NORTH Dakota | Commission on Legal Counsel for Indigents
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MINIMIUM ATTORNEY PERFORMANCE STANDARDS
CRIMINAL 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 evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such evaluation, depending upon all the circumstances.

Adapted from: GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Introduction to Performance Standards; ABA Standards for Criminal Justice: Defense Function, Standard 4-1.1.

1.2 Interpretation the Performance Standards

The language of these Standards is general, implying flexibility of action which is appropriate to the situation. Use of judgement 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 judgement 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 and the particular jurisdiction, there may well be additional actios that an attorney should take or should consider taking in order to provide zealous and effective representation.

Adapted from: GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases Olay 21, 2004), Introduction to Performance Standards.

2.1 - Training and Experience Defense 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 experience to provide effective representation. In order to provide quality representation, an attorney must be familiar with the substantive criminal law and the law of criminal procedure, and its 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.

Commentary: Adopted by the North Dakota Commission on Legal Counsel for Indigents at its June 22, 2006 meeting as "Standard on 'Minimum Qualifications for Contract Counsel and Public Defenders. ' "

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 1.1 (a); GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard I.B.

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 defendant 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 performance standards, 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 performance standards, the Supervising or Lead Attorney shall inform the court or courts before whom cases are pending and the Director.

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 1.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 1. C.

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. 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 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 incidents, 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 Commission 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.

Commentary: The majority of the language of this standard was previously adopted by the Commission as "Policy Regarding Conflicts."

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 1.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 1.C. Approved with changes at June 14, 2022 meeting.

Form: "Conflict Reassignment"

4.1 – General Responsibilities - Acting Diligently and Promptly

Defense 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. This includes an obligation to provide copies of police reports, filed documents and other relevant documents to the client, unless it is not appropriate to do so in the specific case.

Counsel should avoid unnecessary delay in the disposition of cases. Counsel should be punctual in attendance at court and in the submission of all motions, briefs and other papers. Counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

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 charges, or may lead to the breach of professional obligations. Counsel should not accept an appointment in one case for the purpose of delaying trial in another case.

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-1.3. NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 1.3.

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

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 known 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: ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard I.A.

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.

5.1 - Attorney-Client Relationship - Role of Counsel

The primary role of a public defender or other counsel appointed by the Commission is to provide zealous and quality representation for their clients. Counsel should seek the lawful objectives of the client and should not substitute the attorney's judgnent for that of the client in those case decisions that are the responsibility of the client.

Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.

Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

Counsel has an obligation to abide by ethical norms, to act in accordance with the rules of the Court, and pursuant to the Standards and Policies of the Commission.

Commentary: The decisions which are ultimately for the client include: what plea to enter, whether to accept a plea agreement, whether to waive a jury trial, whether to demand a speedy trial, and whether to testify in his or her own behalf whether to appeal. Counsel has the primary responsibility for deciding what motions to file and what evidence to offer, including which witnesses to call and what questions to ask of the witnesses.

Adapted from: Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases, Standard 1.3 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)); NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 1.1.

5.2 - Attorney-Client Relationship - Candor Toward Client

Counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence over the client's decision as to the client's pleas.

Adapted from: Connecticut Public Defender Services Commission, Guidelines on Indigent Defense, Guideline 5.1 (as set forth in the Compendium of Standards for Indigent Defense Systems, vol. 2 (Dec. 2000)).

6.1 - Initial Case Activities- Meeting with Client/Scheduling Initial Intake Interview

Counsel or a representative of counsel should meet with incarcerated clients within 24 hours after assignment to the case. Counsel or a representative of counsel should contact a nonincarcerated client within 72 hours after assignment to the case, in order to schedule an initial interview with the client.

Commentary: It is understood that in some situations counsel or a representative of counsel will not be able to meet with an incarcerated client within 24 hours after assignment. Under such circumstances, counsel or counsel's representative should attempt to contact the client by telephone to inform the client of the representation, to answer any immediate questions, and to inform the client of when counsel or counsel's representative will meet with the client. If contact cannot be made by telephone, the client should be sent the information by mail.

