing.

D. To provide competent, quality representation in post-trial proceedings, counsel must be familiar with the Rules of Appellate Procedure.

Guideline 1.3 General Duties of Defense Counsel

A. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to confirm that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

B. Counsel has the obligation to maintain regular contact with the client and keep the client informed of the progress of the case, when it is possible to do so. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.

C. Counsel should adequately inform the client of the client's legal obligations related to the case, such as conditions of release or sentencing terms, and have the client verbally restate the obligations in order to ascertain the client's understanding of those obligations.

D. If appointed to represent an indigent client, counsel shall make every reasonable effort to contact the client not later than the end of the first working day after the date on which counsel is appointed. In making this contact, counsel should provide the client with an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with counsel.

E. Counsel should appear timely for all scheduled court appearances in a client's case.

F. Counsel should spend appropriate time on each case regardless of whether counsel is appointed or retained. Counsel shall not suggest to an appointed client that counsel would provide preferential treatment if counsel were retained or otherwise compensated beyond the fee paid by the court for their work on a case.

G. Counsel must be alert to all potential and actual conflicts of interest.

H. If a conflict develops during the course of representation, counsel has a duty to notify the client and, generally, the court. Notice must be provided to the court without disclosing any confidential information.

I. If counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, counsel shall inform the court or courts before whom counsel's cases are pending.

J. Counsel shall continue to represent the client until charges are dismissed, the client is acquitted, appeals are exhausted, or counsel is relieved of counsel's duties by the court or replaced by other counsel after a finding of good cause is entered on the record.

K. If counsel withdraws from representation, counsel has an obligation to deliver all contents of the client's file, including notes by counsel, to new counsel if requested. Counsel shall timely respond to any reasonable request by new counsel regarding the case.

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

When appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

Guideline 2.2 Initial Interview

A. Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. When necessary, counsel may arrange for a designee to conduct the initial interview. If the initial interview is completed by a designee, counsel shall interview the client personally at the earliest reasonable opportunity.

B. After being assigned to a case and prior to conducting the initial interview, counsel should, when possible, do the following:

1. Be familiar with the elements of the offense and the potential punishment range, if the charges against the client are already known;

2. Obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial services agencies concerning pretrial release, and law enforcement reports; and

3. If representing client with mental illness, obtain reports from jail staff on the client's mental health status at the time of booking into the jail and the client's current mental health status.

4. If the Client is incarcerated, be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting pretrial release conditions; the different types of pretrial release conditions the court may set; any written pretrial release policies of the court, and whether any pretrial service or other agency is available to act as a custodian for the client's release; and any procedures available for reviewing the trial judge's setting of bail.

C. The Interview:

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release if the client is incarcerated, and also to provide the client with information concerning the case. At this and all successive interviews and proceedings, counsel should make every effort to overcome barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds. When appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

2. In addition, counsel should obtain from the client all release forms necessary to obtain the client's medical, psychological, education, military, prison, and other records as may be pertinent.

3. In some jurisdictions, videoconferencing or teleconferencing is available for meeting with the client from a remote location, rather than traveling to the jail. Videoconferencing or teleconferencing is not preferred for the initial interview. Videoconferencing or teleconferencing is never recommended for contact with mentally ill clients or clients who have a developmental disability.

4. If working with a mentally ill or developmentally disabled client, counsel should be aware of symptoms of the client's mental impairment that may make it difficult to obtain some of the necessary information. Counsel may need to make a few visits to the client to obtain the specified information or obtain the information from multiple sources, depending on the client's state of mind and ability to provide counsel with information. Counsel may need to seek assistance from a person trained in social work or similar field.

5. Information that should be acquired includes, but is not limited to:

a. The client's ties to the community, including the length of time the client has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);

b. The client's physical and mental health, educational, employment, social security/disability, and armed services records;

c. The client's immediate medical needs;

d. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;

e. The ability of the client to meet any conditions of release, including financial conditions;

f. The names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

g. Any necessary information waivers or releases that will assist in the client's defense, including preparation for sentencing; the written releases obtained should include a HIPAA (Health Insurance Portability and Accountability Act) compliant release in case medical records are required; and

h. Any other information that will assist the client's defense, including mitigation information for use in preparation for sentencing.

6. Information to be provided to the client includes, but is not limited to:

a. An explanation of the procedures that will be followed in setting the conditions of pretrial release;

b. An explanation of the types of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

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

d. The charges and the potential penalties;

e. A general procedural overview of the progression of the case, when possible;

f. Realistic answers, when possible, to the client's most urgent questions;

g. What arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers;

h. How and when counsel can be reached; and

i. When counsel intends to see the client next.

D. Supplemental Information

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense.

