

**MINIMUM ATTORNEY PERFORMANCE STANDARDS
APPELLATE AND POST-CONVICTION MATTERS**

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1.1 -The Objective and Function of the Performance Standards

These standards are intended to service several purposes. They are intended to encourage public defenders and other appointed counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent clients. The Standards are intended to alert counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions that must be taken in each case to ensure that the client receives the best representation possible. The Standards are also intended to provide a measure by which the Commission can evaluate the performance of individual attorneys, and to assist the Commission in training and supervising attorneys.

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 1.1.

1.2 - Interpretation of the Performance Standards

The language of these Standards is general, implying flexibility of action which is appropriate to the situation. Use of judgment in deciding upon a particular course of action is reflected by the phrases "should consider" and "where appropriate." In those instances where a particular action is absolutely essential to providing quality representation, the Standards use the words "should" or "shall." Even where the Standards use the words "should" or "shall," in certain situations the lawyer's best informed professional judgment and discretion may indicate otherwise.

There is an unending variety of circumstances presented by indigent defense cases and that this variation in combination with changes in law and procedure requires that attorneys approach each new case with a fresh outlook. Therefore, though the Standards are intended to be comprehensive, they are not exhaustive. Depending upon the type of case, there may well be additional actions that an attorney should take or should consider taking in order to provide zealous and effective representation.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 1.2.

2.1 - Training and Experience of Appellate and Post- Conviction Counsel

An attorney appointed by the Commission to represent clients, whether as a contract counsel or as a public defender, shall be licensed to practice law in the State of North Dakota.

An attorney who undertakes representation of clients as an appointed counsel must have sufficient training and appellate or post-conviction experience to provide effective representation. Depending on the particular matter, in order to provide quality appellate representation, an attorney may need to be familiar with the substantive criminal law and the law of criminal procedure, the Juvenile Court Act, the North Dakota Rules of Appellate Procedure, the Uniform Post-Conviction Procedure Act, and their application in the State of North Dakota. Appointed counsel has a continuing obligation to stay abreast of changes and developments in the law, to meet the necessary requirements to maintain their license, and to meet any requirements set by Commission for training.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 2.1.

3.1 - Accepting Appointments - Adequate Time and Resources

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

If counsel's caseload is so large that counsel is unable to satisfactorily meet these, counsel shall inform the Supervising or Lead Attorney of counsel's public defender office (if counsel is a public defender) or the Director of the Commission on Legal Counsel for Indigents (if counsel is an attorney otherwise assigned to cases by the Commission}, and the court or courts before whom counsel's cases are pending. If a Supervising or Lead Attorney of a public defender office determines that the caseloads for his or her entire office are so large that counsel is unable to satisfactorily meet these, the Supervising or Lead Attorney shall inform the court or courts before whom cases are pending and the Director.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 3.1.

Also considered: ABA Formal Ethics Opinion 06-441 (May 13, 2006).

3.2 - Accepting Appointments - Conflicts

Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client.

Counsel should identify those potential clients for whom representation would constitute an ethical conflict as soon as possible. Conflicts will include, but are not limited to, the following situations:

1. representation of co-defendants;
2. when the defendant was represented at the trial level by the appellate counsel or by a counsel in the same public defender office as the appellate counsel, and it is asserted by the client that trial counsel provided ineffective representation, or it appears to the appellate counsel that trial counsel provided ineffective representation, or appellate counsel is likely to be a necessary witness;
3. when it is necessary for the appellate attorney to interview or examine in a post-conviction evidentiary hearing another client of the attorney's office in an effort to substantiate information provided by the first client; or
4. when, in the pursuit of an appeal or post-conviction hearing, it is necessary to assert for the first time that another client of the office committed perjury at trial.

When a case assignment is made, the attorney should conduct an initial

intake interview/consultation with the client where the attorney first inquires as to whether the client knows of any other parties or defendants who are, or who may become clients of the attorney. The attorney should then (assuming that no conflicts have as yet been identified) ask about the specifics of the case, which may lead to the identification of other conflicts. If a conflict is identified, the interview should end at that point.

If there is a conflict, the attorney should submit a conflict form to the lead attorney for that judicial district, or to the Commission, if there is not a lead attorney, and a different attorney will be assigned. If the attorney has made an appearance before the court, the attorney should also move the court to withdraw, and/or submit a substitution of counsel, whichever is the court's preference.

