COMMONWEALTH OF VIRGINIA

STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL

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IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL

In 2004, the Virginia General Assembly created the Virginia Indigent Defense Commission to provide oversight of and support for the attorneys performing court appointed criminal defense work. As part of the new Commission's charge, the General Assembly in Section 19.2-163.01 of the Code of Virginia directed the Commission to establish standards of practice for indigent defense counsel. The Standards give meaning to the Sixth Amendment right to counsel and further the overall goal of zealous and high quality legal representation for each and every client.

Unlike many performance standards, Virginia's Standards of Practice for Indigent Defense Counsel are legislatively mandated under Section 19.2-163.01(A)(4). Court appointed counsel and public defenders must comply with these Standards and the Rules of Professional Conduct, which the Standards referentially incorporate. These Standards should not serve as a benchmark for ineffective assistance of counsel claims or attorney discipline hearings. Rather, they should serve as standards of practice for court appointed counsel and public defenders providing indigent defense in Virginia. Failure to comply with these Standards can result in the removal of the non-compliant attorney from the list of counsel certified for the court appointed representation of the indigent accused.

In order to fulfill its statutory mandate, the Virginia Indigent Defense Commission invited a number of public and private criminal defense attorneys, prosecutors, representatives from the Office of the Attorney General, judges, Supreme Court administration, and legal scholars to participate in drafting the Standards. The standards of practice committee surveyed criminal defense performance guidelines from around the country and held its first meeting in late November 2005. After several meetings the committee drafted the following standards, largely based on the National Legal Aid and Defender Association's and the American Bar Association's Performance Guidelines and standards from several of our sister states. Additionally, the committee considered the nuances of Virginia law in drafting the Standards. The Commission sent a preliminary draft to various bar associations and criminal law practitioners for their review and feedback, and incorporated many of their suggestions into these Standards.

These Standards are comprehensive, but not exhaustive. The language allows for flexibility. While the Standards are absolutely essential, the comments are instructive and advisory. The Commission has divided the Standards into the following sections:

1. Role, Duties, Training, and Experience of Counsel (pp. 4-6)
2. Pre-Trial Release and Initial Interview (pp. 6-9)
3. Preliminary Hearing, Prosecution Requests for Non-Testimonial Evidence, and Counsel's Continuing Obligation to Raise Issue of Client's Incompetence (pp. 9-10)

4. Investigation and Discovery (pp. 10-12)
5. Pre-Trial Motions (pp. 12-13)
6. Plea Negotiations (pp. 13-16)
7. Duties at Trial (pp. 17-24)
8. Sentencing (pp. 24-27)
9. Post-Trial Motions and Right to Appeal (pp. 27-29)
**Standards of Appellate Practice (pp.30-36)
**Standards for Juvenile Defense Counsel (pp. 37-58)

The Commission shall provide every attorney certified to perform indigent criminal defense with a copy of these Standards. The Commission shall also provide copies to all of the judges in Virginia's circuit, general district, and juvenile and domestic relations courts. These Standards will be updated as necessary and those updates will be sent to the attorneys on the certification list and the courts. The Standards will also be available on the Indigent Defense Commission's website at www.indigentdefense.virginia.gov.

The Virginia Indigent Defense Commission is grateful to all of the defense attorneys who represent indigent defendants across the state. The Commission also thanks the following members of the standards of practice committee who devoted time and energy to drafting, revising, and reviewing these Standards:

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Standard 1.0 The Lawyer-Client Relationship

(a) In all phases of representing a person accused or convicted of a crime, counsel and the client enjoy a lawyer-client relationship. While the relationship is governed by the Virginia Rules of Professional Conduct, it is also governed by the law of agency.

(b) As a general matter, the client, after consultation with the lawyer, holds the ultimate decision making authority over lawful objectives of the representation. The lawyer, owing to his or her training and experience, generally chooses the means of obtaining the client's objectives.

(c) The lawyer shall not, without the client's express authority, enter a plea, request or waive trial by jury, waive the client's right to testify, or waive or take an appeal. The lawyer shall abide by the client's decision, after consultation, on those decisions.

(d) Cases in which the client is at risk of the death penalty pose unique challenges for defense counsel, including, but not limited to, situations in which the client wishes to die by execution or wishes to abandon some or all of the defense or mitigation. In those situations, defense counsel may be governed by applicable law and the Rules of Professional Conduct. This standard of conduct does not apply to those situations.

Comment:

Standard 1.0(b) confers upon the client the ultimate decision making authority regarding the purposes or objective of the representation, provided that such objectives are within the limits of the law and the lawyer's professional obligations. Because of the lawyer's knowledge, skill, and experience, clients normally defer to the lawyer with respect to the means used to accomplish the client's objectives. A lawyer's authority to act may also be implied from a client's general directive. Decisions that involve tactics and trial strategy generally are reserved for the professional judgment of the lawyer. Tactical or strategic decisions include, but are not limited to, witness selection, arguments, motions and objections, cross-examination, and juror selection.

The lawyer should keep the client reasonably informed about the status of work performed on behalf of the client including the means the lawyer has selected to accomplish the client's objectives. If the lawyer has reason to believe the client may disapprove of a particular course of action, the lawyer should consult with the client and obtain the client's approval beforehand. If the client directs the lawyer to employ a tactic, argument or other course of action that, in the lawyer's professional judgment, is unwise, the lawyer shall advise the client of the consequences of such course of action, but shall comply with the client's direction unless doing so would be illegal or unethical. Notwithstanding the client's direction, a lawyer may not file a motion, make an argument, assert a position, or take any other action if such action would serve merely to harass or maliciously injure another or if there is no basis in law of fact or cannot be supported by a good faith argument for the reversal, extension, or modification of existing law. An indigent client is entitled to take an appeal and a lawyer must, if the client so requests, protect the client's right to an appeal even though grounds for an appeal do not exist.

Standard 1.1 Role of Indigent Defense Counsel

The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by the Virginia Rules of Professional Conduct and act in accordance with the rules of the court and all applicable law.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 1.1;
Virginia Rules of Professional Conduct.

Standard 1.2 Education, Training, and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law, the law of criminal procedure, and its application in the particular local jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law.

(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 the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters.

Comment:

Counsel should become familiar with the practices of the court before which the case is pending. Counsel should continually improve advocacy skills and legal knowledge through training and continuing education, as well as through mentoring with more experienced practitioners.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 1.2.

Standard 1.3 General Duties of Defense Counsel

(a) Before agreeing to act as counsel or accepting court appointment, counsel has an obligation to make sure that counsel has sufficient time, resources, knowledge, and experience to offer quality representation to a defendant in a particular matter. If counsel later discovers that counsel cannot provide quality representation, counsel should move to withdraw.

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

(c) Counsel must meet with the client as promptly as possible, and has a continuing obligation to keep the client informed of the progress of the case.

Comment:

When counsel cannot arrange a face-to-face meeting with the client, counsel should use the best reasonable alternative means of communication.

Counsel should also keep detailed records reflecting the extent of client services provided. The file that the attorney maintains on a client's behalf should document the work performed, the time spent, any costs incurred, the advice rendered, the attorney's

communications to or on the behalf of the client, and a summary of each court appearance.

Counsel should maintain control over the client's file to protect privileged and confidential information, keeping all documents, evidence, motions and correspondence in an organized manner.

In the file, counsel should also maintain a timeline of important dates in the representation of the client, including but not limited to: dates when counsel gives advice, dates when the client makes decisions affecting the outcome of the case, dates of witness interviews, dates of meetings with the Commonwealth's agents, and the dates of all court appearances.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 1.3;
State of Georgia Performance Standards for Criminal Defense Representation in Indigent Criminal Cases 1.C;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 1.3.

Standard 2.1 General Obligations of Counsel Regarding Pretrial Release

Counsel has a continuing obligation to discuss pretrial release options with the client and, consistent with the client's wishes, attempt to secure the pretrial release under conditions the client finds most favorable and acceptable.

Comment:

While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery. Counsel should also be aware that there are circumstances when pretrial release is not in the client's best interest and discuss these circumstances with the client when appropriate.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 2.1.

Standard 2.2 Initial Interview

(a) Preparation for the Initial Interview:

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

(1) Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
(2) Obtain copies of any reasonably available relevant documents, including copies of any charging documents, pretrial release services agencies' recommendations and reports concerning pretrial release, and law enforcement reports;
(3) Be familiar with the legal criteria for determining pretrial release and the protocol in setting those conditions;
(4) Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies can act as a monitor during the client's release;
(5) Be familiar with any procedures available for reviewing the trial judge's decision regarding bail.

(b) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should interview the client in an environment that protects the attorney-client privilege. Counsel should remove at this, and at all successive interviews and proceedings, barriers to communication, such as differences in language or literacy.

(2) In appropriate cases, counsel should pursue the appointment of interpretive services to assist with communication.

(3) Information counsel should acquire includes, but is not limited to:

(A) The client's ties to the community, including the length of time he or she has lived at the current and former addresses, current contact information, family relationships, immigration status (if applicable), employment record and history, date of birth, and social security number;

(B) The client's physical and mental health, educational and armed services records;

(C) The client's immediate medical needs, including chemical dependency treatment;

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

(E) The ability of the client to meet any financial conditions of release;

(F) The names of individuals or other sources that counsel can contact to verify the client's provided information (counsel should consult with the client before contacting these individuals);

(G) And other such information necessary to determine potential exposure under the sentencing guidelines;

(H) Any necessary information waivers or releases that will assist the client's defense.

(4) Information counsel should provide to the client includes, but is not limited to:

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

(B) Warning the client of the dangers related to the search of the client's cell and personal belongings while in custody, and that jail officials may monitor telephone calls, mail, and visitations;

(C) An explanation of the procedures that will be followed in setting the conditions of pretrial release and the consequences of violating any condition of bond or protective orders relative to the case;

(D) An explanation of the type of information that a pretrial release agency will request in any interview, and an explanation that the client should not make statements concerning the offense;

(E) The charges and the potential penalties;

(F) A general procedural overview of the anticipated progression of the case;
(G) The names of any other persons who may contact the client on counsel's behalf;
(H) Explaining the importance of maintaining contact with counsel, and notifying counsel of any changes to the client's address.