Such information may include, but is not limited to:

1. The facts surrounding the charges against the client;

2. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

3. Any possible witnesses who should be located;

4. Any evidence that should be preserved; and

5. When appropriate, evidence of the client's competence to stand trial or mental state at the time of the offense.

Guideline 2.3 Initial Appearance, Preliminary Hearing and Pretrial Release Proceedings

A. At the initial appearance and/or preliminary hearing on the charges, counsel should preserve the client's rights by seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges.

B. When appearing at a bond hearing, counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, when appropriate, to make a proposal concerning conditions of release.

C. Counsel should adequately inform the client of the client's conditions of release after such conditions have been set.

D. If the client is unable to fulfill the conditions of release set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

E. If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should inform the client of the available options and the procedures that must be followed in posting such assets. When appropriate, counsel should advise the client and others acting on the client's behalf how to properly post such assets.

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

G. If the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical, psychiatric, or security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs. Counsel should follow up with the client regarding whether medications or treatments are being given in jail, and notify the court or relevant jail management personnel if any problems arise.

Guideline 2.4 Prosecution Requests for Non-Testimonial Evidence

Counsel should be familiar with and understand the law governing the prosecution's power to require a client to provide nontestimonial evidence, such as handwriting exemplars and physical specimens, the circumstances in which a client may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

Guideline 3.1 Competency to Stand Trial

A. The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea. Counsel is often in the best position to discern whether the client may not be competent to stand trial.

B. Counsel should be familiar with relevant case law, court rules and statutes governing proceedings surrounding incompetence to stand trial.

C. During the initial interview with the client, counsel should note signs that a mentally ill or developmentally disabled client may not be competent to stand trial. Signs include, but are not limited to: inability to communicate with counsel; delusions; psychosis; intellectual inability to comprehend the proceedings; and inability to remember or articulate the circumstances of arrest; illiteracy.

D. Counsel should request mental health records from the client's mental health provider and history of psychiatric treatment in the jail, if any.

E. If counsel believes the client may be incompetent to stand trial, counsel should file a motion to have the client examined for competency. The motion to have a client examined for competency may be supported by affidavits setting out the facts on which the suggestion of incompetence is made.

F. If counsel has determined that the client may be incompetent to stand trial, and it appears that transporting the client to and from court for routine proceedings at which the client's presence is not needed may cause disruption or undue stress for the client, counsel should consider requesting that the client not be transported to court unless or until the client's presence is necessary.

G. If the court finds that there is some evidence that would support a finding of incompetence, the judge is required to stay all other proceedings in the case and order a competency evaluation. Counsel should facilitate setting up the competency evaluation as soon as possible. The sooner the evaluation is completed, the sooner the client can receive the mental health treatment that the client may need.

H. Counsel should investigate competency restoration treatment options including outpatient or community competency restoration.

I. If client is in custody while awaiting competency restoration, counsel should communicate with the Sheriff's office and the designated treatment facility regarding when the client will be transported to the hospital or treatment program.

J. To the extent it is possible to communicate with the client, counsel should keep the client informed of when the client will be going to the hospital.

K. Counsel should provide contact information to the social workers at the hospital and stay in touch with the social workers regarding the client's status.

L. When the client is returned from the hospital after competency restoration treatment, counsel should request that the client's case be placed back on the docket as quickly as possible to prevent the client from decompensating upon return to the jail, but before the case can be resolved.

Guideline 4.1 Investigation

A. Counsel has a duty to conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. Counsel should, regardless of the client's wish to admit guilt, determine whether the charges and disposition are factually and legally correct and inform the client of potential defenses to the charges. Counsel should explore all avenues leading to facts relevant both to the

merits and to the penalty in the event of conviction. In no case should counsel delay a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed.

B. Sources of review and investigative information may include the following:

1. Charging documents, statutes, and case law

The arrest warrant, accusation, complaint, and information or indictment documents, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

a. The elements of the offense with which the client is charged;

b. The defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses;

c. Any lesser included offenses that may be available;

d. Any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy; and

e. The applicable punishment range for the charged offense and all potential lesser included offenses.

2. The client

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to obtain information as described above under the performance guideline applicable to the initial interview of the client. Information relevant to sentencing also should be obtained from the client when appropriate.

3. Potential witnesses

Counsel should consider whether to interview potential witnesses, including any complaining witnesses, others adverse to the client, and witnesses favorable to the client. If counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.

4. The police and prosecution

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so.

5. The courts

When possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel also should review the client's prior court file(s) when appropriate.

6. Information in the possession of third parties

When appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

7. Physical evidence

When appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing and counsel should examine any such physical evidence. Upon completion of the inspection of the physical evidence, counsel should determine whether independent analysis or testing of the evidence is appropriate and, if so, seek the services of a qualified expert to complete such analysis or testing.

