North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

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Preface

The primary goal of the Commission on Indigent Defense Services ("IDS Commission") is to ensure that indigent defendants in North Carolina are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4).

These performance guidelines are based largely on the "Performance Guidelines for Criminal Defense Representation" that have been promulgated by the National Legal Aid and Defender Association, as well as a review of standards and guidelines in several other jurisdictions, including Connecticut, Kansas, Massachusetts, New Mexico, New York City, Oregon, and Washington. Over a period of several months, a Committee of the IDS Commission reviewed a draft of these guidelines and revised them to fit the nuances of North Carolina law and practice. Initial proposed guidelines were then sent to 70 public and private defense attorneys around the state, with a request that they provide feedback. Based on the comments that were received, the Committee made a number of changes to that earlier draft. In August 2004, the revised guidelines were mailed to all public defenders and assistant public defenders, more than 2,000 private defense attorneys, all active district and superior court judges, and all elected district attorneys for comments. Again, based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on November 12, 2004.

These performance guidelines cover all indigent adult non-capital criminal cases in district and superior court. The guidelines are intended to identify issues that may arise at each stage of a criminal proceeding, and to recommend effective approaches to resolving those issues. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced defense attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality criminal defense representation is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by defense counsel across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources, and hopes the North Carolina General Assembly will continue its support of quality indigent defense services.

The IDS Commission thanks all of the defense attorneys who zealously represent indigent defendants across the state. In addition, the Commission thanks everyone who worked on the drafting of these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North Carolina law and reflect quality performance, and invites ongoing feedback from the defense bar and criminal justice community.

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SECTION 1:

Guideline 1.1 Function of Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent defense representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

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

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 Role of Defense Counsel

(a) The paramount obligations of criminal defense counsel are to provide zealous and quality representation to their clients at all stages of the criminal process, and to preserve, protect, and promote their clients' rights and interests throughout the criminal proceedings. Attorneys also have an obligation to conduct themselves professionally, abide by the Revised Rules of Professional Conduct of the North Carolina State Bar and other ethical norms, and act in accordance with all rules of court.

(b) Defense counsel are the professional representatives of their clients. Counsel should candidly advise clients regarding the probable success and consequences of adopting any posture in the proceedings, and provide clients with all information necessary to make informed decisions. Counsel does not have an obligation to execute any directive of a client that does not comport with law or standards of ethics or professional conduct.

Guideline 1.3 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in North Carolina. Counsel should also be informed of any applicable local rules, including those set forth in the district's case docketing plan, as well as the practices of the specific judge before whom a case is pending.

(b) Counsel has an ongoing obligation to stay abreast of changes and developments in criminal law and procedure, and to continue his or her legal education, skills training, and professional development.

(c) Prior to accepting appointment to an indigent criminal matter, counsel should have sufficient experience, skills, training, and supervision to provide quality representation. Where appropriate to provide competent representation, counsel should consult with more experienced attorneys to acquire

necessary knowledge and information, including information about the practices of judges, prosecutors, and other court personnel.

Guideline 1.4 General Duties of Defense Counsel

(a) Before accepting appointment to an indigent criminal case, an attorney has an obligation to ensure that he or she has available sufficient time, resources, knowledge, and experience to afford quality representation to a defendant in a particular matter. If it later appears that counsel is unable to afford quality representation in the case, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in the best interests of the client and in accord with the Revised Rules of Professional Conduct.

(b) Counsel must be alert to all actual and potential conflicts of interest that would impair their ability to represent a client. If counsel identifies an actual conflict of interest, counsel should immediately move to withdraw. If counsel identifies a potential conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients. Where appropriate, counsel may seek an advisory opinion on any potential conflicts from the North Carolina State Bar. Mere tactical disagreements between counsel and a client ordinarily do not justify withdrawal from a case. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the client's rights and interests, and does not violate counsel's ethical duties to the client.

(c) Counsel has an obligation to maintain regular contact with the client and keep the client informed of the progress of the case. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.

(d) Counsel should appear on time for all scheduled court hearings in a client's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice.

(e) Counsel should never give preference to retained clients over appointed clients, or suggest that retained clients should or would receive preference.

