Indiana Public Defender Council

PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION

Indiana Public Defender Council
309 W. Washington Street
Indianapolis, IN 46204
Phone: 317-232-2490
FAX: 317-232-5524

Updated: 2020

ACKNOWLEDGMENT

The National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense Representation, adopted in 1994, served as the basis for both the original 2000 version and the updated 2012 and 2014 versions of these guidelines. Indiana Public Defender Council (IPDC) is grateful to NLADA for permission to use and modify their guidelines. T

The Indiana Public Defender Council Board of Directors and IPDC staff provided assistance in the modification of these guidelines. For this update, IPDC staff reviewed developing case law and a number of other sets of performance guidelines that have been adopted around the nation and benefitted from feedback and comment from board members. The guidelines are intended to serve as a ready reference for Indiana's criminal defense practitioners.

A special thank you goes to Chris Shema, Joel Schumm, Laura Pitts and Gretchen Etling for their input and guidance in updating these guidelines to reflect best practices with respect to providing meaningful representation to indigent individuals at their first or initial appearance in court.

Contents

Where the Guidelines Apply

These *Performance Guidelines for Criminal Defense Representation* are promulgated by the Indiana Public Defender Council. The Council is dedicated to assuring the availability of high-quality legal representation for indigent people accused of crimes.

The *Guidelines* reflect the knowledge and experience of members of the Indiana Public Defender Council. The *Guidelines* are intended to provide guidance to criminal defense attorneys (by identifying potential options, actions and relevant considerations) for the purpose of ensuring that all defendants receive the zealous and quality representation that should be their right.

Defending criminal cases is an increasingly complex and difficult job.[1] The unending variety of factual situations presented by criminal cases and the constant changes in criminal law and procedure require that the attorney approach each new case with a fresh outlook. These complexities also make the drafting of general performance guidelines a difficult and challenging task. But there are procedures common to all criminal cases with which the attorney must be familiar in order to be able to incorporate and best utilize the varying facts and law of each individual case. The objective of these *Guidelines* is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible. While these *Guidelines* will perhaps be most useful to the new attorney or the attorney who does not have significant experience in criminal cases, they may also be useful to the experienced defense attorney in deciding upon the strategy and approach to a given case.

Just as criminal cases vary endlessly in their details, jurisdictions vary in practice and procedure. The language of these *Guidelines* is therefore general, implying flexibility of action by counsel 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 few instances where a particular action is absolutely essential to providing quality representation,[2] the *Guidelines* use the words "should" or "shall." Even where the *Guidelines* use the words “should” or “shall,” in certain situations the lawyer’s best, informed professional judgment and discretion may indicate otherwise.

While the *Guidelines* are intended to be comprehensive, they are not exhaustive. Depending upon the type of case and the particular jurisdiction, there may well be additional actions that an attorney should take or consider in order to provide zealous and quality representation.

Guidelines Do Not Apply in Death Penalty, Post-Conviction or Appellate Cases

These *Guidelines* are not intended for application in death penalty cases, deferring to the American Bar Association (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) and the *Indiana Rules of Criminal Procedure, Rule 24.* In addition, the *Guidelines* do not cover the area of post-conviction obligations of an attorney or the duties of appellate counsel.[3]

---

1 See Commentary to Guideline 1.1, *infra*.

2 One example is reading a presentence investigation report (where one has been prepared) prior to sentencing (Guideline 8.4(a)(3), *infra*).

3 Appellate attorneys are referred to NLADA, *Standards and Evaluation Design for Appellate Defender Offices*, 1980. See also Michigan Appellate Assigned Counsel System, *Regulations* and ABA *Standards*, Appeals, *infra* note 5.

Layout

Following each Guideline is a list of Related Standards, including nationally recognized standards[4] or codes (not necessarily focused on performance of counsel but addressing some aspects of representation) as well as statutes, regulations and policy manuals affecting attorneys in defender offices or assigned counsel programs. Following the Related Standards for each Guideline is a Commentary, which develops the rationale for the Guideline, drawing on primary legal and secondary materials. Where relevant, the Commentary contrasts the approach taken by these *Guidelines* with that taken by other standards.

These Guidelines do not take a position on the issue of whether criminal law should be formally recognized as a specialty by the organized bar.[5] The Guidelines recognize that criminal defense is a legal practice requiring dedication and skill.

4. Including the *Standards for Criminal Justice* promulgated by the American Bar Association [hereinafter ABA *Standards*].

5. Criminal law or practice is a recognized specialty in eleven states, including Indiana.

Guideline 1.1 Role of Defense Counsel

(a) The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.

Related Standards

Indiana Rules of Professional Conduct, Rule 1.1

ABA *Model Rules of Professional Conduct* (1983), [Hereinafter ABA *Model Rules*], Rule 1.1.

