

**Superior Court of the  
District of Columbia,  
Criminal Division**

**Attorney Practice Standards  
for Criminal Defense Representation**

Submitted to Lee F. Satterfield, Chief Judge  
Superior Court of the District of Columbia  
January 2010

By

The Attorney Practice Standards for Criminal Defense  
Representation Committee

Ann O'Reagan Keary  
Presiding Judge, Criminal Division (2006-2009)

Russell F. Canan  
Presiding Judge, Criminal Division (2010)

Adopted by Administrative Order 10-02  
January 2010

## **Table of Contents**

	<u>Page</u>
Acknowledgements .....	1
Executive Summary .....	2
Statement of Intent.....	4
A. Panels, Appointments, Certification, and Training.....	4
A-1 Application Requirements for Admission to the Panel .....	4
A-2 Training Requirements for New Panel Members .....	5
A-3 Continuing Legal Education Requirements for All Attorneys.....	5
B. General Authority and Duties.....	5
B-1 Reasonable Diligence and Promptness .....	5
B-2 Case Management.....	6
B-3 Case Organization .....	7
B-4 Financial Eligibility Determinations.....	7
B-5 Continuity of Representation.....	7
B-6 Court Appearances .....	7
B-7 Duties of Stand-In Counsel .....	7
B-8 Ethical Obligations and Conflicts of Interest.....	8
C. Attorney-Client Relationship .....	8
C-1 Role of Counsel for Defendant.....	8
C-2 Protecting Confidentiality of Communication and Proceedings in General.....	8
C-3 Meeting with the Client.....	8
C-4 Barriers to Communication with Clients .....	9
C-5 Preparing for and Conducting the Initial and Follow-up Meetings.....	9
C-6 Duty to Keep Client Informed.....	11
C-7 Advising the Client .....	11
C-8 Distinguishing Between Client and Attorney Decisions.....	11
C-9 Client Plea Discussions .....	12
C-10 Respecting Client Decisions .....	12
D. Pre-Trial Actions .....	12
D-1 Detention Hearing.....	12
D-2 Probable Cause Determination .....	13
D-3 Investigation.....	13
D-4 Discovery .....	14
D-5 Filing Pleadings .....	14
D-6 Negotiated Pleas .....	15
D-7 Trial Preparation .....	15

E.	Hearings .....	16
	E-1 Motion Hearings .....	16
	E-2 Court Appearances .....	16
	E-3 Experts .....	16
	E-4 Client and Witness Testimony .....	16
	E-5 Motions and Objections .....	17
	E-6 Presentation of Evidence .....	17
F.	Trial Preparation .....	17
	F-1 General Trial Preparation .....	17
	F-2 Voir Dire and Jury Selection .....	18
	F-3 Opening Statement .....	19
	F-4 Cross Examination .....	20
	F-5 Motion For Judgment of Acquittal .....	21
	F-6 Defense Case .....	21
	F-7 Closing Argument .....	22
	F-8 Jury Instructions .....	22
G.	Sentencing and Post-Conviction Advocacy .....	23
	G-1 Sentencing Hearings .....	23
	G-2 Post-Sentencing Obligations .....	23
H.	Appeal .....	23
	H-1 Decision to Appeal .....	23
I.	Effective Date .....	23

## ACKNOWLEDGEMENTS

The Superior Court Attorney Practice Standards for Criminal Defense Representation Committee (“the Committee”), chaired by Judge Ann O’Regan Keary, Presiding Judge of the Criminal Division, was established to develop and implement attorney practice standards for criminal defense representation in the District of Columbia Superior Court’s Criminal Division (hereafter “Criminal Division”). Consistent with the goals of furnishing representation of indigents, the Court adopted practice standards for the CCAN panel attorneys in February 2003 (Administrative Order 03-07), for juvenile panel attorneys (Administrative Order 04-13) the following year, and recently, for special education panel attorneys (Administrative Order 09-03). This document, *Superior Court of the District of Columbia, Criminal Division, Attorney Practice Standards for Criminal Defense Representation*, continues this goal of setting standards for all panel practitioners. As such, this document draws on the language of previously adopted panel standards.

A special debt of gratitude is owed to Judge Ann O’Regan Keary and Judge Russell F. Canan, Deputy Presiding Judge of the Criminal Division, whose leadership on the Committee was instrumental in ensuring that Criminal Division standards and training were developed and implemented so as to maintain the highest level of representation in all Criminal Division matters. The standards were drafted and approved by members of the Superior Court, Superior Court Trial Lawyers’ Association, Public Defender Service, Georgetown Law, and D.C. Law Students in Court, and reviewed and approved by Chief Judge Lee F. Satterfield.