SECTION 2:

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

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

Guideline 2.2 Initial Interview

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

(b) *Preparation:*

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

(1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;

(2) obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial service or detention agencies concerning pretrial release, and law enforcement reports;

(3) be familiar with the legal criteria for determining pretrial release conditions and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the judicial district, and whether any pretrial service or other agencies are available to act as a custodian for the client's release; and

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(c) *The Interview:*

(1) The purpose of the initial interview is to acquire information from the client concerning pretrial release and, where appropriate, the facts of the case, and to provide the client with information concerning the case. Counsel should try to ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

(2) Information that should be acquired during the initial interview 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, family relationships, employment record and history, and immigration status (if applicable);

(B) the client's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and educational and armed services history;

(C) the client's immediate medical and/or mental health needs;

(D) the client's past criminal history, if any, including arrests and convictions for adult and juvenile offenses and prior history of court appearances or failure to appear in court;

(E) the existence of any other pending charges against the client and the identity of any other appointed or retained counsel;

(F) whether the client is on probation or parole, and the client's past or present performance under supervision;

(G) the ability of the client to meet any financial conditions of release; and

(H) the names of individuals or other sources that counsel can contact to verify the information provided by the client, and the permission of the client to contact those individuals.

(3) Information to be provided to the client during the initial interview includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency, and an explanation that the client is not required to and should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting the attorney;

(D) the nature of the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(F) how counsel can be reached and when counsel plans to have contact with the client next;

(G) realistic answers, where possible, to the client's most urgent questions; and

(H) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, such as medical or mental health attention, and contact with family members.

(4) Where appropriate, counsel should be prepared at the initial interview to ask the client to sign a release authorizing counsel to access confidential information.

(d) *Additional Information*

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

(1) the facts surrounding the charges against the client and the client's view of any potential defenses;

(2) any evidence of improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved; and

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Guideline 2.3 Pretrial Release Proceedings in Misdemeanor and Felony Cases

(a) As soon as possible after appointment, where the client has not been able to obtain pretrial release, counsel should consider filing a motion to reduce bond or otherwise modify any pretrial release conditions that were set by the magistrate or other judicial official at the client's initial appearance.

(b) Counsel should be prepared to present to the appropriate judicial official a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release. Counsel should consider the potential consequences of allowing the client to make statements at any bond reduction hearing.

(c) In counties with a pretrial service program, counsel should consider utilizing the services of that program where it would be likely to benefit the client.

(d) Counsel should fully inform the client of his or her conditions of release after such conditions have been set by the court.

(e) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should be familiar with and explain to the client the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how properly to post such assets.

(f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the jail, and if appropriate the court, to any special medical or psychiatric and security needs of the client that are known to counsel.

Guideline 2.4 Probable Cause Hearing in Felony Cases

(a) Counsel should discuss with the client the meaning of probable cause and the procedural aspects surrounding a probable cause determination, and should consider the tactical advantages and disadvantages of having a probable cause hearing. Counsel should consider any concessions the prosecution might make if the defendant waives, or does not oppose a continuance of, a probable cause hearing. Before waiving a probable cause hearing, counsel should consider the possible benefits of a hearing, including the potential for discovery and the development of impeachment evidence. Counsel also should be aware of all consequences if the client waives a probable cause hearing, including the effect of waiver on the statutory deadline for requesting voluntary discovery under G.S. 15A-902(d).

(b) In preparing for a probable cause hearing, counsel should consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) factual information that is available concerning the existence or lack of probable cause;

(4) the tactics of full or partial cross-examination;

(5) additional factual information and impeachment evidence that could be discovered by counsel during the hearing; and

(6) any continuing need to pursue modification of the conditions of release if the client is in custody.

Counsel ordinarily should not call the client or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.

Guideline 2.5 Charging Language in Criminal Pleadings

(a) Counsel should review the criminal pleadings in all cases and, unless there are sound tactical reasons for not doing so, move to dismiss the pleading if there are defects in the charging language, including but not limited to:

(1) the pleading does not list all of the essential elements of the charged offense; and

(2) the pleading contains more than one charge in a single count.

(b) Even if the pleading adequately charges a crime, counsel should be sufficiently familiar with the language of the pleading to recognize a fatal variance at trial and move to dismiss the charge if the evidence is insufficient to support the charge as pled.