The initial contact with a non-incarcerated client may be by telephone or mail.

Adapted from: GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 2.A.

6.2 - Initial Case Activities- Initial Intake Interview

A. Preparation:

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

1. be familiar with the elements of the offense(s) and the potential punishment(s);
2. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available.

B. In addition, where the Client is incarcerated, the attorney should:

1. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
2. be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release; and
3. be familiar with any procedures available for reviewing the trial judge's setting of bail.

C. Conducting the Interview:

1. The purpose of the initial interview is to acquire information from the client concerning the case, the client and pre-trial release, and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, prison and other records as may be pertinent.

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

a) the facts surrounding the charges leading to the client's arrest, to the extent the client knows and is willing to discuss these facts;

b) the client's version of arrest, with or without warrant; whether client was searched and if anything was seized, with or without warrant or consent; whether client was interrogated and if so, was a statement given; client's physical and mental status at the time the statement was given; whether any exemplars were provided and whether any scientific tests were performed on client's body or body fluids;

c) the names and custodial status of all co-defendants and the name of counsel for co-defendants (if counsel has been appointed or retained);

d) the names and locating information of any witnesses to the crime and/or the arrest; regardless of whether these are witnesses for the prosecution or for the defense; the existence of any tangible evidence in the possession of the State (when appropriate, counsel should take steps to insure this evidence is preserved);

e) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, any prior names or alias used, family relationships, immigration status (if applicable), employment record and history, and social security number;

f) the client's physical and mental health, educational, vocational and armed services history;

g) the client’s current immigration status and immigration history;

h) the client's immediate medical needs including the need for detoxification programs and/or substance abuse treatment;

i) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges or outstanding warrants from other jurisdictions or agencies and also whether he or she is on probation (including the nature of the probation, such as "first offender") or parole and the client's past or present performance under supervision;

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

k) the ability of the client to meet any financial conditions of release (for clients who are incarcerated); and

l) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense, including releases from the client for any records for treatment or testing for related to behavioral health.

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

a) an explanation of the scope of representation which will be provided;

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

c) an explanation of the charges and the potential penalties, including the court's authority to order restitution;

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

e) an explanation of the right to plead not guilty, the right to a speedy and public trial by an impartial jury, the right to counsel at trial and every stage of the proceeding, the right to confront and cross examine witnesses, the right to testify, and the right to not incriminate him/herself; and

f) the names of any other persons who may be contacting the client on behalf of counsel.

4. If special conditions of release have been imposed (e.g., random drug screening) or other orders restricting the client's conduct have been entered (e.g., a no contact order), the client should be advised of the legal consequences of failure to comply with such conditions.

5. For clients who are incarcerated, the following additional information should be provided:

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 also an explanation that the client should not make statements concerning the offense;

c) warn the client of the dangers with regard to the search of client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 2.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 2.B.; Virginia Indigent Defense Commission, Standards of Practice For Indigent Defense Counsel (December 2021), Performance Standard 2.2. *Approved with changes at June 14, 2022 meeting.*

Forms: "Interview Form (version 10/23/06). "

6.3 – Initial Case Activities – Pretrial Release

If conditions of release have not been set, counsel shall attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

Counsel should be prepared to present to the court a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands 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 to properly post such assets.

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

Where the client is unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 2.1; id. Guideline 2.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 2. C.

See also: N.D.R. Crim. P 46 (Release from custody); NDCC Ch. 29-08 (Bail).

7.1 - Investigation and Preparation - Independent Investigation

Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client's statements or admissions to defense counsel of facts constituting guilt or the client's stated wish to plead guilty, insure that the charges and disposition are factually and legally correct and the client is aware of potential defenses to the charges.