If a conflict develops later during the course of representation, counsel has a duty to notify the client and move to withdraw from the matter.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 3.2; NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), II (E). American Bar Association Model Rules of Professional Conduct 3.7: Lawyer as Witness. Approved with changes at December 20, 2022 meeting.

Form: "Conflict Reassignment."

4.1 - General Responsibilities - Acting Diligently and Promptly

Counsel should act with reasonable diligence and promptness in representing a client. Counsel has the obligation to keep the client informed of the progress of the case in a timely manner, where it is possible to do so.

Counsel should avoid unnecessary delay in the disposition of cases. Cases in which the defendant is incarcerated only on the basis of the conviction under appeal shall be handled in a priority manner.

Counsel should be punctual in attendance at court and in the submission of all motions, briefs and other papers.

Counsel should not misrepresent facts or otherwise mislead the court in order to obtain a continuance. Counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

Counsel should not carry a workload, that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of the matter, or may lead to the breach of professional obligations. Counsel should not accept an appointment in one case for the purpose of a delay in another case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 4.1; ABA Standards for Criminal Justice: Defense Function, Standard 4-1.3; NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (E).

4.2 - General Responsibilities - Acting Ethically

All attorneys are expected to act ethically at all times. As with all members of the bar, a public defender or other counsel appointed by the Commission is an officer of the court. An attorney should not intentionally misrepresent matters of fact or law to the court. Counsel should disclose to the tribunal legal authority in the controlling jurisdiction know to defense counsel to be directly adverse to the position of the client and not disclosed by opposing counsel.

Counsel should adhere to the North Dakota Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons. Counsel has no duty to execute any directive of a client which does not comport with law or such standards.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 4.2.

See also: Comment to N.D.R. Prof. Conduct 6.2 ("[a]n appointed lawyer has the same obligations to the client as retained counsel . . .").

4.3 - General Responsibilities – Acting in Accordance with Commission Standards and Policies

Public defenders and other counsel appointed by the Commission should abide by the standards and policies adopted by the Commission on Legal Counsel for Indigents.

Adopted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 4.3.

5.1 - Contact with Client

All clients shall be personally interviewed by the attorney who will be handling the appellate or post-conviction case. The interview may be in person, or telephonically.

Counsel shall discuss the merits, strategy, and ramifications of the proposed appeal or post-conviction matter with the client at the earliest convenience, and provide a candid estimate of the probable outcome.

Counsel shall inform the client of the status of the case at each step in the appellate or post-conviction process, explain any delays in the case, and provide general information to the client about the appellate or post-conviction process. Counsel shall provide the client with each substantive document filed in the case by other parties and by counsel.

Adapted from: NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (I).

5.2 - Contact with Trial Counsel

Appellate or post-conviction counsel shall notify trial counsel that the appellate/post-conviction counsel has been assigned to provide appellate/post-conviction representation to the defendant. Appellate/post-conviction counsel shall consult with trial counsel in order to assist appellate/post-conviction counsel in consult understanding and presenting the client's issues on appeal or in the post-conviction matter.

In any case in which the appellate or post-conviction counsel shall argue that trial counsel provided ineffective assistance of counsel, appellate/post-conviction counsel shall give notice to the trial counsel of such asserted claim.

Adapted from: NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (J); New Mexico Public Defender Department, Performance Guidelines for Appellate Criminal Defense Representation, Guideline 2.4 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)).
Approved with changes at December 20, 2022 meeting.

6.1 - Determining Issues to Appeal

Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment or order, including any that might require initial presentation in a post-conviction proceeding. Counsel should advise the client on the probable outcome of a challenge to the judgment or order.

Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw while protecting the client's interests to the extent possible.

Appellate counsel has the ultimate authority to decide which arguments to make on appeal. When appellate counsel decides not to argue all of the issues that his or her client desires to be argued, appellate counsel should inform the client of any right to file a pro se brief.

*Adapted from: ABA Standards for Criminal Justice: Defense Function,
Standard 4-8.3. Approved with changes at December 20, 2022 meeting.*

See also: N.D.R. Prof. Conduct 3.1 (Meritorious claims and contentions).

6.2 - Release Pending Appeal/Stay of Execution of Judgment

If it appears that there is reasonable probability of release pending appeal or other relief pending review, appellate counsel shall bring appropriate motions therefor.

Commentary: Once an appeal has been filed, it is the obligation of the appellate attorney to file any necessary motions for relief pending appeal.

Adapted from: NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (DJ).