(c) Counsel should be aware of all time limits applicable to challenges to defects in the charging language of a criminal pleading. Counsel also should be aware of the potential consequences of alerting the prosecution to defects in the charging language.

Guideline 2.6 Indictments and Bills of Information in Felony Cases

(a) Upon return of a bill of indictment, unless there are sound tactical reasons for not doing so, counsel should consider any potential grounds for quashing the indictment or challenges to the grand jury proceedings, including, but not limited to:

(1) improper composition of the grand jury as a whole, including any systematic exclusion of qualified persons either in the drawing of the list of potential grand jurors or the selecting of grand jurors from the list;

(2) the inclusion of a grand juror who does not meet the requirements of G.S. 9-3;

(3) the bill of indictment lacks the signatures and markings required by G.S. 15A-644;

(4) the bill of indictment was not found to be true by at least twelve grand jurors and/or was not returned in open court; and

(5) the bill of indictment was based entirely on the testimony of witnesses who were disqualified or evidence that is incompetent.

(b) Counsel should be aware of all time limits applicable to motions to quash the indictment or challenges to the grand jury proceedings.

(c) Where applicable, counsel should consider, and inform the client of, the advantages and disadvantages of waiving a bill of indictment and consenting to a bill of information pursuant to G.S. 15A-642 and G.S. 15A-923.

Guideline 2.7 Arraignment in Felony Cases

Counsel should consider whether to request arraignment under G.S. 15A-941(d). Counsel should be aware that some pretrial motions may be waived if they are not filed at or before arraignment (or within the time limit prescribed by G.S. 15A-952 if arraignment is waived), including a motion to continue, motion challenging venue or for change of venue, motion to join or sever offenses, motion challenging grand jury composition, motion for a bill of particulars, and motion challenging non-jurisdictional pleading defects. Counsel should also consult local calendaring rules to determine whether they establish different deadlines for pretrial motions.

SECTION 3:

Guideline 3.1 Search Warrants and Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should be familiar with the law governing search warrants under G.S. 15A-241 *et seq.* and applicable case law, including, but not limited to, the requirements for a search warrant application, the basis for issuing a search warrant, the required form and content of a search warrant, the execution and service of a search warrant, and the permissible scope of the search.

(b) Counsel should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a defendant refuses to comply with a non-testimonial identification order issued pursuant to G.S. 15A-271 *et seq.*, and the extent to which counsel may participate in or observe the proceedings.

Guideline 3.2 Client's Competence and Capacity to Proceed

(a) When defense counsel has a good faith doubt as to the client's capacity to proceed in a criminal case, counsel may:

(1) file an *ex parte* motion to obtain the services of a mental health expert and thereby determine whether to raise the client's competency before the court; or

(2) file a motion questioning the client's competence to stand trial or enter a plea under G.S. 15A-1001(a) and applicable case law, in which case the court may order a mental health examination at a state mental health facility or by the appropriate local forensic examiner.

(b) While the client's wishes ordinarily control, counsel may question competency without the client's assent or over the client's objection if necessary.

(c) After counsel receives and reviews the report from any court-ordered competency examination, counsel should consider whether to file a motion requesting a formal hearing on the client's capacity to proceed.

(d) Whenever competency is at issue, counsel still has a continuing duty to prepare the case for all anticipated court proceedings.

(e) If the court enters an order finding the client incompetent and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the client at those proceedings, but should cooperate with the commitment attorney upon request.

SECTION 4:

Guideline 4.1 Case Review, Investigation, and Preparation

(a) Counsel has a duty to conduct an independent case review and investigation. The client's admissions or statements to counsel of facts constituting guilt do not necessarily obviate the need for such independent review and investigation. The review and investigation should be conducted as promptly as possible.

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

(1) *Charging Documents, Statutes, and Case Law*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

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

(B) the defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses; and

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the grand jury proceedings.

(2) *The Client*

An in-depth interview or interviews of the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s);

(B) elicit information concerning possible improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(C) explore the existence of other potential sources of information relating to the offense or client, including school, work, jail, probation, and prison records;

(D) collect information relevant to sentencing; and

(E) continue to assess the client's medical and/or mental health needs.

(3) *Potential Witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be

available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *The Police and Prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so (*e.g.*, defense obligations under G.S. 15A-905).