Sources of investigative information may include the following:

1. 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 and affirmative defenses that may be available;
    c) any lesser included offenses that may be available; and
    d) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.
2. Information from the client. If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment of counsel. The interview with the client should be used to obtain information as described above under the performance standards applicable to the initial interview of the client. Information relevant to sentencing should also be obtained from the client, when appropriate.
3. Interviewing witnesses. Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses adverse to the accused should be conducted in a manner that permits counsel to effectively impeach

the witness with statements made during the interview, such as in the presence of a third person who will be available to testify as a defense witness at trial.

4. The police and prosecution reports and documents. Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports and field notes. Where appropriate, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain criminal history information regarding the client and for the prosecution witnesses.

5. 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 examine any such physical evidence.

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

7. Securing the assistance of experts. Counsel should secure the assistance of experts where it is necessary to:

   a) the preparation of the defense;

   b) adequate understanding of the prosecution's case;

   c) rebut the prosecution’s case; 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.

e) Ascertain the immigration consequences of a criminal disposition

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-4.1; NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 4.1; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 4.A; New Mexico Public Defender Department, Performance Guidelines for Criminal Defense Representation, Guideline 4.1 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)). Virginia Indigent Defense Commission, Standards of Practice For Indigent Defense Counsel (December 2021), Performance Standard 6.1. Approved with changes at June 14, 2022 meeting.

7.2 – Investigation and Preparation - Formal and Informal Discovery Procedures

Counsel has a duty to pursue as soon as practicable discovery regarding to the case and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering formal discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

Counsel should consider seeking discovery of the following items:

1. potential exculpatory information;
2. potential mitigating information;
3. all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;
4. the prior criminal record of the client and any evidence of other misconduct that the prosecution may intend to use against the client;
5. all books, papers, documents, data, photographs, tangible objects, buildings or places, or copies, or copies or portions thereof, relevant to the case;
6. all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
7. a written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.
8. the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
9. statements of co-defendants;
10. statements of other persons when relevant to the case.

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

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 4.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 4.B; Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures 4.10 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000).

See also: N.D.R. Crim. P. 16 (Discovery and inspection).

7.3 - Investigation and Preparation - Duties Regarding Physical Evidence

In a criminal matter, defense counsel may receive physical evidence from the client, his or her friends and relatives, the police, or the prosecution.

Counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver the item to law enforcement authorities only if required by law or court order, or as provided in this standard.

Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in this standard. In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

Defense counsel may receive the item for a reasonable period of time during which defense counsel intends to return the item to the owner; reasonably fears that return of the item to the source will result in destruction of the item; reasonably fears that return of the item to the source will result in physical harm to anyone; intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in counsel's law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

If the item received is contraband (an item possession of which is in and of itself a crime, such as narcotics), defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense

counsel's judgment he or she cannot retain the item, whether or not it is contraband, defense counsel should disclose the location of or should deliver the item to law enforcement authorities in a manner that does not pose an unreasonable risk of physical harm to anyone.

If defense counsel discloses the location of or delivers the item to law enforcement authorities, or delivers the item to a person other than the client, counsel should do so in a way designed to protect the client's interests.

Adapted from: ABA Standards for Criminal Justice: Defense Function, Standard 4-4.6; Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures 6 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2(Dec. 2000)).

7.4 - Investigation and Preparation - Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. Counsel, during the investigatory stages of the case preparation must understand and develop strategies for advancing the appropriate defenses on behalf of the client.

Adapted from: GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 4. C.

8.1 - Preliminary Proceedings - Initial Appearance

Counsel should preserve the client's rights at the initial appearance on the charge by advising the client to plead not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so.

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 3.1.

See also: N.D.R. Crim. P. 5 (Initial Appearance before the Magistrate).

8.2 - Preliminary Proceedings - Preliminary Hearing

Where the client is entitled to a preliminary hearing, counsel should take steps to see that the hearing is conducted in a timely fashion unless there are strategic reasons for not doing so.