The Court gratefully acknowledges all the individuals whose expertise and knowledge were invaluable to the completion of this document, particularly the following individuals and organizations:

Judge Ann O’Regan Keary  
Presiding Judge  
Criminal Division

Judge Russell F. Canan  
Deputy Presiding Judge  
Criminal Division

Betty M. Ballester, Esquire  
Superior Court  
Trial Lawyers Association

Claire T. Roth, Esquire  
Special Counsel to the Director  
Public Defender Service

Sharon L. Burka, Esquire  
Superior Court  
Trial Lawyers Association

John M. Copacino, Esquire  
Georgetown Law  
Criminal Justice Clinic

Justin A. Okezie, Esquire  
Superior Court  
Trial Lawyers Association

Moses A. Cook, Esquire  
D.C. Law Students in Court

***Superior Court of the District of Columbia,  
Criminal Division  
Attorney Practice Standards for Criminal Defense Representation***

**Executive Summary**

The quality of legal representation is critical to the court's effective administration of justice, as well as its constitutional obligation to provide effective assistance of counsel to indigents under the Criminal Justice Act (CJA). To advance these goals by rendering high quality representation, attorneys handling criminal matters in the Criminal Division of the Superior Court must be well trained and informed about changes in procedural and substantive law. These practice standards are intended to help define the role of CJA counsel when representing individuals in criminal cases in the Superior Court.

***Basic Functions of Defense Counsel***

The practice standards address the duties of attorneys appointed to represent individuals charged with criminal matters, and to define the overall objectives that counsel should seek to achieve. The paramount obligation of defense counsel in the administration of justice, and as an officer of the court, is to serve as their client's counselor and zealous advocate and render effective, quality representation. Moreover, defense counsel should ensure that the legal interests and rights of the client are fully protected and advanced. Under these standards, attorneys shall only accept an appointment or otherwise appear in criminal court proceedings if they are knowledgeable of substantive and procedural criminal law and have participated in the required training programs. Counsel must also know and adhere to all applicable ethical opinions and standards and comply with all relevant court rules. If counsel is unclear about how to resolve an ethical issue, counsel should seek guidance from other experienced attorneys or from the Office of Bar Counsel. The fundamental obligations of counsel as set forth below are based on the District of Columbia Rules of Professional Conduct and the Superior Court Rules of Criminal Procedure.

***Responsibilities to the Client***

Establishing and maintaining a trusting relationship with a client is the foundation of quality representation. An attorney's responsibilities to his or her client include:

- open, candid, and on-going communication;
- thorough investigation of all necessary and relevant information;
- attempts to resolve relevant issues through formal or informal negotiation;
- obtain a plea offer and presenting it to the client, thoroughly reviewing the possible outcomes at trial and the consequences of accepting or rejecting the offer;
- adequate pre-trial preparation, including pretrial motions practice;
- attendance and participation in court conferences and hearings;
- post-hearing follow-up and review of court orders;

- assist clients with accessing services or navigating the court system;
- effective sentencing and post-sentencing advocacy; and
- discussion with the client about his or her appellate rights.

**Superior Court of the District of Columbia,  
Criminal Division  
Attorney Practice Standards for Criminal Defense Representation**

**Statement of Intent**

D.C. Code § 11-2602 (2009) provides that Superior Court judges shall appoint qualified attorneys to represent indigent clients in criminal proceedings under the Criminal Justice Act (“CJA” or “the Act”). Counsel appointed pursuant to the Act “shall in every case be selected from panels of attorneys designated and approved by the courts.” *Id.* See also *Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act (2008)*, D.C. Court Rules Ann., vol. I, p. 783 (ed. 2009) (hereinafter *Plan for Furnishing Representation*). To comply with the Act, the Chief Judge issued Administrative Order No. 00-26, which requires the Superior Court to establish a panel of qualified attorneys to represent indigents under the Act. Thereafter, the Chief Judge established a panel of attorneys eligible to receive CJA appointments in Superior Court.

To accomplish the goals of the Act and to promote high quality representation for indigents charged with criminal offenses under the D.C. Code, the *Plan for Furnishing Representation* provides that the Superior Court shall maintain panels of attorneys to receive appointments in criminal proceedings “pursuant to procedures prescribed by Administrative Orders currently in effect or subsequently promulgated.” *Plan for Furnishing Representation* at p. 783. To this end, the Court, by Administrative Order, seeks to establish standards of practice for attorneys appointed as counsel in matters under the jurisdiction of the Criminal Division. Counsel must comply with these practice standards. The Court will rely on these standards in evaluating the performance and conduct of counsel.