8. The scene

When appropriate, counsel or an investigator should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed or retained. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense.

9. Expert assistance

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize ex parte and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:

a. The preparation of the defense;

b. Adequate understanding of the prosecution's case;

c. Rebut the prosecution's case or provide evidence to establish any available defense;

d. Investigate the client's competence to proceed, mental state at the time of the offense, or capacity to make a knowing and intelligent waiver of constitutional rights; and

e. Mitigate any punishment that may be assessed after a verdict or plea of guilty to the alleged offense.

10. Mental Health Records

If representing a client with mental illness or a developmental disability, counsel should seek available mental health records (e.g., records of previous court cases in which mental health issues may have been raised; mental health treatment records, whether institutional or in the community). Counsel should

consider obtaining these records using a HIPAA (Health Insurance and Portability Act) release instead of a subpoena in order to maintain client confidentiality.

C. During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel also should consider how best to respond to objections that could be raised by the prosecution.

Guideline 4.2 Formal and Informal Discovery

A. Counsel has a duty to pursue discovery procedures provided by the rules of the jurisdiction and such informal discovery methods as may be available. Counsel should pursue formal and informal discovery as soon as practicable and to the extent reasonably necessary to zealously and effectively represent the client.

B. Counsel should consider seeking discovery of the following items:

1. All information to which the client is entitled under the Mississippi Rules of Criminal Procedure;

2. Potential exculpatory information;

3. Potential mitigating information;

4. Potential favorable information;

5. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

6. Any other information that may be used to impeach the testimony of prosecution witnesses;

7. All oral or written statements by the client, and the details of the circumstances under which the statements were made;

8. The prior criminal record of the client and any evidence of other misconduct that the government may intend to use against the client;

9. Statements made by co-defendants;

10. Statements made by other potential witnesses;

11. All official reports by all law enforcement and other agencies involved in the case, e.g., police, arson, hospital, results of any scientific test(s);

12. All records of evidence collected and retained by law enforcement;

13. All video/audio recordings or photographs relevant to the case, as well as all recordings of transmissions by law enforcement officers, including radio and computer transmissions;

14. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;

15. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof; and

16. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.

C. If counsel has made formal discovery demands, counsel should seek prompt compliance and sanctions for failure to comply.

D. Counsel should timely comply with all of the requirements governing disclosure of evidence by the client and notice of defenses and expert witnesses. Counsel should be aware of the possible sanctions for failure to comply with those requirements.

Guideline 5.1 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case and develop strategies for advancing appropriate defenses and mitigating factors, including those related to mental health, on behalf of the client.

Guideline 5.2 The Decision to File Pretrial Motions

A. Counsel should consider filing an appropriate pretrial motion, including motions in limine, whenever a good-faith reason exists to believe that the client is entitled to relief that the court has discretion to grant.

B. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case.

Among the issues that counsel should consider addressing in a pretrial motion are:

1. The pretrial custody of the client and the filing of a motion to review conditions of release;

2. The competency of the client;

3. The constitutionality of the relevant statute or statutes;

4. Potential defects in the charging process;

5. The sufficiency of the charging document;

6. Severance of charges or defendants;

7. The discovery obligations of the prosecution;

8. The suppression of evidence gathered as the result of violations of the Fourth, Fifth, Sixth, or Fourteenth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, statutes and/or any right, duty, or privilege arising out of state or local law including;

a. The fruits of illegal searches or seizures;

b. Involuntary statements or confessions;

c. Statements or confessions obtained involuntarily or in violation of the client's right to counsel, or privilege against self-incrimination; and

d. Unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification.

9. Change of venue;

10. Access to resources that or experts who may be denied to the client because of the client's indigence;

11. The client's right to a speedy trial;

12. The client's right to a continuance in order to adequately prepare or present the client's case;

13. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion; and

14. Matters of trial or courtroom procedure.

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

Counsel thus should consider whether:

1. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

2. Changes in the governing law might occur after the filing deadline that could enhance the likelihood that relief ought to be granted; and

3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions.

D. Counsel should request a full evidentiary hearing on any pretrial motion to the extent necessary to preserve the issue adequately for appellate review.

E. Counsel should consider the advisability of disqualifying or substituting the presiding judge. The decision to disqualify a judge shall only be made when it is a reasoned strategy decision and in the best interest of the client. The final decision rests with counsel.

F. Requests or agreements to continue a trial date should be discussed with the client before they are made.

G. Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

Guideline 5.3 Filing and Arguing Pretrial Motions

A. Motions should be filed in a timely manner in accordance with statute and local rule, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon.