In preparing for the preliminary hearing, the attorney should become familiar with:

1. the elements of each of the offenses alleged;
2. the law of the jurisdiction for establishing probable cause;
3. factual information which is available concerning probable cause; and
4. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing.

Counsel should not advise the client to waive the preliminary hearing unless there is a strategic reason for doing so.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 3.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 3.A.

See also: N.D.R. Crim. P. 5 (Initial Appearance before the Magistrate); u. Rule 5.1 (Preliminary examination).

9.1- Pretrial Motions - The Decision to File Motions

A. 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.

B. The decision to file pretrial should be made after considering the applicable law in light of the known circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial custody of the client;
2. the constitutionality of the implicated statute(s);
3. the potential defects in the charging process;
4. the sufficiency of the charging document(s);
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 the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, as a result of violations of the North Dakota Constitution, or as a result of violations of North

   Dakota statutes or rules; 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;

d) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

8. access to resources which may be denied to an accused because of his or her indigence;

9. the defendant's right to a speedy trial;

10. the defendant's right to a continuance in order to adequately prepare or present his or her case;

11. matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

12. matters of trial or courtroom procedure.

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

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

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

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

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 5.1.

See also: N.D.R. Crim. P. 12 (Pleadings and pretrial motions); u. Rule 12.1 (Notice of alibi defense); u. Rule 12.1 (Notice of defense based on mental condition); u. Rule 14 (Relief from prejudicial joinder); NDCC Ch. 29-19 (Continuance); u. 5 29-19-02 (Right to speedy trial).

9.2 - Pretrial Motions - Preparing, Filing, and Arguing

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. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

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

1. investigation, discovery and research relevant to the claim advanced;
2. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses.
3. full understanding of the burdens of proof, evidentiary principles and dial court procedures applying to the hearing, including the benefits and potential consequences of having the client testify, and
4. familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial.

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 5.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 5.B.

See also: N.D.R. Crim. P. 12 (Pleadings and pretrial motions); id. Rule 47 (Motions); N.D.R. Ct. 3.2 (Motions).

9.3 - Pretrial Motions - Continuing Duty to File Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Furthermore, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 5.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 5.B.

10.1 - Plea Negotiations - Duties

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

Counsel should keep the client fully informed of any continued plea discussion and negotiations and promptly convey to the accused any offers made by the prosecution for a negotiated settlement.

Counsel shall not accept 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 preserve a defense nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 6.1; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 6.A.

10.2- Plea Negotiations - Negotiation

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

1. the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment;
2. the possibility of forfeiture of assets;
3. other consequences of conviction including but not limited to deportation, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote and hold public office, and sex offender registration requirements;
4. any possible and likely sentence enhancements or parole consequences;
5. the possible and likely place and manner of confinement;
6. the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.

B. In developing a negotiation strategy, counsel should be completely familiar with concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

1. not to proceed to trial on merits of the charges;
2. to decline from asserting or litigating any particular pretrial motions;
3. an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and

4. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

C. In developing a negotiation strategy, counsel should be completely familiar with benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

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

2. to dismiss or reduce one or more of the charged offenses;

3. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

4. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

5. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;

6. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the offcial pre-sentence report, certain information; and

7. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the client's place and/or manner of confinement.

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

1. consider whether interviewing the alleged victim or victims is appropriate and if so, who is the best person to do so and under what circumstances;
2. consider to what extent the alleged victim or victims might be involved in the plea negotiations;
3. be familiar with any rights afforded the alleged victim or victims under North Dakota law; and
4. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.

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

1. the various types of pleas that may be agreed to, including a plea of guilty, an Alfred plea, and a conditional plea of guilty;
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.

F. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and probation department which may affect the content and likely results of negotiated plea bargains.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 6.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 6.B.

See also: N.D.R. Crim. P. n (Pleas); u. Rule 48 (Dismissal); NDCC Ch. 12.1-34 (Fair Treatment of Victims and Witnesses); u. Ch. 12.1-35 (Child Victim and Witness Fair Treatment Standards).