(c) Supplemental Information:

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

(1) The facts surrounding the charges against the client;
(2) The client's version of arrest, with or without warrant, including whether the police searched the client and if they seized anything; whether the police interrogated the client, and, if so, whether the client was given Miranda warnings, and whether the client gave a statement; the client's physical and mental status at the time of any statement; whether arresting officers provided any exemplars, and whether officers performed any scientific tests on the client's body or bodily fluids;
(3) Any co-defendant's name and custodial status;
(4) Any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;
(5) Any possible witnesses who should be located;
(6) Any evidence that should be preserved;
(7) Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense, including the client's releases for any records for mental health treatment or testing for mental retardation.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 2.2, 4.1;
State of Georgia Performance Standards for Criminal Defense Representation in Indigent Criminal Cases 2.B;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 2.2.
Miranda v. Arizona, 384 U.S. 436 (1966)

Standard 2.3 Pretrial Release Proceedings

(a) Counsel should prepare to present the appropriate judicial officer with evidence of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(b) If the client cannot obtain release under the court-set conditions, counsel should consider pursuing modification of the conditions of release under the procedures available.

(c) If the court sets conditions of release which require posting a monetary bond or real property as collateral for release, counsel should ensure the client understands the available options and the protocol in posting such assets.

(d) When the client is incarcerated and unable to obtain pretrial release, counsel should consult with the client and, when appropriate, alert the court or other authority of the

client's special medical, psychiatric, and/or security needs and request that the court direct the appropriate officials to meet such special needs.

Comment:

During a bond hearing, counsel should not call the client as a witness, or otherwise permit the client to testify, except in extraordinary circumstances where there is a sound tactical reason for doing so. Counsel should carefully consider the implications of calling other witnesses to support pretrial release. Counsel should also consider making a proffer in lieu of testimony if local rules or procedures permit.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 2.3;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 2.3;
Virginia Code §§ 19.2-119,19.2-120, 19.2-121, 19.2-124.

Standard 3.1 Preliminary Hearing

(a) Prior to conducting a preliminary hearing, counsel should make reasonable efforts to secure information in the prosecution's or law enforcement authorities' possession. Where necessary, counsel should pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.

(b) Counsel should request scheduling the preliminary hearing as soon as reasonably and strategically possible unless the counsel needs more time to prepare and the delay would not prejudice the client or increase the likelihood of direct indictment.

(c) Though the client retains the sole right to waive a preliminary hearing, counsel should advise the client not to waive this right without good reason. Counsel must evaluate and advise the client of the consequences of waiving the preliminary hearing.

(d) Counsel should conduct a preliminary hearing and avoid a direct indictment unless there is good reason for another strategy.

(e) Counsel should take reasonable steps to preserve preliminary hearing testimony.

(f) Counsel should not present evidence, especially the client's testimony, except in extraordinary circumstances where there is a sound tactical reason for doing so.

(g) Where appropriate, counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.

(h) Counsel should move to sequester witnesses at the preliminary hearing and trial unless there is a sound tactical reason to do otherwise.

Comment:

(a) The preliminary hearing may provide counsel with an opportunity :
(1) To test the adequacy of the prosecution's case for possible trial or negotiation;
(2) To become familiar with the strengths and weaknesses of the prosecution's case

(b) Counsel should be aware that requesting a continuance or objecting to the prosecution's motion for a continuance could increase the likelihood of the client's direct indictment.

(c) Counsel should be aware of the procedures for obtaining a court reporter. If no court reporter is available in the jurisdiction, counsel should consider making an audio recording of the proceedings per Virginia Code Section 16.1-69.35:2. Counsel should

recognize that there may be times when creating a record of the proceedings is not in the client's best interest.

RELATED STANDARDS

Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 3.2;
Virginia Code §§ 16.1-69.35:2, 19.2-185, 19.2 –218, 19.2-218.1,19.2-218.2, 19.2-243;
Rules of the Supreme Court of Virginia 3A:11;
Harley v. Commonwealth, 25 Va. App. 342 (1997).

Standard 3.2 Prosecution Requests for Non-Testimonial Evidence

Counsel should understand the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the required preservation of the record.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 3.3;
Rules of the Supreme Court of Virginia 3A:11.

Standard 3.3 Continuing Responsibility to Raise Issue of Client's Incompetence

(a) Whenever defense counsel has a good-faith doubt regarding the client's competence to proceed in the criminal case, defense counsel should consider the client's capacity to stand trial or to enter a plea. Counsel may move for evaluation over the client's objection and, if necessary, counsel may make known to the court those facts that raise a good-faith doubt of competence to proceed in the criminal case.

(b) If the court grants the motion for a competency evaluation, counsel shall, pursuant to statute, promptly provide all required information to the evaluator.

(c) Where competency is at issue, counsel has a continuing duty to review and prepare the case for all court proceedings.

(d) Counsel should be aware of the procedures and consequences of a finding of incompetence.

RELATED STANDARDS

New Mexico Public Defender Department Performance Guidelines for Criminal Defense Representation 3.5;
Virginia Code §§ 19.2-169.1, 19.2-169.2, 19.2-169.3, 19.2-169-4, 19.2-165, 19.2-169.7.

Standard 4.1 Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or account of events provided to counsel indicating guilt. Counsel should conduct a fact investigation as promptly as practicable.

(b) Sources of investigative information may include the following:

(1) Charging Documents

Counsel shall obtain and examine copies of all charging documents in the case to determine the specific charges brought against the accused. Counsel shall examine relevant statutes and precedents to identify:

(A) the elements of the offense with which the accused is charged;

(B) the available defenses, ordinary and affirmative;

(C) any defects, constitutional or otherwise, in the charging documents

(2) The Client

As previously stated in Standard 2.2, counsel should conduct an in-depth interview as soon as possible after counsel's appointment.

(3) Potential Witnesses

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should consider doing so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial.

(4) Law Enforcement and Prosecution

Counsel should try to secure information in the prosecution's and/or law enforcement authorities' possession including physical evidence and expert reports relevant to the offense or sentencing. Counsel should pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.

(5) The Scene

Where appropriate, counsel should attempt to visit the scene of the alleged crime in a timely manner, prior to the preliminary hearing or trial. Counsel should consider obtaining fair and accurate photographs and maps of the area, and, where relevant, measurements.

(6) Expert Assistance

Counsel should formally request the assistance of experts where it is reasonably necessary or appropriate to:

(A) Prepare the defense;

(B) Rebut the prosecution's case.

Comment:

(a) In appropriate cases, court-appointed counsel should consider requesting court funds to retain an investigator to assist with the client's defense. Public defenders should utilize the services of the investigator on staff when necessary.

(b) In appropriate cases, counsel should pursue the appointment of interpretive services to assist with communication.

(c) In cases where private funds are available to secure an expert, counsel should engage the services directly so as to maintain the attorney-client privilege.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 4.1;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 4.1;
Virginia Code §§ 19.2-164, 19.2-164.1;
Husske v. Commonwealth, 252 Va. 203 (1996);

Lenz v. Commonwealth, 261 Va. 451 (2001);
Green v. Commonwealth, 266 Va. 81 (2003);
Juniper v.Commonwealth, 271 Va. 362, 626 S.E.2d 383 (2006).

Standard 4.2. Formal and Informal Discovery

(a) Counsel must pursue discovery procedures provided by the Constitution of the United States, the Code of Virginia, the Rules of the Supreme Court of Virginia, and any local practices of the court, and pursue such available informal discovery methods as soon as practicable unless there is a sound tactical reason for not doing so. In considering discovery requests, counsel should consider that such requests will trigger reciprocal discovery obligations.

(b) Counsel should consider seeking discovery of the following items:

(1) Potential exculpatory information;
(2) All accused's oral and/or written statements, and the details of the circumstances under which the accused made the statements;
(3) The accused's prior criminal record and any evidence of other alleged misconduct that the government may intend to use against the accused;
(4) All relevant books, papers, documents, photographs, tangible objects, access to buildings and places, or copies, descriptions, representations and portions thereof;
(5) All results, reports, or copies of relevant physical or mental health examinations and scientific tests or experiments;
(6) Co-defendants' statements.

Comment:

Counsel should be aware of the jurisdiction's local practice concerning filing formal discovery and obtaining informal discovery. In addition to the applicable law governing discovery, counsel should, when appropriate, ask for co-defendants' statements, copies of photo arrays used in eyewitness identification procedures, and other evidence material to the client's case if there is a substantial basis for claiming materiality.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 4.2;
U.S. Constitution, amendment IV and V;
Virginia Constitution art. I, § 8;
Rules of the Supreme Court of Virginia 3A:11, 7C:5, 8:15;
Virginia Code § 19.2-265.4;
Brady v. Maryland, 373 US 83 (1963);
Sennett v. Sheriff of Fairfax County, 608 F.2d 537 (4th Cir. 1979);
Dozier v. Commonwealth, 219 Va. 1113 (1979).

Standard 5.1. The Decision to File Pretrial Motions

(a) Counsel shall consider filing appropriate pretrial motions when a good-faith basis for such motions exists.

(b) Counsel shall make the decision to file pretrial motions after full consideration of the applicable law and the known circumstances of each case.

(c) Counsel should withdraw or decide not to file a pretrial motion only after careful consideration, and only after determining whether the filing of a pretrial motion may

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

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 5.1;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 5.1.

Standard 5.2 Filing and Arguing Pretrial Motions

(a) Counsel shall, in a timely manner, file and docket pretrial motions that comport with the formal requirements of the Code of Virginia, Rules of the Supreme Court of Virginia, and local practices of the jurisdiction, and inform the court of the authority relied upon. In filing a pretrial motion, counsel should understand the potential effect upon the client's speedy trial rights.

(b) Counsel should comprehend the burdens of proof and production, evidentiary principles, and court practices relating to any pretrial motions hearing, including the potential advantages and disadvantages of having the client testify. Counsel should inform the court of the supporting authority for the motion.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 5.2;
Virginia Code §§ 16.1-69.25:1, 19.2-266.2;
Rules of the Supreme Court of Virginia 3A:9, 3A:20, 3A:21.

Standard 5.3 Continuing Duty to File Pretrial Motions

Counsel has a continuing duty to raise any issue that was not raised pretrial, 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.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 5.3.

Standard 6.1 Plea Negotiation Process and Duties of Counsel

(a) Counsel shall discuss with the client the possibility and potential desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel shall fully explain the rights the client would waive by entering a guilty or *nolo contendre* plea and not proceed to trial.

(b) Ongoing tentative plea negotiations with the prosecution should not prevent or delay counsel's investigation of the facts of the case and preparation of the case for future proceedings.

(c) Counsel shall keep the client fully informed of any plea discussions and negotiations and shall convey to the accused the prosecution's offers for a negotiated settlement.

(d) Counsel may not accept any plea agreement without the client's express authorization.

Comment:

(a) Counsel should, when appropriate, explore plea negotiations with the Commonwealth.
(b) Counsel should prepare sentencing guidelines at the District Court level prior to entering into plea negotiations.
(c) When applicable, counsel should caution the client that every state has rules and requirements concerning sex offender registration.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 6.1;
Virginia Code § 19.2-254 and 19.2-259;
Rules of the Supreme Court of Virginia 3A:8;
Virginia Rules of Professional Conduct 1.2.