ABA *Model Code of Professional Responsibility*, (1980), [Hereinafter ABA *Model Code*], DR 6-101(A)(1).

ABA *Standards for Criminal Justice*, The Defense Function (3d ed.), [Hereinafter ABA *Standards*, The Defense Function], Standards 4-1.1, 4-1.6.

ABA *Standards for Criminal Justice*, Providing Defense Services (3d ed.), [Hereinafter ABA *Standards*, Providing Defense Services], Standard 5-1.1.

ABA *Ten Principles of a Public Defense Delivery System*, (adopted February 2002), [Hereinafter ABA *Ten Principles*], Introduction.

Massachusetts Committee for Public Counsel Services (MCPCS), *Manual for Counsel Assigned Through the Committee for Public Counsel Services (Policies and Procedures)* [Hereinafter Mass. Publ. Counsel Ser., *Manual*], updated through June 17, 2011, Sec. IV., Performance Standards and Complaint Procedures, Standards 1.1 and 1.3.

National Advisory Commission on Criminal Justice Standards and Goals [Hereinafter NAC], *Courts*, (1973), Standard 13.9.

NLADA, *Assigned Counsel Standards*, Standard 2.1.

Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct* (1980), appended to John M. Burkoff, *Criminal Defense Ethics* (rev.ed. 1993), Rule 4.1.

Washington State Bar Association, *Standards for Indigent Defense Services* [Hereinafter Washington State Bar *Standards*], updated through March 2, 2011, Standard 2.

Commentary

All lawyers have a professional, ethical duty to provide "competent" legal representation to their clients, under the Indiana Rules of Professional Conduct, Rule 1.1.[1] When dealing with the

1. Indiana Rules of Professional Conduct, Rule 1.1 reads as follows: "A lawyer shall provide competent representation to a

provision of counsel to poor persons accused of crime, the ABA and NLADA have both called for "quality" legal representation, a more progressive standard.[2] "It is precisely because 'clients' in criminal proceedings have entrusted the defense of their most fundamental liberties to the professional skill and personal integrity of their attorneys, however, that it is appropriate to remind the members of the criminal bar that neither the trial courts nor the supreme court of this state will allow them to abdicate their solemn duty to serve as zealous advocates of their clients' rights." See State v. Johnson, 714 N.E.2d 1209, 1213 (Ind.Ct.App. 1999). These Guidelines advocate the provision of zealous and quality legal representation to all clients charged with crime. In subsequent Guidelines and Comments, the shorter phrase "quality representation" may appear. The absence of the additional words "zealous and" in such instances does not reflect an acceptance of a lesser standard of representation. Rather, such Guidelines or Comments may deal with issues that would affect the quality but not necessarily the zealousness of counsel's representation (for example, an attorney's low experience level, Guideline 1.2, would not necessarily prevent that attorney from acting zealously but might lower the quality of counsel's zealous actions). "Zealous and quality representation" as required by this Guideline is the touchstone of all that follows.

Neither the terms "zealous and quality representation" nor "competent representation" are coextensive with the minimum standards of representation found in case law involving allegations of constitutionally ineffective assistance of counsel. The dual performance and prejudice test set forth in the landmark ineffective assistance case, Strickland v. Washington,[3] is designed to be applied *after* a conviction, when factors such as finality and independence of counsel must be considered.[4] That is, Strickland focuses on the fairness of the trial in the case being litigated, not on improving the quality of lawyering[5] or on establishing guidelines for defense attorneys. But the Sixth Amendment "protects rights that do not affect the outcome of a trial"; therefore,

---

client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Matter of Dahlberg, 611 N.E.2d 641, 643, 645-46 (Ind. 1993) (attorney failed to provide competent representation and violated Prof. Cond. R. 1.1; AThe litany of Respondent=s abuses violate virtually all professional guidelines.@) For factors assessing competence to handle a case, see IPDC Pre-Trial Manual, Ch. 14, Sec. 1.

See also Abraham v. State, 228 Ind. 179, 91 N.E.2d 358, 360 (1950) (AIf he elects to stand trial his counsel should vigorously present every legal defense and represent him with his utmost skill and ability. Anything short of this is not adequate, competent or effective representation by counsel which the Constitution commands shall be afforded.@)

2. ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-1.1 and History of Standard (2d ed.), pp. 5-7 (going on to say that at the very least, counsel being provided to indigent defendants must act in full compliance with the ABA *Standards* relating to The Defense Function); NLADA, *Assigned Counsel Standards*, 2.1.

3. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Christian v. State*, 712 N.E.2d 4 (Ind.Ct.App. 1999) (ineffective assistance of counsel where during closing argument defense counsel conceded his client sexually penetrated alleged victim; held, defense counsel undermined client=s credibility when client had earlier testified that sexual contact was consensual and that there was no penetration. Counsel failed to put State's charges to a meaningful adversarial test).