B. If a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

1. Investigation, discovery, and research relevant to the claim advanced;

2. The subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;

3. Full understanding of the burdens of proof, evidentiary principles, and trial court procedures applicable to the hearing, including the benefits and potential consequences and costs of having the client testify;

4. The assistance of an expert witness when appropriate and necessary;

5. Familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial; and

6. Preparation and submission of a memorandum of law when appropriate.

C. Counsel should obtain a clear ruling on any pretrial motion on the record and/or in writing.

Guideline 5.4 Subsequent Filing of Pretrial Motions

A. Counsel has a continuing duty to raise any issue that was not raised before trial, because the facts supporting the motion were not reasonably available at that time. Further, counsel shall be prepared, when appropriate, to renew a pretrial motion if new supporting information is disclosed in later proceedings.

B. When appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

A. Under no circumstances should counsel recommend to the client acceptance of a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial. The amount of appropriate investigation will vary by case.

B. After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial, and in doing so counsel should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

C. Counsel should obtain the consent of the client before entering into any plea negotiation. Exploratory inquiries of the prosecution prior to obtaining client consent are permitted.

D. Counsel should keep the client fully informed of any continued plea discussions and negotiations and promptly convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

E. Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel also should explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a guilty plea ultimately rests with the client, if counsel believes the client's decisions are not in the client's best interest, counsel should attempt to persuade the client to change the client's position.

F. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

G. Counsel should confirm that all conditions and promises comprising a plea agreement between the prosecution and defense are included in writing or in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

A. In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular jurisdiction, judge, and prosecution that may impact the content and likely results of a negotiated plea agreement.

B. In order to develop an overall negotiation plan, counsel should be fully aware of, and make the client fully aware of:

1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;

2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;

3. If a plea involving community supervision or deferred adjudication community supervision is under consideration, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;

4. If a plea involving deferred adjudication community supervision is under consideration, special considerations regarding such a plea including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;

5. If a plea of no contest is under consideration, differences between a no contest plea and a guilty plea including the potential collateral uses of such a plea in subsequent judicial proceedings;

6. Any registration requirements including sex offender registration and job-specific notification requirements;

7. The availability of appropriate diversion and rehabilitation programs;

8. The possible and likely place and manner of confinement;

9. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;

10. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;

11. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence on a parole status;

12. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

13. Deportation and other possible immigration consequences that may result from the plea;

14. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions;

15. The effect on appellate rights; and

16. That plea bargains are not binding on the court.

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

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

a. Not to proceed to trial on the merits of the charges;

b. To decline from asserting or litigating any particular pretrial motions;

c. An agreement to fulfill specified restitution conditions or to participate in community work or service programs, or in rehabilitation or other programs;

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

e. Admitting identity and waiving challenges to proof or validity of a prior conviction record;

f. Foregoing appellate remedies; and

g. Asset forfeiture.

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

a. That the prosecution will not oppose the client's release on bail pending sentencing or appeal;

b. To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

c. That the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

d. That the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

e. That the prosecution will take, or refrain from taking, at the time of sentencing or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;

f. That the prosecution will not present, at the time of sentencing or in communications with the preparer of the official presentence report, certain information; and

g. That the client will receive, or the prosecution will recommend, specific benefits concerning the client's place or manner of confinement or release on parole and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from incarceration.

D. In developing a negotiation strategy, counsel should be familiar with the position of any alleged victim with respect to conviction and sentencing.

In this regard, counsel should:

1. Consider whether interviewing the alleged victim or victims is appropriate and, if so, who is the best person to do so and under what circumstances;

2. Consider to what extent the alleged victim or victims might be involved in the plea negotiations;

3. Be familiar with any rights afforded the alleged victim or victims under the Victim's Rights Act or other applicable law; and

4. Be familiar with the practice of the prosecutor or victim-witness advocate working with the prosecutor and to what extent, if any, the prosecution defers to the wishes of the alleged victim.

E. In conducting plea negotiations, counsel should be familiar with:

1. The various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, and a plea in which the client is not required to personally acknowledge guilt;

2. The advantages and disadvantages of each available plea according to the circumstances of the case, including whether or not the client is mentally, physically, and financially capable of fulfilling requirements of the plea negotiated;

3. Whether the plea agreement is binding on the court and prison and parole authorities;

4. Possibilities of pretrial diversion; and

5. Any recent changes in the applicable statutes or court rules and the effective dates of those changes.

Guideline 6.3 The Decision to Enter a Plea of Guilty

A. Counsel shall make it clear to the client that the client must make the ultimate decision whether to plead guilty. Counsel should investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses (if known), relevant concessions and benefits subject to negotiation, and possible consequences of a conviction after trial. Counsel should not base a recommendation of a plea of guilty solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.

B. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential direct and collateral consequences of the agreement. Counsel shall advise the client if the agreement carries a risk that the client will be deported.