Standard 6.2 Contents of Negotiation

(a) To develop an overall plan, counsel shall prepare, at the earliest opportunity, sentencing guidelines for the client for all felonies in Circuit Court. In addition, counsel should be aware of, and ensure the client is aware of:
(1) The maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory (minimum) punishment or sentencing guidelines applicable to the case;
(2) The possibility of forfeiture of assets;
(3) Other consequences of conviction, such as the loss of driving or firearm privileges, ineligibility for certain government benefits, and adverse effect on employment, the possibility of deportation, and denial of naturalization or of re-entry into the United States;
(4) Any possible and likely sentence enhancements, parole and/or probation consequences, or revocations of suspended sentence;
(5) The possible effect of good-time and earned sentence credits, and the general sentence ranges for similar offenses committed by defendants with similar backgrounds;
(6) The terms and requirements of the Commonwealth's applicable Sex Offender Registration laws and of Violent Sexual Predator Commitment Statutes.

(b) In developing a negotiation strategy, counsel should be completely familiar with:
(1) Concessions client may 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) Decline from asserting or litigating any particular pretrial motions;
(C) Agree to fulfill specified restitution conditions and/or participation in community work, service programs, supervised probation, rehabilitation, or other programs;
(D) Assist in prosecution or investigation of the present case or other alleged criminal activity;
(E) Foregoing appellate remedies;
(F) 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) That, with the consent of the Commonwealth, the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
(C) To dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement;
(D) That the client will not be subject to further investigation or prosecution for certain uncharged alleged criminal conduct;
(E) That the client will receive, with the agreement of the court, a specified sentence or sanction, or that the prosecution will not argue for a sentence or sanction greater than that recited in the plea agreement;
(F) That the prosecution will take, or refrain from taking, at the time of sentencing a specific position with respect to the sanction to be imposed on the client by the court;
(G) That the prosecution will not present, at the time of sentencing and/or in communication with the preparer of the official presentence report, certain information.

(c) In conducting plea negotiations, counsel should be familiar with:
(1) The types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendre, a conditional plea of guilty, and a plea in which the client is not required to personally acknowledge his or her guilt (Alford plea);
(2) The advantages and disadvantages of each available plea according to the circumstances of the case;
(3) Whether the plea agreement is binding on the court and prison, parole, and probation authorities.

(d) In conducting plea negotiations, counsel should seek to become familiar with the practices and policies of the particular jurisdiction, judge, and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 6.2;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 5.4; 5.10;
New Mexico Public Defender Department Performance Guidelines for Criminal Defense Representation 6.2;
Virginia Sentencing Guidelines;
North Carolina v. Alford, 400 U.S. 25, 35, 91 S.Ct. 160, 166 (1970).

Standard 6.3 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) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to improperly influence that decision.

(c) Counsel should, whenever possible, obtain a written plea offer from the prosecution. If the prosecutor 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.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 6.3;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 5.1.

Standard 6.4 Entry of the Plea Before the Court

(a) Prior to the entry of the plea, counsel shall:

(1) Make certain the client understands the rights the client will waive in entering the plea, and that the decision to waive those rights is knowing, voluntary, and intelligent;

(2) Make certain the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client may face by entering a plea, including whether the plea agreement is binding on the court and whether 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, prepare the client for the hearing, and review with the client the questions that the Judge will ask.

(b) Counsel should make sure that the full content and conditions of the plea agreement are presented to the court.

(c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing, absent any contrary provision in the plea agreement. Counsel should also be prepared to move the court for any appropriate evaluations to aid in disposition, sentencing, or eligibility for various post-conviction sentencing alternatives. If the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. If the client is in custody prior to the entry of the plea, counsel should, where appropriate, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Comment:

Counsel should inform the client and make sure that the client understands that by entering a plea of guilty, the client will be waiving the following rights and privileges:

(a) Presumption of innocence;
(b) Privilege against self incrimination;
(c) Right to a jury trial;
(d) Right to confront and cross examine witnesses;
(e) Right to subpoena witnesses who are favorable to the client's case;
(f) Right to produce and present favorable evidence the client wanted to present at trial.
(g) Right to appeal.

Counsel should note in the file that these rights and privileges have been thoroughly explained to the client.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 6.4;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 5.9; 5.10; 5.12;
Rules of the Supreme Court of Virginia 3A:8(c)(4);
Smith v. Commonwealth, 17 Va. App. 162 (1993).

Standard 7.1 General Trial Preparation

(a) The decision to proceed to trial, with or without a jury, ultimately rests with the client. Counsel should discuss the relevant strategic considerations of this decision with the client. Counsel has an obligation to advise the Court of the client's decision in a timely manner.

(b) 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 all potentially helpful witnesses, utilizing *ex parte* procedures if advisable;
(2) Subpoenaing all potentially helpful physical or documentary evidence;
(3) Arranging for defense experts to consult and/or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);
(4) Obtaining and reading transcripts and/or 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 which may assist the fact finder in understanding the defense.

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

(1) Copies of all relevant documents filed in the case, including reports, test results, and other materials subject to disclosure under the Rules of the Supreme Court of Virginia;
(2) Relevant documents prepared by the investigators;
(3) Return of copies of defense subpoenas, if at issue;
(4) All prosecution witnesses' prior statements (e.g., transcripts, police reports) when obtainable;
(5) All defense witnesses' prior statements;
(6) Defense experts' reports;
(7) Originals and copies of all documentary evidence;
(8) Proposed jury instructions and supporting case citations;
(9) Copies of all relevant statutes, rules, and cases;

(d) 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 in the trial.

(e) 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 accused) and, where

appropriate, counsel should prepare motions and memoranda for such advance rulings.

(f) Throughout the trial process counsel should take all steps necessary to preserve a proper record for appellate review. As part of this process, counsel should request, whenever necessary, that all trial proceedings, including motions, bench conferences in chambers or at sidebar, opening statements, closing arguments, and jury instructions, be recorded.

(g) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the prejudicial effects of the client appearing before the jury in jail uniform or other inappropriate clothing.

(h) Counsel should seek appropriate means to confer privately with the client throughout the trial.

(i) Counsel should be aware of protocol in making proffers to preserve objections when evidence is ruled inadmissible.

Comment:

Counsel may wish to have the following material available at the time of trial:

(a) Opening statement outline or draft;

(b) Cross-examination plans for all possible prosecution witnesses;

(c) Direct examination plans for all prospective defense witnesses;

(d) A list of all defense exhibits and the witnesses through whom the exhibits will be introduced;

(e) Closing argument outline or draft.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.1;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.1;
Virginia Constitution, article I, section 8.

Standard 7.2 Voir Dire and Jury Selection

(a) Preparation

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

(2) Prior to jury selection, counsel should seek to obtain a prospective juror list and should determine the court's method for tracking juror seating and selection.

(3) Counsel should be aware of available juror information and, where appropriate, should submit a supplemental questionnaire as a pretrial motion.

(4) Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Voir dire questions should elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

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

(6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes, and preserve for appeal any challenges for cause that have been denied.

(b) Examining the Prospective Jurors

(1) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, reading 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 which may elicit responses that are likely to prejudice other prospective jurors.

(c) Challenges

(1) When it is likely to benefit the client, counsel should consider challenging for cause all persons for whom counsel can make a legitimate argument for actual prejudice or bias relevant to the case.

(2) Counsel should timely object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

Comment:

(a) Counsel should consider seeking the assistance from a colleague or a defense team member to record venire panel responses and to observe venire panel reactions. Counsel should also communicate with the client regarding the client's venire panel preferences.

(b) Counsel should be aware that a skillful voir dire may be helpful in advancing the defense case.

(c) In appropriate cases, counsel may want to consider filing a supplemental questionnaire as part of a pretrial motion.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.2
New Mexico Public Defender Department Performance Guidelines for Criminal Defense Representation 7.2;
Rules of the Virginia Supreme Court 1: 22 and 3A:14;
Virginia Code § 19.2-202;
Batson v. Kentucky, 476 US 79 (1986);
Georgia v. McCullom, 505 US 42 (1992).

Standard 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, when reasonably possible, the individual trial judge's practices regarding the permissible content of an opening statement.

(c) Counsel should consider the strategic advantages and disadvantages of disclosing particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

(d) Counsel may make an opening statement to:

(1) Provide an overview of the defense case;
(2) Identify the weaknesses of the prosecution's case;
(3) Emphasize the prosecution's burden of proof;
(4) Summarize the witnesses' testimony and the role of each in relationship to the entire case;
(5) Describe the exhibits to be introduced and the role of each in relationship to the entire case;
(6) Clarify the juror's responsibilities;
(7) State the ultimate inferences that counsel wishes the jury to draw.

(e) Counsel should consider incorporating the prosecution's promises of proof to the jury during opening statement in the defense summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or 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.

Comment:

As a tactical matter, counsel should be cognizant of the potential negative impression on jurors that might result from their making objections during the prosecution's opening statement.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.3;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.5.

Standard 7.4 Confronting the Prosecution's Case

(a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and should research and consider preparing corresponding motions to strike.

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

(c) In preparation for cross-examination, counsel should be familiar with the applicable laws 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.

(d) In preparing for cross-examination, counsel should:

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

(2) Review all prior statements of the witnesses' testimony and prospective witnesses' prior relevant testimony;
(3) Anticipate those 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) Consider whether cross-examination of each individual witness will likely generate helpful information;
(6) Be alert to inconsistencies in a witness' testimony;
(7) Be alert to possible variations in witnesses' testimony;
(8) Where appropriate, review relevant statutes and local police policies and practices for possible use in cross-examining police witnesses;
(9) Be alert to issues relating to witness credibility, including bias and motive for testifying.

(e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including the prosecution's expert witnesses. Counsel should be aware of the applicable Virginia law concerning competency of witnesses in general and admission of expert testimony in particular to raise appropriate objections.

(f) If the Court sustains a prosecution objection, counsel should make an appropriate effort to rephrase the question and/or make an offer of proof.

(g) Unless there exists a good-faith basis for not doing so, counsel should make a motion to strike each count charged and be prepared to present supporting case law at the close of the prosecution's case-in-chief and out of the presence of the jury. If the motion is denied, if necessary, counsel should request that the court allow counsel sufficient time to consult with the client in order to make an informed decision as to whether to present a defense case.

(h) Unless there exists a good-faith basis for not doing so, counsel should renew the motion to strike the prosecution's case at the close of all the evidence.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.4;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.6;
Rules of the Virginia Supreme Court 3A:15;
Poole v. Commonwealth, 211 Va. 258 (1970).

Standard 7.5 Presenting the Defense Case

(a) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify or to present evidence on the client's behalf.