**A. Panels, Appointments, Certification, and Training**

**A-1 Application Requirements for Admission to the Panel**

Individual attorneys seeking to receive appointments pursuant to the Criminal Justice Act must be selected from the Superior Court’s Panel. An attorney seeking to become a member of the Panel must complete an application (which sets forth the qualifications to act as defense counsel in criminal court proceedings); provide a Certificate of Good Standing from the District of Columbia Bar; and certify, in writing, that he or she has read, understands, and agrees to abide by these standards. Additionally, any attorney admitted to the Panel is expected to have read the District of Columbia Rules of Professional Conduct and to have a working knowledge of all Superior Court Rules and District of Columbia statutes governing criminal court proceedings. All newly admitted Panel attorneys must comply with the training requirements set forth below in Section A-2 during the first year of their admission to the Panel. After the first year of admission to the Panel, counsel must comply with the annual training requirements set forth below in Section A-3.

## **A-2 Training Requirements for New Panel Members**

Before appointment to their first case, attorneys who have never been a member of the U.S. Panel, must complete eight hours of training presented by the Superior Court Trial Lawyers' Association and the Public Defender Service. This training shall be devoted to the following categories: the operation of presentment and arraignment court, preventive detention and preliminary hearings, obtaining discovery and filing motions, and the operation of specialty courts and diversion programs. In addition, all new Panel members are required to comply with the Continuing Legal Education ("CLE") requirements of A-3.

As part of the training process, new attorneys are strongly encouraged to seek the advice and input of more experienced lawyers. Correspondingly, experienced attorneys are encouraged to aid new attorneys by providing mentoring, assisting in preparing cases, debriefing following court hearings, and answering questions as they arise.

New applicants are encouraged to "second chair" a felony jury trial in Superior Court. To this end, in the event that a Panel attorney chooses to act in a "second chair" capacity and the Panel attorney of record and the client consent, judges are encouraged to facilitate such representation by allowing the attorney who wishes to act as "second chair" to enter his or her praecipe for the purposes of the trial.

## **A-3 Continuing Legal Education Requirements for All Attorneys**

All attorneys admitted to the Panel, and who practice in the Superior Court, have a continuing obligation to stay abreast of changes and developments in the law. Counsel should be familiar with substantive criminal law, criminal procedure, and the Superior Court Rules of Criminal Procedure.

Pursuant to the Chief Judge's Administrative Order 2-33, all Panel attorneys practicing in the Superior Court must complete at least eight hours of CLE each year. Panel attorneys are not permitted to carry over credits from one calendar year to another. Qualifying CLE credits must be satisfied in accordance with the requirements set forth in the Chief Judge's Administrative Order 2-33. Panel attorneys fulfilling the certification training requirement pursuant to Section A-2 are exempted from fulfilling the CLE requirements during the first year of their admission to the Panel.

## ***B. General Authority and Duties***

### **B-1 Reasonable Diligence and Promptness**

An attorney appointed in any criminal matter has a duty to advance zealously the interests of the client. All CJA Panel attorneys practicing in the Superior Court shall act

diligently and promptly in the representation of their clients. Counsel should avoid unnecessary delay in the disposition of cases, should take steps to inform all parties when delay is unavoidable, should strive to be punctual in attendance in court, and should timely file all motions, requests for discovery, briefs, and other papers.

## **B-2 Case Management**

Counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with the rendering of quality legal service, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Before agreeing to act as counsel, or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, resources, knowledge, and experience to offer quality legal services in a particular matter. If, after accepting an appointment, it later appears that counsel is unable to offer effective representation, counsel should consider appropriate case law and ethical standards in deciding whether to move to withdraw or take other appropriate action such as seeking to have a "second chair" attorney appointed to the case. When appropriate, counsel should undertake the following:

- (1) Seeking access to appropriate support services, such as investigative assistance, sign interpreters, and language translators;
- (2) Developing a timeline that identifies the actions to be taken and sets deadlines;
- (3) Thoroughly preparing for all hearings and trials;
- (4) Providing Memoranda of Law to the Court;
- (5) Counseling clients concerning matters related to their case;
- (6) Assessing clients' needs for services and assisting in obtaining those services to the fullest extent possible;
- (7) Serving all filings and communications with the court on all parties pursuant to Superior Court Rules;
- (8) Participating in negotiations, discovery, pretrial conferences, mediation sessions, and hearings;
- (9) Cooperating and communicating civilly with other professionals, the court, and parties in a case; and
- (10) Promptly providing the case file to successor attorneys.

### **B-3 Case Organization**

Counsel shall maintain a client case file on each active case. Counsel should maintain information about the case's history and proceedings on or within the client case file so that it is readily discernible. The case file should contain all relevant documents received or produced by the attorney in connection with his or her representation of the client in the case.

### **B-4 Financial Eligibility Determinations**

Counsel must ensure that the client has been interviewed and declared financially eligible for representation under the Criminal Justice Act. See also D.C. Code § 11-2602 (2001).