See also: N.D.R. Crim. P. 38 (Stay of execution and relief pending review); id. Rule 46 (c) (Release from custody); N.D.R. App. P. 8 (Stay or injunction pending appeal); id. Rule 9 (Release in criminal case); ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 13.3 (Bail Pending Appeal).

6.3 - Briefing

All motions, briefs, and appendices should have a professional, neat appearance without typographical errors or misspellings. Counsel should be accurate in referring to the record and the authorities upon which counsel relies in the preparation of briefs and motions. All briefs shall make appropriate use of legal authority. Counsel shall utilize case authority from other jurisdictions in support of positions for which no local authority exists or when local authority is contrary to the weight of recent decisions from other jurisdictions. Where appropriate, briefs shall include cites to non-case reference materials, such as law reviews, treatises, scientific works, and legal encyclopedias. Counsel shall use appropriate citation forms.

Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

If needed, counsel should move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by the record.

Counsel shall comply with all applicable appellate and court rules and statutes regarding the timing and filing of pleadings, briefs, and appendices, and with other timing requirements as may be specified by the court in a particular case.

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-8.4; Michigan Minimum Standards for Indigent Criminal Appellate Defense, Standards 8, 14, 15 (1982); NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (L).

See also: N.D.R. App. P. 28 (Briefs); id. Rule 30 (Appendix to the briefs); id. Rule 31 (Serving and filing briefs); id. Rule 32 (Form of briefs, appendices, and other papers); N.D.R. Ct. 11.6 (Medium-Neutral Case Citations).

6.4 - Oral Argument

Absent unusual circumstances appellate counsel should request oral argument.

Counsel shall inform the client of the date, time and place scheduled for oral argument as soon as counsel receives notice from the appellate court.

In preparation for oral argument, counsel shall review the briefs and appendices of the parties, and all relevant case law.

Counsel should be accurate in referring to the record and the authorities upon which counsel relies in oral argument.

Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

*Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-8.4; Michigan Minimum Standards for Indigent Criminal Appellate Defense, Standard 16 (1982); Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual Policies and Procedures, Standard IV (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)).
Approved with changes at December 20, 2022 meeting.*

See also: N.D.R. App. P. 34 (Oral argument); N.D.R. App. P. 28

6.5 - Court's Decision

Counsel should promptly notify the client of the appellate court's decision in the matter, and provide to the client a copy of the opinion. Counsel should accurately inform the client of the courses of action which may be pursued as a result of the decision.

Adapted from: Michigan Minimum Standards for Indigent Criminal Appellate Defense, Standard 18 (1982).

6.6 - Petition for Rehearing

Following the completion of an unsuccessful direct appeal, appellate counsel shall inform the client of the opportunity to file a petition for rehearing. Counsel shall file and litigate such petition, if it appears that there is a reasonable probability of success.

Approved with changes at December 20, 2022 meeting.

See also: N.D.R. App. P. 40 (Petition for rehearing).

7.1 - Determining Issues to Raise in a Post-Conviction Matter

Post-conviction counsel should give a client his or her best professional evaluation of the questions that might be legitimately raised in a post-conviction matter. Counsel, when inquiring into the case, should consider all issues that might provide a ground for relief, and whether it is an appropriate time to bring a post-conviction matter. Counsel should advise the client on the probable outcome of the post-conviction matter. Counsel should endeavor to persuade the client to abandon a wholly frivolous matter, and to eliminate contentions lacking in substance.

If the client chooses to proceed with a post-conviction matter against the advice of counsel, counsel should present the case, as long as there is a basis for doing so that is not frivolous. If there are no meritorious claims or contentions, counsel should move the court for permission to withdraw.

Counsel has the ultimate authority to decide which arguments to make in a post-conviction matter. When counsel decides not to argue all of the issues that his or her client desires to be argued, counsel should inform the client of his or her right to proceed pro se in the matter.

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-8.3; id. Standard 4-8.5.

See also: NDCC § 29-32.1-01 (Remedy- To whom available - Conditions); id. § 29-32.1-07 (Amended and supplemental pleadings); N.D.R. Prof. Conduct 3.1 (Meritorious claims and contentions).

7.2 - Investigation and Preparation

Counsel has a duty to conduct a prompt investigation of each post-conviction matter. Counsel should obtain copies of all relevant police reports, witnesses' statements, charging documents and judgments in the underlying matters. Counsel should order any necessary transcripts.

See also: NDCC § 29-32.1-08 (Discovery); Policy Regarding Transcripts, Adopted by the Commission on October 27, 2006.