(b) Counsel should be aware of the elements of any affirmative defense as well as any mandatory time frame for disclosure.

(c) Counsel should determine which party bears the burden of production and the burden of persuasion.

(d) Counsel should guard against improper cross-examination by the prosecution.

(e) In preparing for presentation of a defense case, counsel should, where appropriate, consider:
(1) A plan for direct examination of each potential defense witness;

(2) How the order of witnesses may affect the defense case;
(3) Possible use of character witnesses;
(4) The need for and availability of expert witnesses;
(5) Using demonstrative evidence;
(6) The order of exhibit presentation, and if appropriate, with leave of court prior to trial, label each exhibit.

(f) In developing and presenting the defense case, counsel should consider the implications it may have for the prosecutor's rebuttal.

(g) Counsel should prepare all witnesses for direct and possible cross-examination.

(h) Counsel should advise witnesses of suitable courtroom dress and demeanor.

(i) Counsel should conduct redirect examination, as appropriate.

(j) Unless there exists a good-faith reason for not doing so, counsel should renew the motion to strike on each count charged at the close of the defense case.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.5;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.7;
Rules of the Virginia Supreme Court 3A:15.

Standard 7.6 Closing Argument

(a) Counsel should be familiar with the permissible scope of both prosecution and defense summation.

(b) Counsel should be familiar with the local practices and the individual judge's preferences concerning time limits for closing argument, as well as provisions for rebuttal argument by the prosecution.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
(1) Highlighting weaknesses in the prosecution's case;
(2) Describing favorable inferences to be drawn from the evidence;
(3) Incorporating:
(A) Helpful testimony from direct and cross-examinations;
(B) Verbatim instructions drawn from the jury charge;
(C) Responses to anticipated prosecution arguments;
(4) The potential effects of the defense argument on the prosecutor's rebuttal argument and the defense's sentencing case.

(d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
(1) Whether counsel believes that the trial will result in a favorable verdict for the client;
(2) The potential need to preserve the issue for a double jeopardy motion;
(3) The possibility that an objection might enhance the significance of the information in the jury's mind.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.6;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.8;
Virginia Code § 19.2-268;
Frye v. Commonwealth, 231 Va. 370 (1986).

Standard 7.7 Jury Instructions

(a) Counsel should be familiar with the local practices and the individual judges' preferences concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.

(b) Counsel should, when appropriate, submit written modifications of the standard jury instructions in light of the particular circumstances of the case, including instructions supporting a verdict on a lesser-included offense. As necessary, counsel should provide authority in support of the proposed instructions.

(c) Counsel should object to and argue against improper instructions outside the presence of the jury and before the court instructs the jury.

(d) 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, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.

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

(f) 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 instruction to counsel before delivering instruction to the jury.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 7.7;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 6.9;
Rules of the Virginia Supreme Court 5:10 and 5A:7;
Barrett v. Commonwealth, 231 Va. 102 (1986);
O'Bannon v. Commonwealth, 33 Va. App. 47 (2001).

Standard 7.8 Sentencing Stage of Jury Trial

(a) Counsel should be aware of the limitations on the admissibility of evidence in the sentencing stage of a jury trial and should, when appropriate, object to the Commonwealth's introduction of evidence relating to any prior conviction of client in the event that (1) the prosecution has not complied with the notice requirements of Virginia Code § 19.2-295.1 or (2) the document evidencing the conviction is otherwise inadmissible.

(b) Counsel should appropriately investigate and discuss with client whether to call any mitigation witnesses in the sentencing stage in light of the availability of helpful

evidence and the possibility that any such evidence might open the door for the prosecution to present potentially harmful evidence in rebuttal.

(c) Counsel should interview and appropriately prepare all such witnesses before calling them to testify.

(d) In felony cases, counsel should prepare and present to the Court an appropriate instruction concerning the abolition of parole.

Standard 7.9 Post Verdict Motions

(a) Upon a finding of guilt, counsel should consider requesting the court to poll the jury to ensure a unanimous verdict.

(b) Upon a finding of guilt in cases where a pre-sentence report is not mandatory, counsel should consider the advisability of requesting a report in light of the circumstances of the case.

(c) If the jury returns a verdict of guilty, counsel should consider timely filing a written motion with supporting authority to set aside the verdict for error committed during the trial.

RELATED STANDARDS

Representation of Indigents in Criminal Cases 6.9;
Rules of the Virginia Supreme Court 3A:17(d);
Humbert v. Commonwealth, 29 Va. App. 783 (1999).

Standard 8.1 Obligations of Counsel in Final Sentencing Hearings

Among counsel's obligations in the sentencing process are:

(a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the pre-sentence report.

(b) To present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.

(c) To develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

Comment:

Aside from the welcome resolution of a case by outright dismissal or acquittal, no single point in a criminal case is more consequential than sentencing. Representation of a client at sentencing is not a separate aspect of the criminal case, but should be a final step in a case-long plan.

Sentencing must be considered early in the case if it is to be handled properly. Counsel and client must overcome their reluctance to consider sentencing strategy early in the case. Counsel or client may base such reluctance on an emotional or superstitious fear that thinking about sentencing is an acceptance of or invitation to conviction. Or, counsel and client may base their reluctance on a perceived need to concentrate scarce

time and resources on the most immediately demanding aspects of the case. Whatever the reason, client and counsel must overcome their reluctance to plan for the contingency of conviction and, therefore, sentencing.

Evidentiary rules are generally much more relaxed at sentencing than at trial. This does not mean, however, that counsel may present to or ask the sentencer to consider all types of information. Counsel must be diligent to prevent the introduction of improper and harmful evidence against the client at sentencing.

Counsel should also carefully examine all information offered by the prosecution at sentencing. Furthermore, counsel must carefully review the pre-sentence report and be aware that the probation officer or other preparer of the report is a potential adversary at sentencing.

Without defense input, only information unfavorable to the client may appear in the pre-sentence report, and the client's sentence may be accordingly harsh. Therefore, defense counsel must advise the client about the pre-sentence process and the information the client will be asked to provide. Counsel must also develop mitigating and favorable information and present it to the court, either directly in an evidentiary hearing or through the pre-sentence report.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 8.1;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 7.1.

Standard 8.2 Sentencing Options, Consequences, and Procedures

(a) Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
(1) Mandatory minimum and statutory maximum sentences;
(2) The Sentencing Guidelines
(3) Possible alternatives to incarceration;
(4) Probation or suspension of sentence and permissible conditions of probation;
(5) Deferred findings of guilt, deferred dispositions, and diversionary programs;
(6) Restitution, fines, and court costs;
(7) Confinement in a mental health institution;
(8) Forfeiture of assets.

(b) Counsel should be familiar with the consequences of the sentence and judgment, including:
(1) Credit for pre-trial detention;
(2) Parole eligibility in applicable cases;
(3) The potential impact of sentence length on immigration status;
(4) Use of the conviction in subsequent probation revocation hearings;
(5) Use of the conviction for sentence enhancement in future proceedings;
(6) Loss of civil rights;
(7) Restrictions on or loss of license.

Comment:

Parole in non-capital felony cases for offenses committed on or after January 1, 1995 has been abolished by the Virginia General Assembly.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 8.2;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 7.1;
Virginia Code § 53.1-165.

Standard 8.3 Preparation for Sentencing

In preparing for sentencing, counsel shall:

(a) Inform the client of the applicable sentencing requirements, options, alternatives, and the discretionary nature of sentencing guidelines;

(b) Maintain contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(c) Obtain from the client relevant information concerning his/her 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 which can corroborate the client's information provided;

(d) Request any necessary and appropriate client evaluations, including those for mental health and substance abuse.

(e) Ensure the client has an opportunity to examine the pre-sentence report

(f) Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to deliver to the court.

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

(h) Inform the client of the sentence or range of sentences counsel will ask the court to consider;

(i) Where appropriate, collect affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence;

(j) Prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing.

(k) Counsel should advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution.

Comment:

Counsel should discuss with the client the effect that any perceived dishonesty, lack of remorse, or failure to accept responsibility may have on the sentencing decision in that case.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 8.3;

New Mexico Public Defender Department Performance Guidelines for Criminal Defense Representation 8.1;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 7.4;
Virginia Code § 19.2-300 and 301;
Burns v. Commonwealth, 261 Va. 307 (301).

Standard 8.4 The Official Presentence Report

(a) Counsel should prepare the client for the interview with the official preparing the presentence report.

(b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:

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

(2) Provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(3) Review the completed report prior to sentencing;

(4) Take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

(5) Take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading.

(6) Make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

Comment:

(a) When a presentence report is not statutorily mandated, counsel should consider the strategic implications of requesting a report.

(b) As of July 1, 2006, counsel has the option of requesting a full or abbreviated report for certain felony offenses.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 8.7;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 7.7, 7.8, 7.13;
Virginia Code § 19.2-11.01 and 19.2-298 et seq.

Standard 8.5 The Sentencing Process

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

(b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.

(c) Where appropriate, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.

Comment:
Counsel should promptly obtain a copy of the sentencing order from the Court to confirm that the order actually reflects the sentence imposed.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 8.7;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 7.7, 7.8, 7.13;
Virginia Code § 19.2-298.

Standard 9.1 Post Trial Motions

Counsel should consider filing such post trial motions as appropriate, including, but not limited to: Motion to Set Aside the Verdict, Motion for a New Trial, Motion to Vacate Sentence and Motion to Reconsider Sentence. Counsel should be familiar with the procedures governing post-trial motions including the time period for filing any such motion, the effect it has upon the time to file the notice of appeal, and the grounds counsel may raise. In deciding whether to file a post trial motion, the factors that counsel should consider, include:

(a) The likelihood of success of the motion;
(b) The effect that such a motion might have upon the client's appellate rights, including whether the filing of such a motion is necessary or will assist in preserving the issues that might be raised in the motion.

Comment:

Counsel is not obligated to file post-trial motions in every case, but must analyze every case and determine the likelihood of success in determining whether such motion would be proper.

Counsel should be aware that the trial court loses jurisdiction to set aside a guilty verdict after 21 days (see Virginia Code Section 19.2-296 and Rules of the Supreme Court of Virginia 3A:15). The trial court loses jurisdiction to modify sentence after the client is moved to DOC custody (see Code Section 19.2-303). Counsel should consider the advisability of seeking an order to vacate sentence to preserve the court's continuing jurisdiction. An order to vacate must be entered within 21 days. See Rule 1:1.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 9.1;
ABA Standards, The Defense Function (3d ed.), Standard 4-7.9;
Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases 11.9.1;
Rules of the Virginia Supreme Court 3A:15;
Rules of the Virginia Supreme Court 1:1;
Virginia Code § 19.2-296 and 19.2 –303.