### **B-5 Continuity of Representation**

Counsel shall continue to represent the client from the point of the initial court proceedings through sentencing, and if applicable, post-conviction litigation, and any other related proceedings until the case is closed, unless good cause is shown or otherwise ordered by the court. If counsel is ethically required to withdraw his or her representation in a matter, he or she must do so in a manner that avoids prejudice to the client and must obtain leave of court. Moreover, counsel must provide to the client written notification of the withdrawal, unless such withdrawal occurs during a court proceeding with the client present.

### **B-6 Court Appearances**

At all hearings counsel has an obligation to be prepared and, consistent with client confidentiality and the ethical duty of zealousness, to provide information to the Court on the status of the criminal matter. Additionally, counsel should make efforts to avoid schedule conflicts that prevent counsel from attending a court hearing. If counsel is unable to attend a court hearing or expects to be late due to commitments in other courtrooms or for other reasons, he or she shall notify the courtroom clerk and/or judge's chambers and/or the Chief Judge's Conflicts List. When practicable, and if it will not prejudice the client's interests, counsel should make reasonable efforts to secure an attorney to act as stand-in counsel.

### **B-7 Duties of Stand-In Counsel**

Any attorney appointed to stand in for another at any proceeding must:

- (1) Prepare for the hearing;
- (2) Represent the client zealously as if his or her own client;

- (3) Communicate with counsel of record regarding all upcoming dates and/or hearings; and
- (4) Provide all notes, documents, and discovery (if received) to counsel of record.

Further, in the event that counsel must rely on stand-in counsel to be present at a substantive proceeding, counsel, where practicable, must inform the client prior to the proceeding that there will be stand-in counsel. Additionally, counsel must brief stand-in counsel on the status of the client's case, as well as follow-up with stand-in counsel as soon as possible after the proceeding.

## **B-8 Ethical Obligations and Conflicts of Interest**

Counsel must be knowledgeable of the District of Columbia Rules of Professional Conduct. Counsel must be familiar with his or her ethical obligations including:

- (1) Maintaining a thorough and complete client file;
- (2) Immediately providing a copy of the file to the client upon request;
- (3) Keeping the client informed of the progress of the case; and
- (4) Keeping client information confidential.

Also, counsel must be alert to possible conflicts of interest that would impair counsel's ability to represent a client, and counsel has a duty to seek prompt resolution of conflicts. If, during the course of representing a client, counsel becomes aware of a conflict of interest, counsel must resolve the conflict in accordance with the guidance provided by D.C. ethics rules and opinions. Consistent with Rule 1.6(e)(5) of the D.C. Rules of Professional Conduct, an attorney who is unclear about how to resolve an ethical issue should seek guidance from other experienced attorneys, Special Counsel at the Public Defender Service or the D.C. Bar ([www.dcbar.org](http://www.dcbar.org)). Should it be determined that a conflict exists requiring withdrawal, such withdrawal should be requested expeditiously.

## **C. *Attorney-Client Relationship***

### **C-1 Role of Counsel for Defendant**

The lawyer's principal duty is the representation of the client's legitimate interests. Thus, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client. The potential for conflict of interest between an accused and counsel's other current or former clients should be clearly recognized and acknowledged. In every such case, the attorney should assess the potential for a divided loyalty and resolve the conflict appropriately.

**C-2 Protecting Confidentiality of Communication and Proceedings in General**

Confidential communications between defense counsel and the client should be conducted in private. When necessary, counsel should make the appropriate request to court officials, detention staff, and others to provide necessary accommodations for private discussions between counsel and client. Counsel should comply with all confidentiality statutes, rules, and procedures that govern the dissemination of information concerning the representation.

**C-3 Meeting with the Client**

Counsel shall conduct a substantive in-person client interview as soon as practicable. In all cases counsel must attempt to maintain regular contact with the client to inform the client and to enable counsel to advocate diligently for the client's interests and needs.

**C-4 Barriers to Communication with Clients**

Counsel should address barriers to communication, such as differences in language or literacy, or mental/physical disability. In the event that counsel is not able to communicate with the client because of either language differences or mental disability, the attorney should take steps that are reasonably necessary to communicate with the client. Such steps may include having counsel obtain appropriate accommodations and expert assistance, including an interpreter for pre-trial preparation, interviews, and investigation, as well as for in-court proceedings.

**C-5 Preparing for and Conducting the Initial and Follow-up Meetings with the Client**

Prior to the initial meeting, counsel should, where practicable:

- (1) Be familiar with the elements of the offense and the potential punishment;
- (2) Obtain copies of any relevant documents that are available, including copies of any charging documents, law enforcement reports, and recommendations and reports made by Pretrial Services Agency representatives concerning pretrial release;
- (3) Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in making that determination;
- (4) Be familiar with the different pretrial release and detention options and conditions the court may set and whether private or public agencies are available to act as a custodian upon the client's release; and

- (5) Be familiar with any procedures available for reviewing the trial judge's determination of level of detention and/or conditions of release.