10.3 - Plea Negotiations - The Decision to Enter a Plea of Guilty

Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages of the potential consequences of the agreement.

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

A negotiated plea should be committed to writing whenever possible.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 6.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 6. C.

10.4 - Plea Negotiations - Entry of the Plea before the Court

Prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
2. make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions and collateral consequences the client will be exposed to by entering a plea;
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and if he or she will be providing a statement concerning the offense; and
4. make certain that if the plea is a non-negotiated plea, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.

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

After entry of the plea, if the defendant is not immediately sentenced, counsel should be prepared to address the issue of release pending sentencing. the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 6.4; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 6.D.

See also: N.D.R. Crim. P. 11 (Pleas).

11.1 - Trial - Trial Preparation

The decision to waive a jury trial rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision 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 all possible prosecution witnesses;
6. direct examination plans for all prospective defense witnesses;
7. copies of defense subpoenas;
8. prior statements of all prosecution witnesses (such as transcripts and police reports) and counsel should have prepared transcripts of any audio or video taped witness statements;
9. prior statements of all defense witnesses;
10. reports from defense experts;
11. a 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, and where appropriate, consider and list the evidence necessary to support the defense requests for jury instructions:
14. copies of all relevant statutes and cases; and

15. 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 trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

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

Throughout the trial process counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and 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. If necessary counsel should file pre-trial motions to insure that the court personnel follow appropriate procedures so as not to reveal to jurors that the defendant is incarcerated.

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.

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

Commentary: Under North Dakota law, issues of fact must be tried by a jury, unless the jury is "waived by the consent of the defendant and the state 's attorney ' NDCCS29-16-02.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.1; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7.A.

See also: N.D.R. Crim. P. 23 (Trial byjury or by court); u. Rule 51 (Preserving claimed error).

11.2 - Preparation for Jury Selection

Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, 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.

Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:

1. to elicit information about the attitudes of individual jurors, which will inform counsel and defendant about peremptory strikes and challenges for cause;
2. to convey to the panel certain legal principles which are critical to the defense case;
3. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
4. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and
5. to establish a relationship with the jury.

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.

Counsel should be familiar with the law concerning challenges for cause and peremptory s&ikes. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7.B.

See also: N.D.R. Crim. P. 24 (Trial jurors); NDCC Ch. 29-17 (Trial Jury).

11.3 – Trial - Jury Selection

Counsel should personally voir dire the panel.

Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.

If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the other jurors and counsel should consider requesting that the court, rather than counsel, conduct the voir dire as to those sensitive questions.

In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

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

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

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

Counsel should consult with the client in exercising challenges.

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

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.2; GA Performance Standards for Criminal Defense Representation in

Indigent Criminal Cases (May 21, 2004), Performance Standard 7.B; Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures 6.4 (c)(as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)).

See also: N.D.R. Crim. P. 24 (Trial jurors); NDCC Ch. 29-17 (Trial Jury); u. 5 29-1736.

11.4 – Trial - Jury Instructions

Be familiar with the Uniform Rules of Court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

Counsel should always submit proposed jury instructions in writing.

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

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

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

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.

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

Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.7; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7. G.

See also: N.D.R. Crim. P. 30 (Jury instructions).

11.5 – Trial - Sequestration of Witnesses

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

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7. C.

See also: N.D.R. Evid. 615 (Exclusion of witness).

11.6 - Trial - Opening Statement

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

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'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 which will be introduced and the role of each in relationship to the entire case;
6. to clarify the jurors' responsibilities;
7. to state the ultimate inferences which counsel wishes the jury to draw; and
8. to establish counsel 's credibility with the jury.

Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

Whenever the prosecutor oversteps the bounds of proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7.C.

11.7 – Trial - Confronting the Prosecution's Case

Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

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

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

In preparing for cross-examination, counsel should, when appropriate:

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;
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 in a witness' testimony,
6. be alert to possible variations in witnesses' testimony;
7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses
8. have prepared a transcript of all audio or video tape recorded statements made by the witness;

9. review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;

10. be alert to issues relating to witness credibility, including bias and motive for testifying; and

11. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

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 applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert in particular in order to be able to raise appropriate objections.