C. The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision. If counsel reasonably believes that rejection of a plea offer is in the best interest of the client, counsel should advise the client of the benefits and risks of that course of action. Similarly, if counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.

D. Counsel should, whenever possible, obtain a written plea offer from the prosecution. If the prosecution does not provide counsel with a written plea offer, counsel should document in writing all the terms of the plea agreement offered to and accepted by the client.

Guideline 6.4 Entry of the Plea before the Court

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

1. Make certain that the client understands the rights the client will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;

2. Provide the client a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea, including that the plea agreement is not binding on the court and that the court, having accepted the guilty plea, can impose a sentence greater than that agreed upon;

3. Explain to the client the nature of the plea hearing and prepare the client for the role the client will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and

B. Counsel should investigate and inform the client of the consequences of a plea or a finding of guilty in state court for any current or future federal prosecution.

C. When entering the plea, counsel should confirm that the full content and conditions of the plea agreement are placed on the record before the court.

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

E. Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Guideline 7.1 General Trial Preparation

A. Throughout preparation and trial, counsel should consider the theory of the defense and make decisions and act in a manner consistent with that theory.

B. The decision to seek to proceed with or without a jury during both the guilt and punishment phases of the trial rests solely with the client after consultation with counsel. Counsel should discuss the strategic considerations relevant to this decision with the client, including the availability of different sentencing options depending on whether sentence is assessed by a judge or jury and the need to obtain the prosecution's consent to proceed without a jury on guilt. Counsel should maintain a record of the advice provided to the client, as well as the client's decision concerning trial. Counsel has an obligation to advise the court of the client's decision in a timely manner.

C. Counsel should complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined.

This preparation should include consideration of:

1. Subpoenaing and interviewing all potentially helpful witnesses;

2. Subpoenaing all potentially helpful physical or documentary evidence;

3. Obtaining funds and arranging for defense experts to consult or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);

4. Obtaining and reading transcripts of prior proceedings in the case or related proceedings;

5. Obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may assist the fact finder in understanding the defense; and

6. Obtaining and reviewing the court file of any codefendant(s) and contacting co-defendant's counsel to obtain information about the co-defendant's case and ascertain, to the extent possible, what the codefendant's strategy was or will be, and whether the outcome of the client's case will be affected thereby.

D. When appropriate, counsel should have the following materials available at the time of trial:

1. Copies of all relevant documents filed in the case;

2. Relevant documents prepared by investigators;

3. Relevant documents provided by the prosecution;

4. Reports, test results, and other materials subject to disclosure;

5. Voir dire topics, plans, or questions;

6. An outline or draft of counsel's opening statement;

7. Cross-examination plans for all possible prosecution witnesses;

8. Direct examination plans for all prospective defense witnesses;

9. Copies of defense subpoenas and defense subpoena returns;

10. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

11. Prior statements of all defense witnesses;

12. Reports from defense experts;

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

14. Originals and copies of all documentary exhibits;

15. Proposed jury instructions, with supporting case citations if available;

16. A list of the evidence necessary to support defense requests for jury instructions;

17. Copies of all relevant statutes and cases; and

18. An outline or draft of counsel's closing argument.

E. If counsel or the prosecution will seek to introduce an audio or video tape or a DVD of a police interview or any other event, counsel should consider whether a transcript of the recording should be prepared and how the relevant portions of the recording will be reflected in the appellate record, when necessary, by stipulating those matters with the prosecution.

F. Counsel should be familiar with the rules of evidence, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise at trial.

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

H. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and make a record sufficient to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. As part of this effort, counsel should request, whenever necessary, that all trial proceedings, including voir dire, be recorded.

I. If appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. When necessary, counsel should file pretrial motions seeking appropriate clothing for the client and that court personnel follow appropriate procedures so as not to reveal to jurors that the client is incarcerated. Counsel should attempt to prevent the client from being seen by the jury in any form of physical restraint.

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

K. If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions should be discussed with the client before they are made.

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

Guideline 7.2 Voir Dire and Jury Selection

A. Preparation

1. Counsel should be familiar with the procedures by which both petit and grand jury venires are selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venires.

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

3. Prior to jury selection, counsel should seek to obtain a prospective juror list and the standard jury questionnaire if feasible, and counsel should seek access to and retain the juror questionnaires that have been completed by potential jurors. Counsel should also consider requesting use of a separate questionnaire that is tailored to the client's case and should determine the court's method for tracking juror seating and selection.