Standard 9.2 Right to Appeal

Counsel shall inform the client of his or her right to appeal the judgment of the court, unless such right has been knowingly, intelligently, and voluntarily waived, and the action that must be taken to perfect an appeal. If the client advises counsel that he or she

wishes to note an appeal, counsel shall take all necessary steps to perfect such appeal in a timely fashion pursuant to the Rules of the Supreme Court of Virginia. If trial counsel is relieved in favor of other appellate counsel, trial counsel shall cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Comment:

Technical rules are complex and counsel must pay attention to all deadlines and must meet such deadlines including the ordering and filing of trial transcripts (see Rule 5A:18).

Trial counsel should explore the opportunity of bail during the perfection of appeal. Counsel should only file for such motion after considering the likelihood of success. Counsel is not required to file for an appeal bond in every case.

RELATED STANDARDS

NLADA Performance Guidelines for Criminal Defense Representation 9.2;
ABA Standards, The Defense Function (3d ed.), Standard 4-8.2;
Rules of the Virginia Supreme Court 5.1 through 5.42 and 5A:1 through 5A:36.

Standard 9.3 Collateral Post Conviction Proceedings

Certain post conviction collateral proceedings, including habeas corpus, civil commitment of violent sexual predators, and writs of actual innocence, are civil in nature and not included in these Standards of Practice.

RELATED STANDARD

Virginia Code § 8.01-654

Standards for Appellate Criminal Defense Representation

Standard 10.1.1 Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous, competent representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical standards and act in accordance with the rules of the court. Counsel should be familiar with and explain to the client which matters are appealable.

Standard 10.1.2 Education, Training and Experience

(a) To provide competent appellate representation, counsel must be familiar with the substantive criminal law and the rules of criminal and appellate procedure. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the distinct practices of each of the appellate courts.

(b) When handling a criminal appeal, counsel should have sufficient experience, training and/or supervision to provide competent representation.

COMMENT: The Virginia Indigent Defense Commission should afford sufficient training to enable lawyers to provide competent representation on appeal.

Standard 10.1.3 General Duties of Appellate Defense Counsel

(a) When agreeing to act as counsel or accepting appointment, counsel represents that counsel has sufficient time, resources, knowledge and experience to offer competent representation to a defendant in a particular matter. If counsel believes that counsel is unable to provide competent representation in a particular case, counsel shall decline the representation or seek to withdraw.

(b) Counsel has a continuing duty to keep the client informed of the progress of the case.

COMMENT: Counsel who is unable to provide competent representation because of workload or inexperience or lack of training should decline appointment by the court.

Standard 10.1.4 Conflicts of Interest

If counsel becomes aware of a conflict of interest, counsel shall immediately inform the client. If the conflict cannot be resolved, counsel shall move to withdraw and cooperate with new counsel who is prosecuting the appeal.

COMMENT: Counsel who is unable to provide competent representation because of workload or inexperience or lack of training should decline appointment by the court.

RELATED STANDARDS:

New Mexico Public Defender Department: *Performance Guidelines for Appellate Criminal Defense Representation*, Standards 1.1 – 1.4.

ABA Standards: the Defense Function Standards 4.8.2 and 4.8.3.

Standard 10.2.1 Scope of Appellate Representation

(a) Appellate counsel shall ensure that a client understands the merits, strategy, and possible implications of the proposed appeal. These considerations should include the costs of an appeal that may accrue to the client, what implications a reversal or remand might have on any suspended sentence or probation, plea agreement, or possible re-trial and re-sentencing.

(b) When the client requests review of a trial court's decision denying an appeal bond or setting an excessive appeal bond, and the trial court record is adequate for appellate review, appellate counsel shall prepare and submit a motion for review in the Court of Appeals.[1]

(c) Counsel should ascertain that the record received in the Court of Appeals is complete and that it contains all documents or materials from the trial court necessary to litigate the appeal.

(d) Where instructed by the client to do so, counsel must appeal a criminal conviction or revocation of a suspended sentence to the Court of Appeals of Virginia and to the Supreme Court of Virginia. If a client has not explicitly elected to appeal to the Supreme Court of Virginia after losing an appeal in the Court of Appeals of Virginia, and counsel has not learned that the client desires to abandon his appeal, counsel should continue to prosecute the client's appeal in the Supreme Court of Virginia. Counsel should conscientiously consider whether to (i) seek in the Court of Appeals, three judge panel review of a petition's denial by a single judge; (ii) present oral argument before the judges or Justices of the Court; (iii) in the Court of Appeals, file a petition for rehearing

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[1] **COMMENT:** Counsel should verify that filings necessary to perfect the appeal, including the transcripts or written statement of facts and the notice of appeal, have been made. If the necessary filings have not been made, appellate counsel should, where possible, take the steps necessary to perfect the appeal.

en banc when a client loses an appeal before a panel of judges and one judge dissented and (iv) file a reply brief. [2]

(e) When a court appoints counsel to represent a client on appeal, unless otherwise stated by the appointing court, that appointment is to represent the client in the Court of Appeals of Virginia and in the Supreme Court of Virginia. Counsel may, but need not, represent the client in the Supreme Court of the United States after consultation with the client. If counsel desires to represent a client after the conclusion of proceedings in the Supreme Court of Virginia, counsel should seek appropriate entry of orders confirming the client's status as a pauper or indigent, and should confirm that counsel continues to enjoy appropriate professional liability insurance or indemnity for the continued representation.

Standard 10.2.2 Timing of Representation After Sentencing and Before Commencement of Appeal

(a) Appellate counsel shall cooperate with trial courts, appellate courts, and trial counsel to ensure that the client is not without legal representation between trial and appeal.

(b) Appellate counsel shall cooperate with the courts *and* court reporters to ensure the prompt completion of the appropriate record on appeal.

Standard 10.2.3 Client Contact

(a) Appellate counsel shall communicate with the client, unless the client cannot be found through reasonable measures.

(b) Appellate counsel shall inform the client of the status of the case at each step in the appellate process and shall provide general information to every client regarding the process and procedures which will be taken in the matter, and the anticipated time frame for such processing. Substantive oral communications between client and counsel should be confirmed in writing.

(c) Appellate counsel shall provide the client with a copy of each substantive document filed or entered in the case by the court and any party.

(d) Appellate counsel shall respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval.

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[2] **COMMENT**: While a guilty plea waives most appellate issues, counsel is nevertheless obligated to appeal from a guilty plea if the client so instructs. Miles v. Sheriff of Va. Beach City Jail, 266 Va. 110, 581 S.E.2d 191 (2003). Limited issues that can be raised following a guilty plea include a sentence that exceeds the statutory maximum or lack of subject matter jurisdiction. If there are no appealable issues, counsel may file an *Anders* petition.

(e) Upon disposition of the case by the court, appellate counsel shall promptly and accurately inform the client of the disposition. Where the appeal was dismissed based on a failure to follow the rules of appellate procedure, counsel shall inform the client of this fact.[3]

(f) Appellate counsel shall take reasonable steps to protect the attorney-client privilege in all correspondence to and from an incarcerated individual.[4]

Standard 10.2.4 Contact with Trial Counsel

Appellate counsel should consult trial counsel to assist appellate counsel in understanding and presenting the client's issues on appeal.

Standard 10.2.5 Research resources

Counsel should not undertake representation of a client on appeal unless counsel has adequate access to the resources necessary to effectively prosecute the appeal. Those resources include, but are not limited to, legal research tools and the ability to file appendices and briefs.

RELATED STANDARDS:

New Mexico Public Defender Department: *Performance Guidelines for Appellate Criminal Defense Representation*, Standards 2.1 – 2.7.

ABA Standards: The Defense Function Standards 4.8.3 and 4.8.4.

Rules of the Supreme Court of Virginia, Rule 5 and Rule 5:A.

Virginia Code § 19.2-163.3. (Duty of Public Defenders to prosecute appeal in the Court of Appeals and Virginia Supreme Court) Miles v. Sheriff, 266 Va. 110, 581 S.E.2d 191 (2003) (Counsel must appeal when instructed by the client to do so).

Standard 10.3.1 Petition and brief preparation

(a) Petitions and briefs shall conform to Part 5 or 5A of the Rules of the Supreme Court of Virginia, as applicable.

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[3] **COMMENT**: Appellate counsel shall not be required to advise a client regarding collateral remedies available to a client including requests for a new trial, claims of actual innocence, or state or federal rights to habeas corpus, or other rights or claims that may accrue to the client following the direct appeal of the client's convictions or sentences to the Supreme Court of Virginia.

[4] **COMMENT**: Correspondence from counsel to an incarcerated client should bear the inscription, in plain and conspicuous lettering, on the envelope and on the correspondence, "LEGAL MAIL - CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED" or comparable language.

(b) Petitions and briefs should (i) have a well organized professional appearance, (ii) conform to acceptable rules of grammar, and (iii) be free of typographical errors and misspellings. *See* Rules 5:6 and 5A:4 of the Rules of the Supreme Court of Virginia.

(c) In the Supreme Court of Virginia, petitions for appeal shall contain, "[u]nder a heading entitled 'Assignments of Error,' the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely. An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error." Rule 5:17(c)(1). "When appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to assignments of error presented in, and to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court." Rule 5:17(c)(1)(ii). In addition, petitions for appeal shall contain, "[a] clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the record, transcript or written statement of facts." Rule 5:17(c)(5).

(d) In the Supreme Court of Virginia, opening briefs of appellant shall contain, "[t]he assignments of error, with a clear and exact reference to the pages of the appendix where the alleged error has been preserved." Rule 5:27(c). In addition, it shall contain a statement of "the facts, with references to the appendix." Rule 5:27(b).

(e) In the Court of Appeals of Virginia, petitions for appeal shall contain, "[u]nder a heading entitled 'Assignments of Error,' the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely. An exact reference to the pages of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error." Rule 5A:12(c)(1). In addition, petitions for appeal shall contain, "[a] clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the record, transcript, or written statement of facts." Rule 5A:12(c)(4).

(f) In the Court of Appeals of Virginia, opening briefs of appellant shall contain, "[a] statement of the assignments of error with a clear and exact reference to the page(s) of the transcript, written statement, record, or appendix where each assignment of error was preserved in the trial court." Rule 5A:20(c). In addition, it shall contain, "[a] clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the transcript, written statement, record, or appendix." Rule 5A:20(d).

(g) Petitions and briefs shall advance argument in support of each contention, and shall cite legal authority in support of each contention. Petitions and briefs shall cite and discuss relevant Virginia authority. Where no relevant Virginia authority exists, petitions and briefs shall so state and shall include relevant authority from other jurisdictions. Petitions and briefs shall not contain string citations listing numerous authorities in support of one general or vague proposition.