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 prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

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, in order that counsel may make an informed decision about whether to present a defense case.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.4; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7.D.

See also: N.D.R. Crim. P. 29 (Motion for a judgment of acquittal).

11.8 – Trial - Presenting the Defendant's Case

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

Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should be aware of the elements of any affirmative defense and whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

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. determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and
7. review all tangible evidence that must be presented.

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

Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable court room dress and demeanor.

Counsel should conduct redirect examination as appropriate.

At the close of the defense case, counsel should renew the motion for a directed verdict of acquittal on each charged count.

Adapted from: NL4DA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.5; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7. E.

See also: N.D.R. Crim. P. 17 (Subpoena).

11.9 – Trial - Closing Argument

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

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

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) helpful testimony from direct and cross-examinations;

b) verbatim instructions drawn from the jury charge; and

c) responses to anticipated prosecution arguments; and

4. the effects of the defense argument on the prosecutor's rebuttal argument.

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

1. whether counsel believes that the case will result in a favorable verdict for the client;
2. the need to preserve the objection for appellate review; or

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

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 7.6; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 7. F.

See also: NDCC 29-21-01 (Order of trial).

12.1- Sentencing - Obligations of Counsel

Among counsel's obligations in the sentencing process are:

1. where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial and collateral implications;
2. 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;
3. to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
4. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
5. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the pre-sentence investigation report before distribution of the report; and
6. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 8.1; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 8.A.

12.2 – Sentencing – Options, Consequences and Procedures

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

1. any sentencing guideline structure;
2. deferred sentence and any diversionary programs;
3. expungement and sealing of records;
4. or suspension of sentence and permissible conditions of probation;
5. the potential of recidivist sentencing;
6. fines, associated fees and court costs;
7. victim restitution;
8. reimbursement of attorneys' fees;
9. imprisonment including any mandatory minimum requirements;
10. the effects of "guilty but mentally ill" and "not guilty by reason of insanity*' pleas; and
11. civil forfeiture implications of a guilty plea.

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

1. credit for pre-trial detention;
2. parole eligibility and applicable parole release ranges (if applicable);
3. place of confinement and level of security and classification criteria used by the North Dakota Department of Corrections and Rehabilitation;
4. eligibility for correctional nd educational programs;
5. availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;

6. the possibility of negative immigration consequences;

7. loss of civil rights;

8. impact of a fine or restitution and any resulting civil liability;

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

10. suspension of a motor vehicle operator's permit;

11. prohibition of carrying a firearm; and

12. other consequences of conviction including but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, registration as a sex offender, loss of public housing and the loss of the right to hold public office.

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 availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;

3. the use of "victim impact" evidence at any sentencing hearing;

4. the right of the defendant to speak prior to being sentenced;

5. any discovery rules and reciprocal discovery rules that apply to sentencing hearings; and

6. the use of any sentencing guidelines.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 8.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 8.B.

See also: N.D.R. Crim. P. 32.1 (Deferred imposition of sentence).

12.3 Preparation for Sentencing

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

1. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
2. maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
3. obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills,
4. education, medical history and condition, and financial status, family obligations, and obtain from the client sources through which the information provided can be corroborated;
5. 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, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
6. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or proceedings;
7. prepare the client to be interviewed by the official preparing the pre-sentence report; and ensure the client has adequate time to examine the pre-sentence report, if one is utilized by the court;
8. inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to

be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences; and

9. collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 8.3; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 8. C.

See also: N.D.R, Crim. P 32 (Sentencing and judgment); NDCC Ch. 29-26 (Judgment and sentence).