(5) *The Courts*

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

(6) *Information in the Possession of Third Parties*

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

(7) *Physical Evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene*

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

(9) *Assistance from Experts, Investigators, and Interpreters*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; and/or

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, *State v. Ballard*, and their progeny. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should take all necessary steps to preserve for appeal any denial of expert, investigative, or interpreter funding.

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

Guideline 4.2 Discovery in Cases Within the Original Jurisdiction of the Superior Court

(a) Counsel has a duty to pursue discovery procedures provided by the applicable rules of criminal procedure within the time periods prescribed by G.S. 15A-902, and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Prior to filing a formal motion with the court, counsel must first serve the prosecutor with a written request for voluntary discovery unless counsel and the prosecutor agree in writing to comply voluntarily with G.S. 15A-901 *et seq.* Counsel must file a motion to compel discovery if the prosecution's response is unsatisfactory or delayed. Regardless of the prosecution's response, counsel should file a motion to compel discovery if the case is proceeding to trial.

(c) In exceptional cases, counsel should consider not making a discovery request or signing a written agreement under G.S. 15A-902(a), on the ground that it will trigger a defense obligation to disclose evidence under G.S. 15A-905.

(d) Unless there is a sound tactical reason for not requesting discovery or signing a written agreement under G.S. 15A-902(a) (*e.g.*, defense obligations under G.S. 15A-905), counsel should seek discovery to the broadest extent permitted under federal and state law, including but not limited to, the following items:

(1) all information to which the defendant is entitled under G.S. 15A-903;

(2) all potential exculpatory information and evidence to which the defense is entitled under *Brady v. Maryland* and its progeny, including but not limited to:

(A) impeachment evidence, such as a witness' prior convictions or other misconduct; bias of a witness; a witness' capacity to observe, perceive, or recollect; and psychiatric evaluations of a witness;

(B) evidence discrediting police investigation and credibility;

(C) evidence undermining the identification of the client;

(D) evidence tending to show the guilt of another;

(E) the identity of favorable witnesses; and

(F) exculpatory physical evidence; and

(3) to the extent not provided under statutory discovery, any other information necessary to the defense of the case, including but not limited to:

(A) the names, addresses, and availability of state witnesses;

(B) the details of the circumstances under which any oral or written statements by the accused or a co-defendant were made;

(C) any evidence of prior bad acts that the prosecution may intend to use against the client;

(D) the data underlying any expert reports; and

(E) any evidence necessary to enable counsel to determine whether to file a motion to suppress evidence under G.S. 15A-971 *et seq*.

(e) Counsel should seek the timely production and preservation of discoverable evidence. If the prosecution fails to disclose or belatedly discloses discoverable evidence, counsel should consider requesting one or more of the sanctions provided by G.S. 15A-910.

(f) If counsel believes the state may destroy or consume in testing evidence that is significant to the case (*e.g.*, rough notes of law enforcement interviews, 911 tapes, drugs, or blood samples), counsel should also file a motion to preserve the evidence in the event that it is discoverable.

(g) Counsel should timely comply with all of the requirements in G.S. 15A-905 governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Counsel also should be aware of the possible sanctions for failure to comply with those requirements under G.S. 15A-910.

Guideline 4.3 Theory of the Case

During case review, investigation, and trial preparation, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for the client's acquittal or conviction of a lesser offense, while also telling the defense story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

SECTION 5:

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing appropriate pretrial motions whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief which the court has authority to grant.

(b) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Among the issues that counsel should consider addressing in pretrial motions are:

(1) the pretrial custody of the client and a motion to review conditions of release;

(2) the constitutionality of the implicated statute or statutes;

(3) any potential defects in the grand jury composition or charging process;

(4) the sufficiency of the charging document under all applicable statutory and constitutional provisions;

(5) the dismissal of a charge on double jeopardy grounds;

(6) the need for a bill of particulars;

(7) the propriety and prejudice of any joinder or severance of charges or defendants;

(8) the statutory and constitutional discovery obligations of the prosecution;

(9) the suppression of evidence gathered as the result of violations of the North Carolina Constitution and the United States Constitution, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the client's right to counsel, or privilege against self-incrimination; and

(D) unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification;

(10) the suppression of evidence gathered in violation of any right, duty, or privilege arising out of North Carolina law;

(11) access to necessary support or investigative resources or experts;