4. *See Luckey v. Harris, 860* F.2d 1012 (11th Cir. 1988), *cert.den 495* U.S. 957,110 S.Ct 2562, 109 L.Ed.2d 744 (1990), cited in *State v. Peart*, 621 So. 2d 780, 787 (La. 1993).

5. *See* Kathy Morris Mejia, *Legal Ethics: Competence to Defend a Criminal Case*, Criminal Justice (Magazine of the ABA Criminal Justice Section), pp. 26, 27, Fall 1988.

"deficiencies that do not meet the `ineffectiveness' standard may nonetheless violate a defendant's [Sixth Amendment] rights."[6] Actions or inactions that do not meet the test for ineffective assistance of counsel in a given case may still constitute poor representation. Because "effective" representation might be defined as any representation held not to be "ineffective," these Guidelines require that counsel provide *zealous and quality* representation.

The duty to provide zealous and quality legal representation applies to all criminal defense attorneys, regardless of the financial status of their clients, or how (or how much) the lawyer is being paid.[7]

Stating that ethical and professional obligations apply to counsel engaged in criminal defense may appear to be a restatement of the obvious.[8] However, increasing political, economic and social pressures on the criminal justice system[9] have led to demands that defense attorneys act

6. Luckey v. Harris*, supra* note 4. In Luckey, the Eleventh Circuit rejected an Eleventh Amendment challenge to a class action suit demanding reform of the Georgia system of providing defense counsel to accused persons unable to afford retained attorneys and also addressed the standard which the plaintiffs had to meet to state a Sixth Amendment cause of action. The Court refused to apply *Strickland* as the standard for a motion to dismiss, noting that "whether an accused has been prejudiced by the denial of a right is an issue that relates to relief -- whether the defendant is entitled to have his or her conviction overturned -- rather than to the question of whether such a right exists and can be protected prospectively." *Id*. at 1017. The lawsuit in Luckey was later dismissed from Federal court under the "abstention doctrine," Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992), *en banc* rehearing den 983 F.2d 1084 (case 2) (1993), but the proposition that the *Strickland* test need not apply to ineffectiveness challenges prior to conviction remains arguable, see *State v. Peart*, *supra* note 4.

7. ABA *Standards*, The Defense Function (3d ed.) Standard 4-1.2 (h) provides in part: "...Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program." Comment to Prof. Cond. R. 6.2 provides: "An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules."

8. Nonetheless, a reminder to observe specific ethical obligations would not be misplaced. As a Michigan State Bar committee noted in proposing a standard for court-appointed counsel that reiterates the necessity of preserving attorney-client privilege, "...it is quite easy to violate the attorney-client privilege through careless conversation or an effort to gain some strategic advantage." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 5, comment, 72 Mich. Bar Journal, #8. (August 1993) pp. 818, 819.

9. Special Committee on Criminal Justice in a Free Society, American Bar Association Criminal Justice Section, *Criminal Justice in Crisis* (Nov. 1988). *See also* The Spangenberg Group, "Overview of the Fulton County, Georgia, Indigent Defense System," 1990. At pp. 6-7, and 34, that report finds that the criminal justice system in Fulton County "is near collapse," due to (*inter alia*): a substantial increase in crime, in arrests, in drug offenses specifically, and in criminal filings in all courts (there being a number of different courts handling criminal matters in the county); overcrowding of the jail; under funding of the courts, prosecution and indigent defense components of the system; and fragmentation and a lack of coordination in regarding each of those components. Among the conclusions of the report is that there is a "need to establish maximum caseload levels for public defenders . . . in accordance with national standards and ethical requirements." Id. pp. 49-50. In its 2009 report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel,* The National Right to Counsel Committee wrote of continuing problems made worse by deep budget cuts as 37 states faced mid-year budget shortfalls. *Id,* p. 59.

as "team players," i.e. to keep the system functioning[10] even at the expense of individual clients.[11] While defense counsel may remain sensitive to systemic difficulties that plague fellow attorneys (e.g., calendaring problems that beset civil cases as a result of criminal case overloads), counsel must not compromise the representation of counsel's own clients when seeking to ameliorate such difficulties.[12]

Guideline 1.2 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel shall be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

Related Standards

ABA, *Standards*, Providing Defense Services (3d ed.), Standards 5-1.5; 5-2.2.

ABA *Model Rules*, Rule 1.1.

ABA *Model Code*, EC 6-1; EC 6-2.

ABA *Ten Principles*, Principles 6 and 9.