4. Counsel should tailor voir dire questions to the specific case.

Among the purposes voir dire questions should be designed to serve are the following:

a. To elicit information about the attitudes, opinions and beliefs of individual jurors, to inform counsel and client about peremptory strikes and challenges for cause;

b. To determine jurors' attitudes, opinions or beliefs toward legal principles that are critical to the defense, including, when appropriate, the client's decision not to testify as well as attitudes toward evidence/information that is likely to come to their attention during trial;

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

6. Counsel should be familiar with the law concerning challenges for cause, peremptory strikes, and requests for additional strikes. Counsel also should be aware of the law concerning whether peremptory

challenges need to be exhausted in order to preserve for appeal any challenges for cause that have been denied.

7. When appropriate, counsel should consider whether to seek expert assistance in the jury selection process and should seek assistance from a colleague or a defense team member to record venire panel responses and to observe venire panel reactions. Counsel also should communicate with the client regarding the client's venire panel preferences.

B. Examining the Prospective Jurors

1. Counsel should take all steps necessary to protect the voir dire record for appeal, including filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.

2. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors.

3. In a group voir dire, counsel should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors or be prepared to examine such prejudices with the panel and address them appropriately.

4. Counsel should be familiar with case law regarding the client's right to be present during individual voir dire.

C. Challenges

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

2. If challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.

3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

4. Counsel should make every effort to consult with the client in exercising challenges.

5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

6. Counsel should object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecution.

7. Counsel should make every effort to preserve error in voir dire by urging proper objection or instruction.

Guideline 7.3 Opening Statement

A. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

B. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

C. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

D. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecution makes to the jury during its opening statement.

E. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking a cautionary instruction, unless tactical considerations weigh against any such objections or requests.

Such tactical considerations may include, but are not limited to:

1. The significance of the prosecution's error;

2. The possibility that an objection might enhance the significance of the information in the jury's mind;

Guideline 7.4 Confronting the Prosecution's Case

A. Counsel should research and be fully familiar with all of the elements of each charged offense and should attempt to anticipate weaknesses in the prosecution's case.

B. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.

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

D. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements that they may have made or adopted, and should consider doing so outside the presence of the jury.

E. In preparing for cross-examination, counsel should:

1. Consider the need to integrate cross-examination, the theory of the defense, and closing argument;

2. Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking unnecessary questions or questions that may hurt the defense case;

3. File a motion requesting the names and addresses of witnesses the prosecution might call in its case-in-chief or in rebuttal;

4. Consider a cross-examination plan for each of the anticipated witnesses;

5. Be alert to inconsistencies or variations in a witness's testimony;

6. Be alert to possible variations between different witnesses' testimony;

7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

8. When appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;

9. When appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

10. Have prepared a transcript of all audio or video tape recorded statements made by witnesses;

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

12. Have prepared, for introduction into evidence, all documents that counsel intends to use during cross-examination, including certified copies of records such as prior convictions of witnesses and prior sworn testimony of witnesses.

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

G. Prior to trial, counsel should ascertain whether the prosecution has provided copies of all prior statements of the witnesses it intends to call at trial.

If disclosure is not timely made, counsel should prepare and argue motions for adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess when necessary; exclusion of the witness's testimony and all evidence affected by that testimony; a mistrial; dismissal of the case; and any other sanctions counsel believes would remedy the violation.

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

Guideline 7.5 Presenting the Defense Case

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

B. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel also should be familiar with the ethical responsibilities that may be applicable if the client insists on testifying untruthfully.

C. The decision to testify rests solely with the client, and counsel should not attempt to unduly influence that decision. When counsel reasonably believes that testifying is in the best interest of the client, counsel should advise the client of the benefits and risks of that course of action. Similarly, when counsel reasonably believes that not testifying is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.

D. Counsel should be aware of the elements and tactical considerations of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.

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

1. Consider all potential evidence that could corroborate the defense case, and the import of any evidence that is missing;

2. After discussion with the client, make the decision whether to call any witnesses;

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

4. Determine the implications that the order of witnesses may have on the defense case;

5. Consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;

6. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;

7. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;

8. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;

9. Review all documentary evidence that may be presented;

10. Review all tangible evidence that may be presented; and

11. Be fully familiar with statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

F. In developing and presenting the defense case, counsel should consider the implications the defense case may have for a rebuttal by the prosecution.

G. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel shall advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. When appropriate, counsel also should advise witnesses of suitable courtroom dress and demeanor.

H. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

I. Counsel should conduct redirect examination as appropriate.

J. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and make an offer of proof.

K. Counsel should guard against improper cross-examination by the prosecution.

L. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

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

Guideline 7.6 Jury Instructions

A. Counsel should file proposed or requested jury instructions before closing argument.

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

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

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

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

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

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

H. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

I. Counsel should move to discuss any jury notes or responses to jury notes regarding substantive matters in open court and on the record, and to include the actual notes and responses in the record for appellate purposes.