Standard 10.3.2 Oral argument

(a) To prepare for oral argument, counsel should review the record and the briefs of the parties, and should update legal research. No argument should be read.

(b) Appellate counsel should be prepared to answer questions propounded by the court. In particular, counsel should be prepared to address (i) whether, and where, the assignment(s) of error were preserved in the record, and (ii) the applicable standards of review.

COMMENT: When reviewing and updating legal research in preparation for oral argument, if dispositive or contrary authority has been published since the filing of the brief, counsel shall disclose this information to the court.

Standard 10.3.3 Presentation of Appellate Issues; Frivolous Issues

(a) Appellate counsel shall identify all issues that counsel believes, in good faith, may have merit for appeal and shall litigate those issues which, in counsel's judgment, are the most promising. When counsel reasonably believes that no potentially meritorious issues exist in a case, he shall so advise the client, and shall inform the client of the costs associated with proceeding with the appeal. Counsel should advise the client that it may be in the client's best interests to withdraw the appeal. If the client nevertheless desires to proceed with the appeal, or fails to respond, counsel shall proceed to litigate the case to the best of his or her ability under the circumstances.

(b) In the alternative, when counsel determines there are no meritorious issues to support an appeal, counsel may elect to advise the court of that fact and request permission to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). Any motion to withdraw, however, must be accompanied by a petition presenting anything in the record that might arguably support the appeal, and by a motion for extension of time to allow the client to respond. The motions and petition should be promptly provided to the indigent client.

(c) Appellate counsel shall appeal every conviction the client wishes to appeal and should give genuine consideration to any issues that the client wishes to raise on appeal; however, what claims to raise on appeal, and how to raise them, are generally matters entrusted to the discretion of appellate counsel.

COMMENT: See Rule 3.1 of the Virginia Rules of Professional Conduct. ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.") See also, Jackson v. Commonwealth, 267 Va. 178, 590 S.E.2d 520 (2004) ("The process of 'winnowing out weaker claims on

appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective . . . advocacy." Burger v. Kemp, 483 U.S. 776, 784, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987); see also Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) (what claims to raise on appeal, and how to raise them, are matters entrusted to the discretion of appellate counsel)).

Standard 10.3.4 Continuing Responsibility to Raise Issue of Client's Incompetence

Appellate counsel should consider the client's competence to make critical appellate decisions whenever counsel has a good faith doubt as to the client's competence to proceed. Counsel may move for an evaluation over the client's objection, and if necessary, counsel may make known to the court those facts that raise the good faith doubt of competence to proceed on appeal.

RELATED STANDARDS:

New Mexico Public Defender Department: *Performance Guidelines for Appellate Criminal Defense Representation*, Standards 3.1 and 3.2.

ABA Standards: The Defense Function Standards 4.8.3 and 4.8.4.

Rules of the Supreme Court of Virginia, Rule 5 and Rule 5:A.

STANDARDS OF PRACTICE FOR JUVENILE DEFENSE COUNSEL

Practice in juvenile cases is unique and challenging, requiring specialized skills and knowledge to assure the best legal representation of clients. Juvenile and domestic relations district courts have jurisdiction over persons less than 18 years of age who are charged with delinquent acts, are alleged to be children in need of supervision or services or are charged with a status offense. However, if a child age 14 or older is charged with some statutorily designated serious offenses, his or her case will or may be prosecuted in the circuit rather than the juvenile and domestic relations district court.

The purpose of these standards is to provide juvenile defense attorneys with a general guide to appropriate and zealous advocacy on behalf of clients in juvenile court delinquency or child in need of supervision, child in need of services or status offender proceedings, and in pursuing the appeal of such cases on a *de novo* basis in circuit court. These standards also apply to the representation of a child who is being tried in the circuit court as an adult after certification or transfer, especially with respect to possible dispositional advocacy since the client may still be treated as a child.

The general defense standards of practice apply to the representation of adults in juvenile and domestic relations district court and to the representation of child clients to the extent that they are not in conflict with these standards, Virginia law and Part 8 of the Rules of the Supreme Court of Virginia.

Performance Standard 1: Obligations of Juvenile Defense Counsel

The primary and most fundamental obligation of a juvenile defense counsel (hereinafter "counsel") is to provide zealous and effective representation for the client at all stages of the juvenile court proceedings. Counsel's duty and responsibility is to promote and protect the child's expressed wishes. If personal beliefs or attitudes make it impossible for the defense counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the client. Attorneys also have an obligation to abide by the Virginia Rules of Professional Conduct and to act in accordance with Part 8 of the Rules of the Supreme Court of Virginia.

Counsel shall maintain regular contact with the client during the course of the case, and especially before court hearings. Counsel should promptly respond to telephone calls and other contacts from the client, where possible, within one business day or as soon thereafter as practicable. Counsel has a continuing duty to keep the client informed of developments in the case and the progress of preparing the defense, and should promptly comply with reasonable requests for information from the client.

Performance Standard 2: Training and Experience of Juvenile Defense Counsel

Counsel should not handle juvenile cases without the adequate experience and knowledge necessary to represent the client zealously and competently.

2.1 Before practicing in juvenile court, counsel should be proficient in applicable substantive and procedural juvenile and criminal law, should have appropriate experience, skills and training necessary to represent children, and should be certified by the Virginia Indigent Defense Commission (VaIDC).

a. Counsel should observe juvenile court proceedings, including every stage of a delinquency, child in need of supervision, child in need of services or status offense case and some observation of abuse and neglect and other proceedings. Counsel should obtain formal and informal training in relevant areas of practice, including the training provided by the VaIDC.

b. Unless counsel has the requisite prior relevant experience in juvenile cases, counsel must complete the initial certification training for court appointed counsel in accordance with Virginia Code § 19.2-163.03, subject to the following statutory exceptions:

i. If counsel has been a member of the Virginia State Bar for more than a year and certifies that he or she has served as lead or co-counsel in four (4) cases involving juveniles within the past year, the requirement to complete ten (10) hours of continuing legal education (CLE) shall be waived.

ii. If counsel has been a member in good standing of the Virginia State Bar for more than one year and certifies that in the past five (5) years he or she has participated in five (5) cases involving juveniles, the requirement to serve as lead counsel or co-counsel in four (4) cases shall be waived.

c. Counsel should also work with a mentor before taking a juvenile case or have a mentor available to consult on a case.

2.2 Counsel should be knowledgeable about and seek ongoing training in at least the following areas:

a. child and adolescent development;

b. brain development and the affect of trauma on brain development;

c. cultural diversity;

d. substance abuse issues;

e. mental health issues and common childhood diagnoses, and the use of psychotropic medications;

f. competency and immaturity laws, issues and defenses;

g. interviewing and communication techniques for children;

h. working with children and building rapport with the child or adolescent client;

i. familiarity with the terminology used in juvenile court;

j. the juvenile justice system;

k. pretrial advocacy;

l. pre-dispositional and dispositional services and programs available through the court and probation;

m. dispositional and post-dispositional advocacy;

n. the consequences of involvement with the juvenile justice system, including receipt of public benefits and housing, and other collateral consequences;

o. the sealing and expungement of delinquency records;

p. pathways to delinquency;

q. the child welfare system;

r. Department of Juvenile Justice (DJJ) policies and procedures;

s. Department of Social Services (DSS) policies and procedures affecting children;

t. special education laws, rights and remedies;

u. facilities available to serve children: on-site visits may be appropriate;

v. the Comprehensive Services Act for At-Risk Youth and Families (CSA);

w. immigration laws and how they can affect a child involved with the juvenile court;

x. school-related issues, including school disciplinary procedures and zero tolerance policies;

y. gangs;

z. the issues of lesbian, gay, bisexual, and transgender youth in the juvenile justice system.

2.3 Counsel should note that local juvenile court practices may differ.

2.4 Counsel has a continuing obligation to stay abreast of changes and developments in the law.

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

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

2.7 If a conflict develops during the course of representation, counsel has a duty to notify the client and the court in accordance with the Rules of Court and in accordance with the Virginia Rules of Professional Conduct.

2.8 When counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, court-appointed counsel shall inform the court or courts before whom counsel's cases are pending. If counsel is employed by a Public Defender Office, then counsel shall then first inform the Public Defender. If, after consulting with the Public Defender, counsel still believes that he or she cannot ethically represent the client because of the caseload, counsel shall advise the Director of the VaIDC before informing the court or courts before whom the cases are pending.

RELATED STANDARDS

Virginia Code § 19.2-163.03

Performance Standard 3: The Role of Juvenile Defense Counsel

After counseling the child, if the child's expressed wishes do not accord with counsel's considered judgment, then counsel may either withdraw or advocate for the child's stated wishes.

3.1 Counsel's client is the child. Counsel's principal duty is to zealously advocate for the client's expressed wishes rather than for counsel's opinion as to what is in the client's best interests.

a. Counsel is bound by and should advocate for the client's definition of the client's interests, and may not substitute counsel's own judgment for the client's, nor should counsel ignore the client's wishes because they are perceived not to be in the client's best interests.

b. Counsel should advise the client as to the probable success, and the consequences of adopting, any position, and should give the client all information necessary for the client to make an informed decision.

3.2 Counsel should remember that, even though the client is a child, all attorney-client privileges and obligations attach.

3.3 If a client is incapable of considered judgment on his or her own behalf, counsel should seek the appointment of a guardian ad litem (GAL) to be appointed to represent the client's best interests.

3.4 Counsel should remember that the child is the client, not the parent (hereinafter "parent" refers to any parent, guardian, or legal custodian, or any entity assuming legal responsibility for the child). The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. Counsel should inform the parent that he or she is counsel for the child, and that in the event of a disagreement between a parent and the child, counsel is required to serve exclusively the wishes of the child.

3.5 In order to effectively advocate for the client and to provide suggestions for appropriate dispositional options, counsel should take a holistic approach to juvenile defense, evaluating all factors which may have contributed to the existing charges and behaviors.

RELATED STANDARDS

Virginia Code § 16.1-166;
Virginia Code § 16.1-268.

Performance Standard 4: Juvenile Defense Counsel's Duty at Appointment

4.1 Counsel has an obligation to meet with detained clients as promptly as possible, and at least prior to the detention hearing. Counsel should regularly meet with clients, especially detained clients, on a face-to-face basis and keep them informed of the progress of the case.

4.2 Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. Counsel should immediately inform the child of his or her rights and the nature of the attorney-client relationship, and should pursue any investigatory or procedural steps necessary to protect the clients' interests. Counsel should invoke the protections of appropriate federal and state constitutional provisions, federal and state laws, statutory provisions, and court rules on behalf of a client, and revoke any waivers of these protections purportedly given by the client, as soon as practicable.