At the initial meeting, counsel should endeavor to:

- (1) Explain the nature of the allegations, what the government must prove, and the likely and maximum potential consequences;
- (2) Explain the role of counsel, the attorney-client privilege and its limits, and advise about the consequences of the client discussing the facts of the case with others without first consulting with the attorney;
- (3) Explain the procedures that will be followed in setting the conditions of pretrial release;
- (4) Explain the type of information that will likely be requested in any other interview the client may have (e.g., with court staff, Pretrial Services Agency, and forensic or mental health evaluators);
- (5) Provide a general procedural overview of the progression of the case, where possible;
- (6) Provide client with information regarding how counsel can be readily reached generally within one business day;
- (7) Consider scheduling the next client meeting;
- (8) Provide realistic answers, where possible, to the client's most urgent case-related questions;
- (9) Consider discussing what arrangements will be made, if any, to address the client's most critical needs (e.g., medical attention, request for separation during detention or contact with family or employers);
- (10) Discuss the facts surrounding the allegations against or affecting the client;
- (11) Identify any possible witnesses who should be located;
- (12) Obtain information relevant to potential motions issues;
- (13) Discuss evidence that should be preserved;
- (14) Where appropriate, discuss evidence of the client's competence to stand trial and/or mental state at the time of the offense;

- (15) Discuss the client's physical and mental health and educational background as related to the case and whether to obtain a signed release authorizing the attorney and/or his or her agent to obtain medical or other relevant official records related to the client;
- (16) Discuss the client's past adult and juvenile record, if any, including arrests in this and other jurisdictions, and history of client's compliance with orders to appear in court. Counsel should also determine whether the client has any pending charges or is on probation, parole, or supervised release, and determine the client's past or present performance under supervision; and
- (17) If the client is not detained, obtain the client's contact information, including family members or friends, who are likely to know the client's whereabouts when urgent communication is necessary.

#### **C-6 Duty to Keep Client Informed**

Counsel should 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 types of contact from the client, where possible, within one business day or a reasonable time thereafter. 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. When on vacation or otherwise unavailable for a considerable length of time, counsel shall make reasonable efforts to provide emergency contact information and/or arrange to have back-up counsel who can respond to client emergencies.

#### **C-7 Advising the Client**

Counsel should advise the client with complete candor about all aspects of the case, including a candid assessment of the possible outcomes. Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the client's decision as to the entry of a plea. Counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Counsel should inform the client of all court hearings and the need to attend. Counsel should advise the client about the consequences of non-compliance with court orders.

#### **C-8 Distinguishing Between Client and Attorney Decisions**

Certain decisions relating to the conduct of the case are to be decided by the client, and defense counsel decides others. Decisions that are to be made by the client after full consultation with counsel include whether to enter a plea, whether to waive jury trial, whether the client will testify, and other important decisions as appropriate under case law. While the client is not the final arbiter as to the conduct of the defense,

the lawyer has a duty to consult with the client about defense strategy. Strategic and tactical decisions should be made by defense counsel after consultation with the client, where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what pre-trial and trial motions should be made, and what evidence should be introduced at hearings or trial.

### **C-9 Client Plea Discussions**

Counsel should explore with the client the possibility of reaching a negotiated plea of the charges rather than proceeding to trial, and whether it promotes the client's interests. In doing so, counsel should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation. Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated disposition. Counsel should not accept or reject any plea agreement without the client's express authorization. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to prepare a defense.

### **C-10 Respecting Client Decisions**

Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his or her position. If the client remains unpersuaded, however, the attorney should assure the client that he or she will defend the client vigorously within the bounds of the law and the D.C. Code of Professional Conduct.

## ***D. Pre-Trial Actions***

### **D-1 Detention Hearing**

Counsel has an obligation to consult with the client regarding the available conditions of release, to consider the client's wishes, and to advocate the express interests of the client. Counsel should consider the range of alternatives to secure detention, including halfway houses and treatment options available through the community such as drug and alcohol treatment facilities, detox facilities, electronic monitoring, acute mental health facilities, stay-away orders, and other non-secure community-based alternatives. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting a request for release and make a proposal concerning conditions of release. Counsel should adequately explain the conditions of release to the client.

If the client is not released, he or she should be advised of the right to have the decision to detain reviewed, and counsel should seek review if requested. If the client continues to be detained, counsel should advise the client of the right to appeal and the advantages and disadvantages of doing so. Where the client is unable to obtain pretrial

release, counsel should inform the court and the detention facility personnel about any medical, psychiatric, or security needs of the client, if appropriate.