Guideline 7.7 Closing Argument

A. Before argument, counsel should file and seek to obtain rulings on all requests for jury instructions in order to tailor or restrict the argument properly in compliance with the court's rulings.

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

C. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

D. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, when appropriate, should consider:

1. Highlighting weaknesses in the prosecution's case;

2. Describing favorable inferences to be drawn from the evidence;

3. Incorporating into the argument:

a. The theory and the theme(s) of the case;

b. Helpful testimony from direct and cross-examination;

c. Verbatim instructions drawn from the jury charge;

d. Responses to anticipated prosecution arguments; and

e. Visual aids and exhibits; and

4. The effects of the defense argument on the prosecution's rebuttal argument.

E. Counsel should consider incorporating into counsel's closing argument summation of the promises of proof the prosecution made to the jury during its opening.

F. Whenever the prosecution exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, and/or seeking a cautionary instruction unless tactical considerations suggest otherwise.

Guideline 8.1 Obligations of Counsel in Sentencing

Among counsel's obligations in the sentencing process are:

A. When a client chooses not to proceed to trial, to negotiate the plea agreement with consideration of the sentencing, correctional, financial, and collateral implications;

B. To object and preserve error so that the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

C. To seek and present to the court all reasonably available mitigating and favorable information that is likely to benefit the client, including evidence from expert witnesses, particularly in the area of mental or behavioral health;

D. To seek the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

E. To object to all information presented to the court that may harm the client and that is not shown to be accurate and truthful or is otherwise improper, and to seek to strike such information from the text of the presentence investigation report before distribution of the report;

F. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted; and

G. To identify and preserve legal and constitutional issues for appeal.

Guideline 8.2 Sentencing Options, Consequences and Procedures

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

1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;

2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;

3. If a sentence involving community supervision or deferred adjudication community supervision is possible, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;

4. If a sentence involving deferred adjudication community supervision is possible, special considerations regarding such a sentence including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;

5. The availability of appropriate diversion and rehabilitation programs; and

6. Applicable court costs.

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

1. The possible and likely place and manner of confinement;

2. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;

3. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;

4. Any registration requirements, including sex offender registration and job-specific notification requirements;

5. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence;

6. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

7. Deportation and other possible immigration consequences that may result from the plea; and

8. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions.

C. Counsel should be familiar with the sentencing procedures, including:

1. The effect that plea negotiations may have upon the sentencing discretion of the court;

2. The procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;

3. The practices of those who prepare the presentence report, and the client's rights in that process;

4. Access to the presentence report by counsel and the client;

5. The defense sentencing presentation and sentencing memorandum;

6. The opportunity to challenge information presented to the court for sentencing purposes;

7. The availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and

8. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing In preparing for sentencing, counsel should consider the need to:

A. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

B. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

C. Obtain from the client and other sources relevant information concerning such subjects as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

D. Inform the client of the client's right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial, or trial on other offenses;

E. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

F. Prepare the client to be interviewed by the official preparing the presentence report and seek adequate time for the client to examine the presentence report, if one is utilized by the court;

G. Inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of the client's right to speak personally for a particular sentence or sentences; and

H. Collect documents and affidavits to support the defense position and, when relevant, prepare witnesses to testify at the sentencing hearing; when necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence and use subpoenas to secure relevant documents and witnesses.

Guideline 8.4 The Official Presentence Report

Counsel should:

A. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; counsel should consider the strategic implications of requesting that a report be prepared;

B. Provide to the official preparing the report relevant information favorable to the client, including, when appropriate, the client's version of the offense, and supporting evidence;

C. Attend any interview of the client by an agency presentence investigator, if there is a significant risk that information damaging to the client will be obtained unless counsel intervenes;

D. Review the completed report;

E. Take appropriate steps to preserve and protect the client's interests, including requesting that a new report be prepared with challenged or unproved information deleted when the defense challenges information in the presentence report as being erroneous or misleading.

Guideline 8.5 The Prosecution's Sentencing Position

A. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed and if so any and all law and evidence the prosecution may rely on;

B. Counsel should be prepared to challenge the prosecution's sentencing position;

C. Counsel should make specific requests for disclosure of mitigation evidence and/or evidence that rebuts potential aggravating evidence to be offered by the prosecution

Guideline 8.6 The Defense Sentencing Memorandum

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

A. Challenges to incorrect or incomplete information in the official presentence report or any prosecution sentencing position;

B. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report or any prosecution sentencing position;

C. Information contrary to that before the court and that is supported by affidavits, letters, and public records;

D. Information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

E. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

F. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and

G. Presentation of a sentencing proposal.

Guideline 8.7 The Sentencing Process

A. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

B. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

C. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. If a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the client.