(12) the need for a change of venue;

(13) the defendant's speedy trial rights and/or calendaring rights under G.S. 7A-49.4;

(14) the defendant's right to a continuance in order adequately to prepare his or her case;

(15) matters of trial evidence that may be appropriately litigated by means of a pretrial motion in *limine*;

(16) the suppression of a prior conviction obtained in violation of the defendant's right to counsel;

(17) the recusal of the trial judge;

(18) the full recordation of all proceedings pursuant to G.S. 15A-1241;

(19) matters of trial or courtroom procedure; and

(20) notice of affirmative defenses if required by G.S. 15A-905(c) and G.S. 15A-959.

(c) Counsel should be aware of all time limits on the filing of pretrial motions, and should know whether a motion must or may be accompanied by a factual affidavit.

(d) Unless there are sound tactical reasons for not doing so, counsel should request that the court rule on all previously filed defense motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

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

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery, and research relevant to the claim(s) advanced;

(2) the subpoenaing of all helpful evidence, and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and procedures applying to the hearing, including the benefits and costs of having the client and other defense witnesses testify;

(4) obtaining the assistance of an expert witness where appropriate and necessary; and

(5) preparation and submission of a memorandum of law where appropriate.

(c) If a hearing on a pretrial motion is held in advance of trial, counsel should attempt to obtain the transcript of the hearing for use at trial where appropriate.

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

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

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

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

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

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

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

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(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 the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(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 uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant 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; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

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

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

SECTION 7:

Guideline 7.1 General Trial Preparation

(a) Throughout preparation and trial, counsel should consider the theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

(b) The decision to proceed to trial rests solely with the client. Counsel should discuss with the client the relevant strategic considerations of this decision. When appropriate, counsel should also explain to the client that decisions concerning trial strategy are ordinarily to be made by counsel, after consultation with the client and investigation of the applicable facts and law. However, counsel should be aware that, under North Carolina law, if counsel and a fully informed competent client reach an absolute impasse as to tactical decisions, the client's wishes may control.

(c) In advance of trial, counsel should take all steps necessary to complete thorough investigation, discovery, and research. Among the steps counsel should consider in preparation are:

(1) interviewing and subpoenaing all potentially helpful witnesses;

(2) examining and subpoenaing all potentially helpful physical or documentary evidence;

(3) obtaining funds for defense investigators and experts, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(4) obtaining and reading transcripts of any prior proceedings in the case or related proceedings; and

(5) obtaining photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may aid the fact finder in understanding the defense case.

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

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) reports, test results, and other materials disclosed by the prosecution pursuant to G.S. 15A-901 *et seq.*;

(4) *voir dire* topics, plans, or questions;

(5) a plan, outline, or draft of opening statement;

(6) cross-examination plans for all possible prosecution witnesses;

(7) direct-examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses (*e.g.*, transcripts, police reports);

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(13) originals and copies of all documentary exhibits;

(14) proposed jury instructions with supporting case citations;

(15) copies of critical statutes and cases; and

(16) a plan, outline, or draft of closing argument.

(e) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that reasonably can be anticipated to arise in the trial.

(f) Counsel should be familiar with case law concerning making admissions of guilt to the jury without the client's consent.

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

(h) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should try to ensure that the client does not appear before the jury in jail or other inappropriate clothing, or in shackles or handcuffs. If an incarcerated client is brought before the jury in jail clothing, shackles, or handcuffs, counsel should object and seek appropriate relief from the court.

(i) Counsel should plan with the client, court personnel, and/or sheriff's office for the most convenient system for conferring throughout the trial.

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

Guideline 7.2 Preserving the Record on Appeal

Counsel should establish a proper record for appellate review throughout the trial process, including requesting recordation of all significant portions of the trial under G.S. 15A-1241(b). If something non-verbal transpires during trial that is relevant and important, counsel should ask to have the record reflect what happened.

Guideline 7.3 *Voir Dire* and Jury Selection

(a) *Preparation*

(1) Counsel should be familiar with the procedures by which a jury panel is selected, and should be alert to any potential legal challenges to the composition or selection of the panel.

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

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list where feasible, and should develop a method for tracking juror selection and seating.

(4) Counsel should be familiar with any juror questionnaire that may be used by the court or prosecution and, where appropriate, should develop a defense questionnaire and file a pretrial motion to authorize its use.