## **D-2 Probable Cause Determination**

The attorney should decide his or her strategic goals prior to the preliminary hearing or detention hearing. The attorney should anticipate the government's prima facie case and be prepared for cross-examination. An attorney should take steps to see that the hearing is conducted within the statutory timeframe, unless there are strategic reasons for not doing so. In preparing for the hearing, the attorney should:

- (1) Know the elements of each of the offenses alleged;
- (2) Know the law regarding the probable cause standard; and
- (3) Obtain factual information available concerning probable cause through investigation and witness interviews as the circumstances of the case require.

With consent of the client, an attorney may waive the preliminary hearing or detention hearing where there are valid reasons for doing so.

## **D-3 Investigation**

Counsel should conduct a prompt and diligent independent case investigation if appropriate. The nature and extent of the investigation will be governed by the specific facts of the case and the goals of the client. Curtailment of the scope of the investigation must be thoroughly discussed with the client, who should be informed of all the risks and benefits.

Counsel should be familiar with the evidence in the case, including the scene(s) of the alleged offense(s) and the circumstances existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions). Counsel should consider hiring experts if warranted by the case. The investigation should also include efforts to secure relevant information in the possession of the prosecution and law enforcement authorities, including:

- (1) Client, complainant, or witness records, if appropriate;
- (2) 911 tapes, inter-officer radio transmissions, and dispatch reports; and
- (3) Civilian police officer complaints and internal affairs files, and other investigation records.

The investigation should also include, but is not limited to:

- (1) Interviewing the client and relevant witnesses identified by the client or by other means;
- (2) Reviewing the client's records including educational, psychological, psychiatric, medical, substance abuse treatment, law enforcement, and court files; and
- (3) Photographing, mapping, and measuring the crime scene when relevant.

#### **D-4 Discovery**

At all stages of the proceedings, counsel should be alert to opportunities for obtaining discovery as permitted by law. Through Super. Ct. Crim. R..16, *Rosser* letters, *United States v. Rosser*, 381 A.2d 598 (D.C. 1977), and *Brady* requests, *Brady v. Maryland*, 373 U.S. 83 (1963), counsel has a duty to pursue, as soon as practicable, both formal and informal discovery unless a sound tactical reason exists for not doing so. In considering discovery requests, counsel should evaluate any reciprocal discovery obligations that may be triggered by a particular discovery demand and consider the strategic implications of the discovery request.

#### **D-5 Filing Pleadings**

When appropriate, counsel must file motions, requests for discovery, and responses and answers to pleadings filed by other parties. These pleadings should be thorough, accurate, and timely. All motions must be served on parties pursuant to Superior Court Rules. Counsel shall consider all potentially appropriate motions so that the absence of pretrial motions is the result of professional choice rather than negligence or error.

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

- (1) The pretrial detention or release conditions of the accused;
- (2) The constitutionality of any applicable statute(s);
- (3) Potential defects in the charging process, including lack of jurisdiction;
- (4) The sufficiency of the complaint or indictment;
- (5) The propriety and prejudice of any joinder of charges or defendants in the charging document;
- (6) The discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;

- (7) The suppression of evidence gathered as a result of violations of the Fourth, Fifth, or Sixth Amendments to the United States Constitution, or corresponding or additional statutory provisions, including:
  - a. the fruits of illegal searches or seizures;
  - b. involuntary statements or confessions;
  - c. statements or confessions obtained in violation of the accused's right to counsel or privilege against self-incrimination; and
  - d. unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
- (8) Access to and funds for experts, investigators, interpreters, or other resources the client cannot obtain for himself or herself because of indigence;
- (9) A defendant's request for a continuance in order to adequately prepare the case;
- (10) Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
- (11) Matters of trial or courtroom procedure;
- (12) Non-suggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client; and
- (13) Request for speedy trial or dismissal for lack of speedy trial.

#### **D-6 Negotiated Pleas**

Counsel should participate in plea negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider narrowing contested issues or reaching global resolution of all charges. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of a plea agreement.

#### **D-7 Trial Preparation**

Counsel should develop and continually reassess the theory of the case based on investigation and discovery. To the extent possible, counsel should develop a witness list in advance of trial, and subpoena witnesses and obtain records in a timely manner. Counsel should set aside adequate time to prepare witnesses and exhibits beforehand. Counsel should communicate with the client in advance of trial, attempt to resolve issues prior to trial, and conduct necessary legal research on relevant topics.