D. When information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.

E. If the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, and against deportation/exclusion of the client.

F. When appropriate, counsel should prepare the client to personally address the court.

Guideline 8.8 Expungement of Record

After final disposition of the case, counsel should inform the client of any procedures available for requesting that the client's records in the case be expunged and, if such procedures may be available in the client's case, when and under what conditions the client may pursue an expunction.

Guideline 9.1 Motion for a New Trial

A. Counsel should be familiar with the procedures applicable to a motion requesting a new trial including:

1. The time period for filing such a motion;

2. The effect it has upon the time to file a notice of appeal;

3. The grounds that can be raised;

4. The evidentiary rules applicable to hearings on motions for new trial; and

5. the effect that not filing such a motion might have upon the client's appellate rights.

B. The decision to file a motion for new trial should be made after considering the applicable law in light of the circumstances of each case. If after explaining to the client the client's rights to submit a motion for new trial, the client desires that such a motion be filed, counsel should file the motion.

Guideline 9.2 Protecting the Right to Appeal

A. Following trial, counsel shall inform the client of the client's right to appeal the judgment of the court and the action that must be taken to perfect an appeal. Counsel's advice to the client should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court.

B. If the client wants to file an appeal and trial counsel will not be handling the appeal, counsel shall formally withdraw from the client's case, but only after taking all steps necessary to preserve the right to appeal including but not limited to requirements of MRAP Rule 6.

C. Counsel must review the entire record to determine whether it is true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial court in order to obtain corrections or hearings necessary to protect the reliability of the record.

D. If an appeal is taken and the client is entitled to bail pending appeal counsel should advise of this and if client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

Guideline 9.3 Direct Appeal

A. Counsel representing a client on direct appeal should be familiar with the procedures applicable to an appeal, including the rules specifying the time period for filing an appeal.

B. Counsel should immediately contact trial counsel to obtain background information on the client, information on the nature of the issues presented.

C. Counsel must review the entire record to determine whether it is true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial or appellate courts in order to obtain corrections or hearings necessary to protect the reliability of the record.

D. Counsel should fully review the appellate record for all reviewable errors, prepare a well-researched and drafted appellate brief, file the brief in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure, and notify the court of counsel's desire to present oral argument in the case, when appropriate.

E. Counsel should consider preparing and filing a reply brief or a motion for rehearing if, under the circumstances, such is needed or required, particularly in order to make the court aware of legal or factual matters that may have been overlooked or mischaracterized or that may have newly developed.

Guideline 9.4 Right to File a Petition for Certiorari Review

A. If the appeal is assigned to the Court of Appeals and that court's decision is unfavorable to the client, counsel must advise the client in writing of the client's right to file a petition for discretionary review and the action that must be taken to properly file such a petition.

B. Counsel representing a client on a petition for certiorari review should be familiar with the procedures applicable to such a petition, including the rules specifying the time period for filing a petition; the organization of a petition; the page limits for a petition and the procedure for requesting an expansion of the petition for good cause; and appendices and copies required for filing a petition.

C. In preparing a petition for discretionary review, counsel should fully review the appellate opinion for all reviewable errors, prepare a well-researched and drafted petition, file the petition in a timely manner

and in accordance with all other requirements in the Rules of Appellate Procedure, and notify the court of counsel's desire to present oral argument in the case, when appropriate.

D. Should the Supreme Court grant review on one or more issues presented in the petition, counsel should notify the client and prepare and timely file a brief on the merits in support of the grant of review.

E. Counsel should be prepared to draft and timely file a reply brief in opposition to any brief filed by the prosecution.

F. Counsel should be prepared to draft and timely file a motion for rehearing should the Supreme Court deny relief after granting a petition for discretionary review and reviewing the case on the merits. Counsel should be prepared to timely defend against the prosecution's motion for rehearing should the court reverse the conviction.

Guideline 9.5 Right to File a Petition for Certiorari to the United States Supreme Court

A. In the event that the Supreme Court either summarily denies a petition for discretionary review or denies relief on the merits, counsel should advise the client in writing of the client's right to file a petition for certiorari before the United States Supreme Court and the action that must be taken to properly file such a petition.

In advising the client of the right to file a petition for certiorari, counsel should explain that:

1. Review by the United States Supreme Court is discretionary and not a matter of right, and that the United State Supreme Court may refuse to review the client's case without providing any reason for doing so;

2. Client does not have the right to court-appointed counsel for the purpose of filing a petition for certiorari; and

3. If the petition for certiorari is granted, the client may request the appointment of counsel for further proceedings on the merits before the United States Supreme Court.

B. Considerations relevant to filing a petition for certiorari may include but are not limited to:

1. The Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort or federal court of appeals; or

2. The Supreme Court has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, or has decided an important federal question in a way that conflicts with decision of the United States Supreme Court.