(5) In advance of trial, counsel should develop *voir dire* topics, plans, or questions that are tailored to the specific case. Among the purposes *voir dire* questions should be designed to serve are:

(A) to elicit information about the attitudes of individual jurors, which will inform the use of peremptory strikes and challenges for cause;

(B) to determine the jurors' attitudes toward legal principles that are critical to the defense case, including, where appropriate, the client's decision not to testify; and

(C) to present the client, preview the defense case, and assess the impact of damaging information on the jurors' ability to fairly consider the case.

In conducting *voir dire*, counsel should be aware that jurors may develop impressions of counsel and the defendant, and should recognize the importance of establishing a relationship of credibility.

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

(7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel also should be aware of the statutory and case law directing that peremptory challenges need to be exhausted in order to preserve for appeal the denial of any challenges for cause.

(b) *Examining the Prospective Jurors*

(1) Counsel should personally conduct the *voir dire* examination of the panel.

(2) If the court denies counsel's request to ask questions during *voir dire* that are significant or necessary to the defense of the case, counsel should take all steps necessary to protect the *voir dire* record for appeal, including filing a written motion listing the proposed *voir dire* questions or otherwise making proposed questions part of the record.

(3) If the *voir dire* questions may elicit sensitive answers or where otherwise appropriate, counsel should request individual *voir dire*.

(c) *Challenges and Objections*

(1) Counsel should consider challenging for cause all persons who are subject to challenge under G.S. 15A-1212, including all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case, when it is likely to benefit the client.

(2) When a challenge for cause is denied, counsel should consider exercising a peremptory challenge to remove the juror. Counsel should be aware of the requirements in G.S. 15A-1214(h) for preserving the denial of a challenge for cause for appellate review.

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

(4) Counsel should object to and preserve for appellate review all issues relating to the unconstitutional exclusion of jurors by the prosecution or court.

Guideline 7.4 Opening Statement

(a) Prior to delivering an opening statement, counsel should consider whether to ask for sequestration of witnesses.

(b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.

(d) Counsel's objectives in making an opening statement may include the following:

(1) to introduce the theory of the defense case;

(2) to provide an overview of the defense case;

(3) to identify the weaknesses of the prosecution's case;

(4) to emphasize the prosecution's burden of proof;

(5) to summarize the anticipated testimony of witnesses, and the role of each in relationship to the entire case;

(6) to describe the exhibits that will be introduced and the role of each in relationship to the entire case;

(7) to clarify the jurors' responsibilities;

(8) to state the ultimate inferences counsel wants the jury to draw;

(9) to personalize the client and counsel for the jury; and

(10) to prepare the jury for the client's testimony or decision not to testify.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement into the defense opening statement and summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error; and

(2) the possibility that an objection might enhance the significance of the information in the jurors' minds, or otherwise negatively affect the jury.

Guideline 7.5 Confronting the Prosecution's Case

(a) Counsel should anticipate weaknesses in the prosecution's proof, and research and prepare to argue corresponding motions for judgment of dismissal or nonsuit.

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

(c) Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper state evidence, and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence is admissible only for a limited purpose, counsel should consider requesting an appropriate limiting instruction.

(d) In preparing for cross-examination, counsel should be familiar with North Carolina law and procedures concerning cross-examination and impeachment of witnesses. Counsel should be prepared to question witnesses as to the existence and content of prior statements.

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

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

(2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the defense case;

(3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal, and consider a cross-examination plan for each of the anticipated witnesses;

(4) be alert to inconsistencies, variations, and contradictions within each witness' testimony;

(5) be alert to inconsistencies, variations, and contradictions between different witnesses' testimony;

(6) if applicable, review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(7) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

(8) be alert to issues relating to witness credibility, including bias and motive for testifying; and

(9) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

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

(g) Before beginning cross-examination, counsel should ascertain whether the prosecutor provided copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a). If disclosure was not properly made, counsel should request relief as appropriate under G.S. 15A-910, including:

(1) a cautionary instruction;

(2) adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

(3) exclusion of the witness' testimony and all evidence affected by that testimony;

(4) a mistrial;

(5) dismissal of the case; and/or

(6) any other sanctions counsel believes would remedy the violation.