## ***E. Hearings***

### **E-1 Motion Hearings**

When a hearing on a motion requires the presentation of evidence, counsel's preparation for the evidentiary hearing should include:

- (1) Investigation, discovery, and research relevant to the claim advanced;
- (2) The subpoenaing of all helpful evidence and witnesses, including witness preparation; and
- (3) A full understanding of the burdens of proof, evidentiary principles, and trial court procedures applicable to the hearing, including an assessment of the benefits and disadvantages of having the client testify.

### **E-2 Court Appearances**

Counsel should be prepared for and attend all hearings, and should participate in all telephone or other conferences with the court. If counsel has a conflict, he or she should call the court's conflict line and notify the courtroom clerk and/or judge's chambers if possible.

### **E-3 Experts**

Counsel should, where appropriate, request from the court funds to retain experts and/or other professionals to provide consultation and testimony regarding issues in the case, evaluations of the client and others, and tests of physical evidence. Counsel should secure the assistance of experts where it is necessary or appropriate to:

- (1) The preparation of the defense;
- (2) An adequate understanding of the prosecution's case; or
- (3) Rebut the prosecution's case.

### **E-4 Client and Witness Testimony**

Counsel should explain to the client and the witnesses, if appropriate, what is expected to happen before, during, and after each hearing. Counsel should make all reasonable efforts to prepare the client and defense witnesses for both direct and cross-examination.

### **E-5 Motions and Objections**

Counsel should make appropriate motions and evidentiary objections during hearings to advance the client's position and to preserve the issue for appeal in the event of a conviction. Counsel should file appropriate motions with memoranda of points and authorities and proposed orders in support of the client's position.

#### **E-6 Presentation of Evidence**

When necessary to advance the client's position, counsel must present and cross-examine witnesses, and prepare and present exhibits.

### ***F. Trial Preparation***

#### **F-1 General Trial Preparation**

The decision to proceed to trial rests solely with the client. Counsel should develop a defense theory of the case in consultation with the client.

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

- (1) Copies of all relevant documents filed in the case;
- (2) Relevant documents prepared by investigators;
- (3) Voir dire questions;
- (4) Outline or draft of opening statement;
- (5) Cross-examination plans for prosecution witnesses;
- (6) Direct examination plans for defense witnesses;
- (7) Copies of defense subpoenas;
- (8) Prior statements of prosecution witnesses (e.g., transcripts and police reports) and expert reports;
- (9) Prior statements of defense witnesses;
- (10) Reports from defense experts;
- (11) List of all defense exhibits and the witnesses through whom they will be introduced;
- (12) Originals and copies of all documentary exhibits;

- (13) Proposed jury instructions with supporting case citations;
- (14) Copies of all relevant statutes and cases;
- (15) Outline or draft of closing argument; and
- (16) Proposed verdict form if there is more than one charge or the likelihood of lesser included offenses.

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 can reasonably be anticipated to arise in the trial. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of the effort, counsel should request, whenever necessary, that all trial proceedings be recorded.

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 possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

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

## **F-2 Voir Dire and Jury Selection**

Where appropriate, in advance of trial, counsel should obtain the trial judge's procedures for jury selection, including topic lists, whether each juror will be questioned individually, whether the attorneys can conduct voir dire, and whether each juror can be questioned in the jury room. Counsel should be familiar with the procedures by which a jury venire is selected and be alert to any potential legal challenges to the composition or selection of the venire. Counsel should also be familiar with the 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. Prior to jury selection, counsel should seek to obtain a prospective juror list.

If appropriate, counsel should file a list of voir dire questions that counsel would like posed to the jury. These questions should be narrowly tailored to the specific facts of the case and designed with the purpose of eliciting information about the prospective jurors' attitudes and conveying legal principles that will be relevant to the defense case.

Counsel should be familiar with the law concerning peremptory strikes, "for cause" challenges, and constitutional challenges, including *Batson v. Kentucky*, 476

U.S. 79 (1986) and its progeny. Counsel should also be familiar with the law concerning mandatory and discretionary voir dire inquiries. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case. Where a challenge for cause has been denied, counsel should make relevant arguments to protect the record for appeal.

### **F-3 Opening Statement**

Counsel should be familiar with the law and the individual trial judge's rules regarding the permissible content of an opening statement. Prior to delivering an opening statement, counsel should seek sequestration of witnesses, unless there is a strategic reason for not doing so.

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

Counsel should have a clear objective as to the purpose of the opening statement, (e.g., self-defense, insufficient evidence, or misidentification). Counsel's objective in making an opening statement may include the following:

- (1) To provide an overview of the defense case;
- (2) To identify the weaknesses of the prosecution's case;
- (3) To emphasize the prosecution's burden of proof;
- (4) To summarize the testimony of witnesses, and the role of each in relationship to the entire case;
- (5) To describe the exhibits that will be introduced and the role of each in relationship to the entire case;
- (6) To clarify the jurors' responsibilities; and
- (7) To state the ultimate inferences that counsel wishes the jury to draw.