12.4 - Sentencing - Presentence Report

Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence report. In addition, counsel should:

1. consider the strategic implications of requesting that a report be prepared;
2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;
3. review the completed report;
4. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
5. take appropriate steps to preserve and protect the client's interest where the defense challenges information in the presentence report as being erroneous or misleading and the court refuses to hold a hearing on a disputed allegation adverse to the client; the prosecution fails to prove an allegation; or the court finds an allegation not proved.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 8.4; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 8.B.

See also: N.D.R. Crim. P. 32 (Sentence and judgment).

12.5 – Sentencing - The Prosecution's Sentencing Position

Counsel should attempt to determine, unless there is a sound reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.

Adapted from: GA Performance Standards for Criminal Defense Representation in *Indigent Criminal Cases (May 21, 2004), Performance Standard 8.D.*

12.6 – Sentencing - The Sentencing Process

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

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

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

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

Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, probation or suspension of part or all of the sentence, psychiatric treatment or drug rehabilitation.

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

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 8.7; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 8.E.

13.1 - Motion for a New Trial

Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

When a plea of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. 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 upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 9.1; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 9.A.

See also: N.D.R. Crim. P. 33 (New' trial); u. Rule 47 (Motions).

13.2 - The Defendant's Right to an Appeal

Following conviction, counsel should inform the defendant of his or her right to appeal, the action that must be taken to perfect an appeal, and the time in which that action must be taken. This notice should be given in writing.

Counsel should inform the client that the appeal should be filed following judgment in the matter, not the verdict, absent a valid and compelling reason to appeal from the verdict. If the defendant desires to appeal and desires counsel for the appeal, trial counsel should file the notice of appeal. Trial 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 cases where a different attorney will handle the appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial 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: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 9.2; GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (May 21, 2004), Performance Standard 9.B.

See also: NDCC 29-28-06 (From what defendant may appeal); "Policy on Assignment of Appellate Cases, " adopted by the Commission at its June 22, 2006 meeting; "Policy Regarding Transcripts, " adopted by the Commission at its October 27, 2006 meeting.

13.3 - Bail Pending Appeal

Where a client indicates a desire to appeal the judgment of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

Commentary: Once a notice of appeal has been filed, it is the obligation of the appellate attorney to file any necessary motion for bail- pending appeal.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 9.3.

See also: N.D.R. Crim. P. 46 (c) (Release from custody); N.D.R. App. P. 9 (Release in criminal case)

13.4 - Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement. Counsel should also consider a remand and release order followed by a later date of self-surrender.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 9.4; New' Mexico Public Defender Department, Performance Guidelines for Criminal Defense Representation, Guideline 9.4 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000)).

13.5 - Sentence Reduction

Counsel should inform the client of procedures available for requesting a discretionary correction or reduction in the sentence imposed by the trial court, and the time limitations which apply to such request.

Commentary: If the client requests counsel to file a Rule 35(b) motion, counsel should do so as long as the case assignment has not terminated, pursuant to the Standard on Case Assignment Termination.

Adapted from: NLADA Performance Guidelines for Criminal Defense Representation (2001), Guideline 9.5.

See also: N.D.R. Crim. P. 35 (2006) (Correcting or reducing a sentence).

14.1 - 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 judgment include a provision that Counsel is permitted to withdraw.

Approved with changes at June 14, 2022 meeting.

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

15.1 - Children Prosecuted as Adults

Counsel representing a child who is being prosecuted as an adult should be familiar with the law and procedure covering children prosecuted as adults and the law and procedure of the juvenile courts. Counsel should, where possible, have received specialized training in the defense of children in the adult and juvenile courts.

The use of experts in evaluating a juvenile charged in adult court with a sex offense should be considered. Developing issues of competency, developmental disability, Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder should also be explored.

Counsel should be cognizant to the future effect of a transfer from "juvenile court" to "adult court."

Adapted from: GA Performance Standards for Criminal Defense Representation in Indigent Criminal Cases Olay 21, 2004), Performance Standard 10.A.

See also: NDCC 27-20-34 (Transfer to other courts).