(h) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of dismissal or nonsuit on each count charged. Where appropriate, counsel should be prepared with supporting case law.

Guideline 7.6 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting defense evidence, and instead relying on the evidence and inferences, or lack thereof, from the prosecution's case.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility.

(c) Counsel should be aware of the elements of any affirmative defense(s) and know whether the defense bears a burden of persuasion or production. Counsel should be familiar with the notice requirements for affirmative defenses and introduction of expert testimony that are imposed by G.S. 15A-905(c), G.S. 15A-959, and North Carolina case law.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the order of exhibits; and

(6) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecution.

(f) Counsel should prepare all defense witnesses for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the defendant of suitable courtroom dress and demeanor.

(g) If a prosecution objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.

(h) Counsel should conduct redirect examination as appropriate.

(i) At the close of all of the evidence, counsel should renew the motion for judgment of dismissal or nonsuit on each charged count.

Guideline 7.7 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation, including the law governing closing arguments under G.S. 7A-97 and G.S. 15A-1230, Rule 10 of the General Rules of Practice for the Superior and District Courts, and North Carolina case law.

(b) 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 into the argument:

(A) the theory of the defense case;

(B) helpful testimony from direct and cross-examinations;

(C) verbatim instructions drawn from the expected jury charge;

(D) responses to anticipated prosecution arguments; and

(E) visual aids and exhibits; and

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

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

(1) the possibility that an objection or cautionary instruction might enhance the significance of the information in the jurors' minds;

(2) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable verdict for the client; and

(3) the need to preserve the objection for appellate review.

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record.

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

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(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 there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

SECTION 8:

Guideline 8.1 Obligations of Counsel in Sentencing

Counsel's obligations in the sentencing process include:

(a) where a defendant chooses not to proceed to trial, to attempt to negotiate a plea agreement with consideration of the sentencing, correctional, and financial implications;

(b) to try to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(c) to ensure that all reasonably available mitigating and favorable evidence, which is likely to benefit the client, is presented to the court;

(d) to develop a plan that seeks to achieve the sentencing alternative most favorable to the client, and that reasonably can be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(e) to try to ensure that all information presented to the court which may harm the client, if inaccurate, untruthful, or otherwise improper, is stricken from the text of any sentencing services plan or presentence report;

(f) to consider the need for and availability of sentencing specialists, or mental health or mental retardation professionals; and

(g) to identify and preserve potential issues for appeal.

Guideline 8.2 Sentencing Options, Consequences, and Procedures

(a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:

(1) the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, mandatory consecutive sentence requirements, and constitutional limits on sentences;

(2) deferred prosecution, prayer for judgment continued, probation without a conviction, and diversionary programs;

(3) probation or suspension of sentence, and mandatory and permissible conditions of probation;

(4) confinement in a mental institution;

(5) forfeiture of assets seized in connection with the case;

(6) any mandatory registration requirements, including sex offender registration, or mandatory DNA testing; and

(7) the possibility of expungement and sealing of records.

(b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:

(1) credit for pretrial detention;

(2) the likelihood that the conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(3) the possibility of earned-time credits;

(4) the availability of correctional programs and work release;

(5) the availability of drug rehabilitation programs, psychiatric treatment, and health care; and

(6) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution.

Counsel should also discuss with the client that there may be other potential collateral consequences of the judgment and sentence, such as deportation or other effects on immigration status; motor vehicle

or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) Counsel should be familiar with the sentencing procedures, including:

(1) the effect that plea negotiations may have upon the sentencing discretion of the court;

(2) the procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;

(3) the practices of those who prepare the sentencing services plan or presentence report, and the defendant's rights in that process;

(4) access to the sentencing services plan or presentence report by counsel and the defendant;

(5) the defense sentencing presentation and/or sentencing memorandum;

(6) the opportunity to challenge information presented to the court for sentencing purposes;

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

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

Guideline 8.3 Preparation for Sentencing

In preparing for sentencing, counsel should consider the need to:

(a) inform the client of the applicable sentencing requirements, options, and alternatives, and the sentencing judge's practices and procedures if known;

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

(c) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical and mental health history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(d) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, after considering the possible consequences that any admission of guilt may have on an appeal, subsequent retrial, or trial on other offenses;

(e) inform the client of the effects that admissions and other statements may have on an appeal, retrial, or other judicial proceedings, such as collateral or restitution proceedings;

(f) inform the client if counsel will ask the court to consider a particular sentence or range of sentences; and

(g) collect and present documents and affidavits to support the defense position and, where relevant, prepare and present witnesses to testify at the sentencing hearing**.**

Guideline 8.4 The Sentencing Services Plan or Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation and submission of a sentencing services plan or presentence report, and should consider the tactical implications of requesting that a plan be prepared.