Counsel should be prepared to object to the prosecutor's opening statements when legally appropriate. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, 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 prosecutor's error;
- (2) The possibility that an objection might enhance the significance of the information in the jury's mind; and
- (3) Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

#### **F-4 Cross Examination**

Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive the prior statements of a prosecution witness until that witness has completed direct examination, counsel should request adequate time to review the documents before commencing cross-examination. Counsel should demand *Jencks* documents for each witness and should request a *Jencks* inquiry out of the presence of the jury if necessary. *Jencks v. United States*, 353 U.S. 657 (1957).

In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. Counsel should be aware of the applicable law concerning competency of witnesses in general and admission of expert testimony, particularly in order to be able to raise appropriate objections.

In preparing for cross-examination, counsel should:

- (1) Consider integrating 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;
- (3) Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
- (4) Consider a cross-examination plan for each of the anticipated witnesses;
- (5) Be alert to inconsistencies or variations in a witness's testimony;
- (6) Review all prior statements 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; and

- (8) Be alert to issues relating to witness credibility, including bias and motive for testifying.

#### **F-5 Motion For Judgment of Acquittal**

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

#### **F-6 Defense Case**

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider if the client's interests are best served by not putting on a defense case and, instead, relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law, the client bears a burden of persuasion or a burden of production. In developing and presenting the defense case, counsel should consider the opportunity it may present for rebuttal by the prosecutor.

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
- (4) Consider the need for expert witnesses.

Counsel should discuss with the client throughout the case all the considerations relevant to the client's decision to testify. The decision to testify rests solely with the client, however, and if the client decides to testify, counsel should assist the client in preparing his or her testimony including anticipated lines of cross-examination. Counsel should prepare the client for a *Boyd* inquiry by the court if the client decides not to testify. *Boyd v. United States*, 586 A.2d 670 (D.C. 1991).

Counsel should conduct redirect examination as appropriate.

#### **F-7 Closing Argument**

Counsel should be familiar with the substantive limits on both prosecution and defense summation. In developing a 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. Helpful testimony from direct and cross-examinations;
  - b. Verbatim instructions drawn from the jury charge;
  - c. Responses to anticipated prosecution arguments;
  - d. The effects of the defense argument on the prosecutor's rebuttal argument;
  - e. Exhibits; and
  - f. Demonstrative evidence;
- (4) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
  - a. Whether counsel believes that the case will result in a favorable verdict for the client;
  - b. The need to preserve the objection for a double jeopardy motion; or
  - c. The possibility that an objection might enhance the significance of the information in the jury's mind.

## **F-8 Jury Instructions**

Counsel should be familiar with the rules and the individual judge's practices concerning proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions. Where appropriate, counsel should submit a list of proposed jury instructions, modified according to the particular circumstances of the case. Where appropriate, and after consulting with the client, counsel should consider whether to request instructions on a lesser-included offense or object to the government's request for such instruction. Where appropriate, counsel should also consult with the client concerning the desirability of requesting a "reasonable efforts" instruction. Criminal Jury Instructions for the District of Columbia, Instruction 2.401 (LexisNexis 2009). Counsel should be prepared to provide applicable case law in support of the proposed instructions. 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.

During the delivery of instructions to the jury, counsel should be attentive to assure that the court does not deviate from the agreed-upon instructions. In the event an unfavorable deviation occurs, counsel should object and request additional or curative instructions.

If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

## **G. *Sentencing and Post-Conviction Advocacy***

### **G-1 Sentencing Hearings**

Counsel must be prepared for sentencing arguments and consider preparing a written memorandum where appropriate.

In preparation for sentencing, counsel should meet with the client to discuss possible mitigating evidence to present at sentencing. Counsel should review all relevant documents including the Pre-Sentence Report, the Sentencing Guidelines calculation, and other appropriate documents. Counsel should then meet with the client to review the Pre-Sentence Report. Counsel should marshal evidence in mitigation and prepare the client for allocution.

### **G-2 Post-Sentencing Obligations**

It is counsel's duty to explain the nature, obligations and consequences of the sentence to the client. Trial counsel's responsibilities are not terminated by the imposition of sentence or by the filing of a notice of appeal and may include, where appropriate, the filing of a motion for a new trial, motion to reduce or modify sentence, or other post-trial pleadings, regardless of whether different counsel is appointed in the appellate court.

## **H. *Appeal***

### **H-1 Decision to Appeal**

Counsel shall discuss with the client the client's right to appeal from a guilty verdict at trial. If the client decides to appeal, trial counsel must file the notice of appeal.

## **I. *Effective Date***

These practice standards shall take effect immediately.