4.3 Whenever the nature and circumstances of the case permit, counsel should explore the possibility of proceeding informally, such as through a diversion program.

4.4 Counsel should ascertain the parent's willingness to take custody of the client upon release (in situations where the child has been detained) and obtain useful social information from the parent, such as: the client's home behavior, school performance and behavior, involvement with special education services, past or present part-time employment, prior delinquency record, whether the client is on probation or pending trial in another case, and other information concerning the child's ability to stay out of trouble if released, and the parent or some other adult's ability to control and discipline the child. Counsel should utilize this information to request and secure release of the client.

4.5 Counsel should also fully and candidly explain the nature, obligations, and consequences of any proposed pre-trial release conditions, including the characteristics of any facility at which pre-trial detention is possible if release is revoked, and the probable duration of the client's responsibilities under the proposed pre-trial release plan.

4.6 The juvenile and domestic relations district court law expressly equates a juvenile's right to bail with that possessed by an adult under Virginia law.

4.7 If the court requires the posting of a bond, counsel should discuss with the client and his or her parent(s) the procedures that must be followed.

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

Performance Standard 5: Counsel's Initial Interview with Client

The initial interview is the first and most crucial opportunity to build rapport with the child client. It is important to initiate face-to-face contact with the client as soon as possible after appointment or retention. This interview, and any subsequent conversations with the client, should be conducted at an age appropriate level. Although it may be a good practice to initially meet with the child and the parents together, any interview with the client regarding the offense should be out of the presence of the parents.

5.1 In preparation for the interview, counsel should:

a. schedule the interview to allow for ample time to speak with the client;

b. collect any relevant information to bring, including all records and releases;

c. be familiar with the elements of the offense(s) and the potential disposition.

5.2 At the interview, counsel should:

a. explain to both the client and parent the role of defense counsel. It is important to clarify that counsel represents the legal interests of the child, not the parent. Thoroughly explain the confidential nature of attorney-client conversations and the necessity of conducting interviews with the client alone;

b. explain the charges, the elements of the underlying offenses, and possible dispositions;

c. explain the juvenile court process, timelines and the role of all those possible individuals involved, such as judge, prosecutor, probation staff, counsel, GALs, client and parent;

d. inform the client and parent not to make statements to anyone concerning the delinquent offense without first consulting with counsel;

e. obtain signed releases by the client and parent for medical and mental health records, school records, court service unit records, Department of Juvenile Justice records, department of social services records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information;

f. counsel should obtain information from the client, out of the presence of the parents, concerning the facts of the arrest and charges, and whether there were any statements made, witnesses, co-defendants, and any other relevant information;

g. if the client is detained, one focus of the initial interview and investigation will be to obtain information relevant to the determination of pre-adjudication conditions of release. Such information should generally include:

i. client's residence and length of time at that residence;

ii. client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client): names, addresses and phone numbers;

iii. health (mental and physical), including any medications currently being taken, and employment background;

iv. client's school placement, status, disciplinary record, attendance and special education designation;

v. whether the client or his or her family has had previous contact with the juvenile justice system, and the nature and status of that contact;

vi. possible adults willing to assume responsibility for the child.

h. explain the different types of pleas that can be made, and the possible collateral consequences of each.

RELATED STANDARDS

Virginia Code § 16.1-250;
Virginia Code § 16.1-260;
Virginia Code § 16.1-266;
Virginia Code § 16.1-266(b);
Virginia Code § 16.1-268.

Performance Standard 6: Juvenile Defense Counsel's Duty: Competency

6.1 Counsel should be familiar with the procedures for a determination of competency under Virginia Code §§ 16.1-356 through 16.1-361.

6.2 If at any time the client's behavior or mental ability indicates that he or she may not be competent, or may be mentally retarded, counsel should make a motion for a competency evaluation.

6.3 Counsel should prepare for and participate fully in the competency hearing.

6.4 Counsel should be aware that the burden of proof is on the child to establish incompetence and that the standard of proof is a preponderance of the evidence.

6.5 If the client is found incompetent, counsel should participate, to the extent possible, in the development of the restoration plan and in any subsequent meetings or hearings regarding the child's mental competency. Counsel should monitor what is occurring during any restoration process.

RELATED STANDARDS

Virginia Code § 16.1-356 through § 16.1-361

Performance Standard 7: Juvenile Defense Counsel's Duty at Detention/Arraignment Hearing

Counsel should be aware that juvenile clients generally have the same constitutional rights as adult defendants.

7.1 Preparation for the hearing:

a. Counsel should be familiar with the elements of each offense alleged.

b. Counsel should prepare the client and parent, where appropriate, for the hearing.

c. Counsel should consult with the petitioning authority (petitioning authority includes, but is not limited to, prosecutors, probation officers, and police officers) concerning the facts of the case and the possibility of resolution of the case at this stage.

d. Counsel should review the Juvenile Detention Assessment Instrument and be prepared to make arguments against secure detention.

e. Counsel should know the detention facilities, community placements and other services available in the jurisdiction.

7.2 During the detention hearing;

a. Counsel should be familiar with the subpoena process for obtaining the compulsory attendance of witnesses at the detention hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings;

b. Counsel should elicit as much information as possible at the hearing with regard to the facts and circumstances of the case;

c. Before a client is detained, counsel should insist that probable cause be found and that the criteria for detention or shelter care are proven;

d. If probable cause is found, counsel should argue for the least restrictive placement for the client pending arraignment and adjudication.

RELATED STANDARDS

Virginia Code § 8.01-407
Virginia Code § 16.1-248.1
Virginia Code § 16.1-250;
Virginia Code § 16.1-265.

Performance Standard 8: Juvenile Defense Counsel's Duty to Conduct an Investigation

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

8.2 When conducting the investigation, counsel should:

a. Obtain the arrest warrant, petition, and copies of all charging documents in the case to determine the specific charges that have been brought against the child.

b. Research relevant statutes and case law to identify:

i. the elements of the offense(s) with which the child is charged;

ii. the defenses that may be available;

iii. any lesser included offenses that may be available; and

iv. any defects in the charging documents, constitutional or otherwise, such as statutes of limitations or double jeopardy.

c. If not done previously, conduct an in-depth interview of the client as described in Performance Standard 5.

d. Attempt to interview all witnesses, favorable or adverse, try to obtain signed witness statements where appropriate, and obtain any criminal or juvenile history records of the witnesses.

e. Examine any available police reports, documents, statements, and identification procedures obtained through discovery or any other means.

f. Counsel should ascertain whether any physical evidence exists and should make a prompt request to examine such evidence.

g. Counsel should attempt to view and photograph the scene of the alleged offense. If practicable, 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, and lighting conditions).

h. Counsel should ascertain whether the assistance of an expert is needed in preparation of the defense case or to understand or rebut the prosecution's case and take all steps necessary to acquire such an expert.

i. Counsel should, where appropriate, obtain those records of the client and/or any witnesses as described in Standard 5.2.

Performance Standard 9: Juvenile Defense Counsel's Duty to Conduct Discovery

Formal discovery in juvenile court is governed by Rule 8:15. Counsel should consider filing a formal request for discovery, taking into account that such requests may trigger reciprocal discovery obligations.

9.1 Counsel must pursue discovery procedures provided by the Constitution of the United States, the Code of Virginia, the Rules of the Supreme Court of Virginia and any local practices of the court, and pursue such available informal discovery methods as soon as practicable unless there is a sound tactical reason for not doing so. In considering discovery requests, counsel should consider that such requests may ~~will~~ trigger reciprocal discovery obligations.

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

a. potential exculpatory information;

b. potential mitigating information;

c. all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;

d. the prior juvenile record of the client and any evidence of other misconduct that the Commonwealth may intend to use against the client;

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

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

g. statements of co-defendants;

i. all audio and video recordings relevant to the case, including 911 calls, radio runs, and videotaped statements;

j. all documents and other evidence of any identification procedures in the client's case.

RELATED STANDARDS

Rules of the Supreme Court of Virginia 3A:11;
Rules of the Supreme Court of Virginia 7C:5;
Rules of the Supreme Court of Virginia 8:15.

Performance Standard 10: Juvenile Defense Counsel's Duty in Plea Negotiations

After interviewing the client and developing a thorough knowledge of the law and facts of the case, counsel should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission.

10.1 Counsel is responsible for assuring that the juvenile and parent understand the concept of plea bargaining in general, as well as the details of any specific plea offer made to him or her.

10.2 Counsel should explain the probabilities of the plea agreement being accepted by the court and the client's options, if the plea agreement is not accepted by the court.

10.3 Counsel should make it clear to the client that the ultimate decision to enter a plea has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of an adjudication of delinquency. Counsel should also ascertain and advise the client of the court's practices concerning disposition recommendations and withdrawing pleas or admissions.

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

10.5 The client shall be kept informed of the status of the plea negotiations.

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

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

10.8 Counsel should make sure that the client is carefully prepared to participate in the procedures required and used in the particular court to determine the providence of a plea.

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

10.10 Counsel should inform the client of the potential collateral consequences that may result from a plea or adjudication of guilt or a deferred finding. Counsel must consider whether an admission will compromise the client's or the client's family's public assistance, public housing or immigration status, and counsel's advice to the client regarding any admissions should include the possible consequences above.

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

RELATED STANDARDS

Virginia Code § 16.1-35.1;
Virginia Code § 16.1-277.1.

Performance Standard 11: Preparation for Adjudicatory Hearing

11.1 Counsel should develop a theory of the case, and be prepared to deliver an opening statement and closing argument and to conduct the direct and cross-examination of any witness, where appropriate.

11.2 Pretrial Motions:

a. Counsel should review all statements, reports and other evidence to determine whether a motion is appropriate.

b. Counsel should file motions in a timely manner pursuant to the applicable provisions of the Code of Virginia, Rules of the Supreme Court of Virginia and local procedures and practices, keeping in mind the time constraints of juvenile court.

c. Counsel should be aware of the burdens of proof, evidentiary principles and court procedures applying to any motions hearing.

d. Counsel has the continuing duty to file pretrial motions as issues arise or new evidence is discovered.

11.3 Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the hearing process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the adjudicatory hearing.

11.4 Counsel should be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review.

11.5 Counsel should advise the client as to suitable courtroom dress and demeanor.

11.6 Counsel should meet with and prepare all defense witnesses.

11.7 Counsel should request the court to authorize the full, official recordation of juvenile court proceedings, when warranted, and especially transfer and

certification hearings and adjudicatory and dispositional hearings involving serious felony charges.