(b) If a plan is prepared, counsel should:

(1) provide to the official preparing the plan relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(2) prepare the client to be interviewed by the person preparing the plan;

(3) review the completed plan and discuss it with the client;

(4) try to ensure the client has adequate time to examine the completed plan; and

(5) take appropriate steps to ensure that erroneous or misleading information that may harm the client is challenged or deleted from the plan.

Guideline 8.5 The Prosecution's Sentencing Position

Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for any sentence in the aggravated range.

Guideline 8.6 The Defense Sentencing Theory

Counsel should prepare a defense sentencing presentation and, where appropriate, a defense sentencing memorandum. Among the topics counsel may wish to include in the sentencing presentation or memorandum are:

(a) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(b) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(c) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(d) challenges to incorrect or incomplete information, and inappropriate inferences and characterizations that are before the court; and

(e) a defense sentencing proposal.

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's legal rights and interests.

(b) Where appropriate, counsel should be prepared to present supporting evidence, including testimony of witnesses, affidavits, letters, and public records, to establish the facts favorable to the defendant.

(c) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement and psychiatric treatment or drug rehabilitation, and against deportation or exclusion of the defendant.

(d) Where appropriate, counsel should prepare the client to personally address the court. In addition, counsel should prepare any expert and other witnesses to address the court.

(e) After the sentencing hearing is complete, counsel should fully explain to the client the terms of the sentence, including any conditions of probation.

SECTION 9:

Guideline 9.1 Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court

(a) When a defendant has been convicted of a misdemeanor in district court, except where the defendant explicitly waives his or her right to appeal as part of a plea agreement, counsel should advise the client of the right to appeal for trial *de novo* with a jury in superior court. Counsel should also advise the client of the potential advantages and disadvantages of exercising that right.

(b) Counsel should be aware of, and advise the client of, the time limit for *de novo* appeal set forth in G.S. 15A-1431(c).

Guideline 9.2 Motion for Appropriate Relief in the Trial Division

(a) Counsel should be familiar with the procedures available under G.S. 15A-1411 *et seq.* to seek a new trial, dismissal of charges, or other relief. Counsel should be aware of the grounds for relief that must be asserted within 10 days after entry of judgment, and the grounds that may be asserted more than 10 days after entry of judgment.

(b) When a judgment has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for appropriate relief with the trial court pursuant to G.S. 15A-1414. In deciding whether to file such a motion, the factors counsel should consider include:

(1) the likelihood of success of the motion, given the nature of the error or errors that can be raised; and

(2) the effect that such a motion might have on the client's appellate rights, including whether the filing of such a motion will assist in preserving the defendant's right to raise on appeal the issues that might be raised in the motion for appropriate relief.

Guideline 9.3 Right to Appeal to the Appellate Division

(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court to the appellate division and the action that must be taken to perfect an appeal.

(b) If the defendant has a right to appeal and wants to file an appeal, the attorney shall preserve the defendant's right to do so by entering notice of appeal in accordance with the procedures and timelines set forth in G.S. 15A-1448 and the Rules of Appellate Procedure. Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(c) If the defendant does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(d) If counsel believes the defendant has a right to appeal and continues to be indigent, but the trial court denies appointed appellate counsel or denies indigency status for purposes of appeal, trial counsel

should consult with the Office of the Appellate Defender about the defendant's options and inform the defendant of those options.

(e) Where the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court, and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 9.4 Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist under G.S. 15A-536 to be released on bail pending the disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion where appropriate.

(b) Where an appeal is taken and after appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.

Guideline 9.5 Post-Disposition Obligations

Even after counsel's representation in a case is complete, counsel should comply with a client's reasonable requests for information and materials that are part of counsel's file. Counsel should also take reasonable steps to correct clerical or other errors in court documents, including jail credit calculations.