7.3 - Documents submitted by counsel

All pleadings, motions, briefs, and other documents prepared and submitted by counsel should have a professional, neat appearance without typographical errors or misspellings. Counsel should be accurate in referring to the record and the authorities upon which counsel relies. All briefs shall make appropriate use of legal authority. Counsel shall utilize case authority from other jurisdictions in support of positions for which no local authority exists or when local authority is contrary to the weight of recent decisions from other jurisdictions. Where appropriate, briefs shall include cites to non-case reference materials, such as law reviews, treatises, scientific works, and legal encyclopedias. Counsel shall use appropriate citation forms.

Counsel shall comply with all applicable court rules and statutes regarding the timing and filing of pleadings, briefs, and motions, and with other timing requirements as may be specified by the court in a particular case.

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-8.4; Michigan Minimum Standards for Indigent Criminal Appellate Defense, Standards 8, 14, 15 (1982); NLADA Standards and Evaluation Design for Appellate Defender Offices (1980), I (L).

See also: N.D.R. Ct. 3.1 (Pleadings); id. Rule 11.6 (Medium-Neutral Case Citations).

7.4 - Motions

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the defendant is entitled to relief which the court has discretion to grant. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon, and be supported by evidence when required.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 9.1. 9.2.

See also: NDCC § 29-32.1-09 (Summary disposition); N.D.R. Ct. 3.2 (Motions).

7.5 - Hearing

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

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all possible state's witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses, when available;
8. prior statements of all defense witnesses;
9. a list of all defense exhibits, and the witnesses through whom they will be introduced;
10. originals and copies of all documentary exhibits;
11. copies of all relevant statutes and cases; and
12. outline or draft of closing argument.

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

Throughout the hearing process counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review,

and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so.

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. If necessary, counsel should obtain appropriate clothing from a second-hand store for the client.

Counsel should plan with the client the most convenient system for conferring throughout the hearing. 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.

Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 11.1.

See also: NDCC § 29-32.1-10 (Hearing - Evidence).

7.6 - Court's Decision

Counsel should promptly notify the client of the court's opinion or judgment in the matter, and provide to the client a copy of the opinion or judgment. Counsel should accurately inform the client of the courses of action which may be pursued as a result of the decision.

Adapted from: Michigan Minimum Standards for Indigent Criminal Appellate Defense, Standard 18 (1982).

7.7 - The Right to an Appeal

Following the entry of any final decision in a post-conviction matter, counsel shall inform the client of the client's right to appeal and the action that must be taken to perfect an appeal.

If it appears that the client desires to appeal and desires appointed counsel for the appeal, post-conviction counsel should file the notice of appeal. Counsel should also order any necessary transcripts.

The appeal will be assigned pursuant to the Commission's policy on Assignment of Appellate Cases, and if a different attorney is assigned to the matter, a substitution of counsel can be filed at a later date.

In those case where a different attorney will handle the appeal, post-conviction counsel should cooperate in providing information to the appellate counsel concerning the proceedings in the lower court.

Commentary: A portion of this standard was previously adopted by the Commission at its October 27, 2006, meeting as "Policy on Filing the Notice of Appeal."

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, 13.2.

See also: NDCC § 29-32.1-14 (Review); N.D.R. App. P. 4 (d) (Appeal in post-conviction proceeding); Policy Regarding Transcripts, Adopted by the Commission on October 27, 2006.

Form: Request to Assign Case to Appellate Attorney

8.1 - Later Proceeding in the Trial Court

Any proceeding in the trial court following a successful appeal or post-conviction judgment is a new case assignment. The matter will be handled by appellate/post-conviction counsel, unless such counsel solely handles appellate matters. In such case, the new case assignment will be assigned pursuant to the Commission's policies on assignment of cases in that particular judicial district.

In those case where a different attorney will handle the trial court proceeding, appellate/post-conviction counsel should cooperate in providing information to the trial counsel concerning the appellate or post-conviction proceedings, and should cooperate in the filing of a substitution of counsel.

9.1 - Case Assignment Termination

Counsel should notify or attempt to notify the client when the case assignment is concluded. Counsel should file a motion to withdraw when the case assignment terminates, or should request that the order or judgment include a provision that counsel is permitted to withdraw.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards- Criminal Matters, 14.1. Approved with changes at December 20, 2022 meeting.

See also N.D.R. Ct. 11.2 (Withdrawal of attorneys).