Performance Standard 12: Juvenile Defense Counsel's Duty at Adjudicatory Hearing

12.1 Counsel should ensure that:

a. all rights afforded by the United States Constitution and the Constitution of the Commonwealth of Virginia are protected;

b. the state bears its burden of proving the allegations beyond a reasonable doubt;

c. the rules of evidence apply to all juvenile court proceedings;

d. the rules of criminal procedure apply to all juvenile court proceedings, except as modified by Part 8 of the Rules of the Supreme Court of Virginia.

12.2 Counsel should be aware that except for certain circumstances, juveniles have a right to a public hearing unless expressly waived.

12.3 Counsel should be aware that a parent must be given notice of the adjudicatory hearing. This requirement cannot be waived by the child. If a parent is unable or unwilling to participate, a guardian ad litem can be appointed.

12.4 Counsel should prepare for adjudication with a written opening statement, closing argument, and direct and cross-examination of witnesses.

12.5 Counsel should use the opening statement as an opportunity to educate the judge as to counsel's theory of the case. Counsel should consider the advantages and disadvantages of the disclosure of information during the opening statement.

12.6 During the Commonwealth's case counsel should:

a. be alert to and object to attempts to admit inadmissible evidence or testimony;

b. be prepared to cross-examine witnesses. Any cross-examination should be conducted to advance the defense's theory of the case.

12.7 At the conclusion of the prosecution's case, counsel should move to strike the prosecution's case and request the court to dismiss each count of the

petition, unless there exists a good faith reason for not doing so. Counsel should be prepared to present supporting case law.

12.8 When presenting the client's case, counsel should:

a. consider whether any evidence needs to be presented;

b. discuss with your client all the implications of testifying, keeping in mind that the decision whether to testify is solely the client's. Counsel should also be aware of his or her ethical responsibilities if counsel knows that the client will testify untruthfully;

c. be prepared for direct examination and redirect of any witnesses;

d. be prepared to assert any affirmative defenses.

12.9 At the conclusion of the defense case, counsel should move to strike the prosecution's case and request the court to dismiss each count of the petition, unless there exists a good faith reason for not doing so. Counsel should be prepared to present supporting case law.

12.10 Counsel should use the closing argument to summarize and argue the evidence and testimony as it applies to the theory of the case and remind the judge of the prosecution's burden of proof.

RELATED STANDARDS

Virginia Code § 16.1-302;
Gilbert v. Commonwealth, 198 S.E.2d 633, 214 Va. 142 (Va., 1973).

Performance Standard 13: Juvenile Defense Counsel's Duty at the Disposition Hearing

The active participation of counsel at disposition is essential. In many cases, counsel's most valuable service to clients will be rendered at this stage of the proceeding. An important part of representation in a juvenile case is planning for disposition.

13.1 Preparation for Hearing:

a. Counsel should explain to the client and parent the nature of the disposition hearing, the issues involved and the alternatives open to the court. Counsel should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan;

b. Counsel should advise the client and the parents that they will be contacted by a probation officer regarding preparation of the social history and that whatever information they give the probation officer likely will be provided to both the court and the prosecution;

c. Counsel should advise the client regarding the possible request by the probation officer to give the client's account of the facts and circumstances surrounding the charge to include in the social history, especially if the client intends to appeal or if the client did not testify during the adjudicatory hearing;

d. Counsel shall read and be thoroughly familiar with the social history (dispositional) report prepared by the court service unit as far in advance of the dispositional hearing as possible. Counsel should review the contents of the report with the client and discuss any findings and recommendations therein. With the consent of the client, counsel should advise the probation officer who prepared the social history report of any findings and recommendations with which the client disagrees, if it is strategically advantageous to do so;

e. Counsel should be familiar with and consider:

i. the dispositional alternatives available to the court and any community services that may be useful in the formation of a dispositional plan appropriate to the client's circumstances;

ii. the official version of the client's prior record, if any;

iii. the position of the probation department with respect to the client;

iv. the sentencing recommendation, if any, of the prosecutor;

v. using a creative interdisciplinary approach by collaborating with educational advocates, social workers, and civil legal services providers;

vi. the collateral consequences attaching to any possible disposition including, but not limited to, sex offender registry, immigration status, right to possess weapons;

vii. the disposition practices of the judge;

viii. referrals to court clinics or community agencies;

ix. any victim impact statement to be presented to the court;

x. requesting a continuance for disposition at a later date;

xi. securing the assistance of psychiatric, psychological, medical or other expert personnel needed for the purposes of evaluation, consultation or testimony with respect to the formation of a dispositional plan;

xii. preparing a letter or memorandum to the judge to assist the court in deciding the client's disposition. A thoughtfully written presentation of a disposition plan that highlights the client's strengths and the appropriateness of the disposition plan should be delivered to the judge and opposing counsel in advance of the disposition hearing. This letter is an opportunity to anticipate and address any concerns the judge may have about the client and the disposition plan. It is also an opportunity to address specific issues of punishment, deterrence, community safety, and rehabilitation as they relate to the client's case.

13.2 During the Hearing:

a. Counsel should insist that proper procedures be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence and in accordance with what is permitted under Virginia law;

b. Counsel should subpoena witnesses and present evidence to support counsel's proposed disposition plan;

c. Counsel should fully cross examine adverse witnesses, and challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court;

d Counsel should consider whether the client should make a statement to the court.

13.3 When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and the client's family and to urge upon the client the need for accepting and cooperating with the dispositional order. If an appeal is contemplated, the client should be advised of that possibility, but counsel

must advise compliance with the court's decision during the interim, unless the disposition order is stayed.

RELATED STANDARDS

Virginia Code § 16.1-261;
Virginia Code § 16.1-273;
Virginia Code § 16.1-274;
Virginia Code § 16.1-278.8.

Performance Standard 14: Juvenile Defense Counsel's Continuing Duty to Client

14.1 Whether or not the charges against the client have been disposed of, if counsel is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

14.2 If the client is committed to the Department of Juvenile Justice, counsel should attempt to ensure that the client is placed in the most appropriate, least restrictive placement available.

Performance Standard 15: Juvenile Defense Counsel's Post-dispositional Duties

15.1 Counsel should be prepared to represent and inform the client with respect to proceedings to review, reopen or modify adjudicative or dispositional orders or to pursue any affirmative remedies that may be available to the client under the law.

15.2 Counsel appointed to represent a client charged with violation of his or her probation or parole should prepare in the same way and with as much care as for an adjudicatory hearing.

RELATED STANDARDS

Virginia Code § 16.1-133.1;
Virginia Code § 16.1-289.

Performance Standard 16: Child's Right to an Appeal

Appeals from final judgments in juvenile court are handled de novo in the circuit court, where the client has an absolute right to a trial by jury on guilt or innocence, and appeals from the circuit court to the Court of Appeals are handled in the same manner as other appeals from the circuit court.

16.1 Counsel should inform the client of his or her right to an appeal, the steps necessary to appeal and the likelihood of success.

16.2 Counsel should know the statutes and rules governing the filing of appeals in the circuit court, the Court of Appeals, and the Supreme Court of Virginia.

RELATED STANDARDS

Virginia Code § 16.1-296;
Virginia Code § 16.1-297.

Performance Standard 17: Juvenile Defense Counsel's Duty during Transfer or Certification Hearings under Virginia Code § 16.1-269 et seq.

A new, inexperienced juvenile defense counsel should not handle a transfer hearing without the supervision or assistance of a more experienced juvenile defender. A transfer or certification hearing, while not a hearing on the merits of the case, could result in the loss of the protections afforded in juvenile court. Therefore, counsel should prepare in the same way and with as much care as for an adjudicatory hearing, in accordance with all previous performance standards.

17.1 Counsel should be aware of the statutory findings the court must make before transferring or certifying jurisdiction to the circuit court.

17.2 Counsel should be aware of the current statutory and case law governing these findings.

17.3 Counsel should explore at an early stage the possibility of a plea negotiation to ensure that the case is handled and disposed of in juvenile court, subject to Standard 10.

17.4 Counsel should be prepared to vigorously contest the issue of probable cause to prevent transfer or certification.

17.5 Counsel should be prepared to present evidence and testimony to prevent transfer or certification, including testimony by people who can provide helpful insight into the client's character, such as teachers, counselors, psychologists, community members, probation officers, religious affiliates, employers, DJJ personnel, or other persons with a positive personal and/or professional view of the defendant. If the competency of the client to participate in the proceedings is in question, that issue should be pursued.

17.6 Counsel should request the court to authorize the full, official recordation of all transfer proceedings, when warranted.

17.7 Counsel should preserve all issues for appeal.

17.8 Counsel should consider obtaining an independent evaluation from a defense expert.

17.9 Counsel should investigate possible placements for the client if the case remains in juvenile court.

17.10 If the judge transfers the case, counsel should make every possible argument to keep the client in juvenile detention or to release the client on bond rather than having the client placed in jail.

RELATED STANDARDS
Virginia Code § 16.1-269.1 through § 16.1-272.1.

Performance Standard 18: Trial and Sentencing of a Child as an Adult in Circuit Court

18.1 Where the client is being tried in the circuit court, he or she has an absolute right to a trial by jury on guilt or innocence.

18.2 Counsel should be prepared to make arguments during sentencing for a juvenile disposition, since the client may still be treated as a child for sentencing purposes.

Performance Standard 19: Special Considerations

There are related legal issues and unique considerations in the juvenile justice system that do not exist in the criminal justice system. Juvenile defense counsel should be aware of the following matters:

19.1 Time Limits: Counsel should be aware of the statutory time limits applicable with regard to detention and the time of trial.

19.2 Confidentiality of Proceedings and Records: Counsel should be aware of the applicable laws and rules governing access to juvenile court proceedings and those juvenile records that are available generally to the public and to other persons.

19.3 Sealing of Records: Counsel should be aware of and inform the client regarding the expungement of juvenile court records.

19.4 Children in Need of Supervision, Children in Need of Services and Status Offenses: Counsel should be aware of the definition of a “child in need of supervision,” a “child in need of services,” and a “status offender” and know the procedural safeguards applicable to such designations.

19.5 Guardians ad litem. Counsel has an ongoing duty to represent the child's wishes. Where counsel has determined that it is appropriate to seek the appointment of a GAL, counsel should not delegate this duty or allow the GAL to interfere with the performance of this duty. In most cases, both the GAL and the client should be instructed not to discuss the facts of the case, as this discussion may not be privileged. However, counsel may discuss the facts of the case with the GAL with discretion.

19.6 Immigration: Counsel should be aware of the collateral effects of a juvenile court proceeding on the client or client's family's immigration status and consult with an expert if necessary.

19.7.1 Special Education: Counsel should be aware of any rights the client may have under special education laws and that any special education records should be presented to the court.

RELATED STANDARDS

Virginia Code § 16.1-228;
Virginia Code § 16.1-277.1;
Virginia Code § 16.1-299 through § 16.1-309.1