---

10. In 1969, then-Attorney General John N. Mitchell said:

> I firmly believe that appointed counsel should make every effort to aggressively defend a client. But, from time to time, we do hear of appointed counsel who impose upon the courts by filing duplicative and frivolous motions. Much of this, of course, comes from inexperience and from a well-intentioned desire to not overlook a single reasonable possibility for the defense. But at other times...some defense counsel, both retained and appointed, knowingly waste the court's time...*I hope, for the sake of all of us engaged in providing legal assistance to the poor, that you will give careful consideration to the types of motions you file in an effort to spend as little time as possible before a judge who has dozens of other cases backed up on his docket*... [emphasis added] Report of Proceedings of the National Defender Conference, Sponsored by the Department of Justice and the ABA, presented by the National Defender Project/NLADA, at the Department of State, Washington DC, May 14-16, 1969, pg. 11.

11. Attorney General John Mitchell, speaking in 1969 (*supra* note 10) went on to say: "While you may, in this process [of filing motions that clog judges' dockets], win a delay or possibly two for your client, you will be unnecessarily delaying the trials of other defendants, and I emphasize the other defendants because this becomes an important element in the process in which we are all interested." Id.

12. ABA *Standards*, The Defense Function (3d ed.), Standard 4-1.2(b); NLADA, *Standards for Defender Services*, Standard III.7.b; NAC, *Courts*, 13.9; *see also* National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter, NSC *Guidelines*], Recommendation 5.13, Role in the Community and the Criminal Justice System, stating that defense system attorneys "should consult regularly with members of the judiciary in order to promote understanding and resolution of problems" [but] "should be subject to judicial influence and supervision only in the same manner and to the same extent as are lawyers in private practice."

Indiana Rules of Professional Conduct, Rule 1.1

Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases, Standards E and M.

Mass. Publ.Counsel Ser. *Manual*, Sec. IV, Performance Standards and Complaint Procedures, Standard 1.2.

NAC, *Courts*, Standard 13.15 commentary.

National Study Commission on Defense Services, *Guidelines* for Legal Defense Systems in the United States (1976) [hereinafter NSC *Guidelines*], Recommendation 2.15.

NLADA, *Assigned Counsel Standards*, Standards 4.1.1. and 4.1.2.

NLADA, *Death Penalty Standards*, Standard 5.1

Washington State Bar *Standards,* Standards 9 and 14.

Commentary

Criminal law was described in 1976 by the National Study Commission on Defense Services as "a highly complex and specialized field,"[1] requiring specialized training beyond a law degree and a license to practice.[2] It has certainly gotten no less complex in the intervening years. Highly skilled advocates are needed to fulfill, in the modern criminal justice system, the role of defense counsel set forth in Guideline 1.1, *supra*.

Attorneys representing clients accused of criminal offenses must keep abreast of substantive and procedural developments in the area[3] -- no mean feat in an era of great legislative activity (especially passage of laws criminalizing more behavior[4] and making harsher the sentences and other consequences for existing crimes[5]) and court procedural changes intended to

1 NSC, *Guidelines*, Ch. 23 (Ensuring Effectiveness), p. 437.

2 Id.; see also ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-2.2; NAC, *Courts*, Standard 13.16, commentary, p. 285.

3 The need for continuing legal education is not unique to criminal defense work. More than 40 states require all lawyers to take a minimum amount of continuing legal education courses, ABA/BNA, *Manual on Professional Conduct*, 1989 update. See also *Indiana Rules for Admission to the Bar and the Discipline of Attorneys, Rule 29, Section 3* (shall complete no less than 6 hours of approved CLE each year and no less than 36 hours each three-year period. At least 3 hours in professional responsibility shall be included during the 3-year period).

4 E.g., under Ann. Laws of Mass. Chap. 266 ' 99A, effective 1990, Concealment of library materials of over $250 subject to imprisonment of up to five years; under $250, jail of no more than 1 year.

5 "The increase in sanctions is reflected in the fact that the number of people in prison and jails increased more than 600% between 1977 and 2005." American Council of Chief Defenders *Statement on Caseloads and Workloads* (2007)[Hereinafter AACD *Statement*], p.6; "The last 34 years have also seen the emergence of entire new practice areas, including sexually violent offender … proceedings…which require a significant degree of specialized knowledge…." Id., p.7.

control or cope with burgeoning dockets.[6] Defense counsel, like Alice and the Red Queen, must sometimes run as fast as possible to stay in one place,[7] much less get ahead in knowledge.

Despite the difficulties in maintaining it, up-to-date knowledge of the law is a vital part of providing quality representation.[8] For example, advising a client to take a guilty plea based on erroneous information about the available sentence alternatives[9] or other collateral consequences,[10] can be very detrimental to the client's welfare, as can missing a procedural filing deadline because the court rules have been changed.

Continuing legal education in criminal law is available from a variety of sources. National training seminars are available from NLADA, the National Criminal Defense College, and other organizations. The Indiana Continuing Legal Education Forum (ICLEF) and IPDC provide criminal law seminars, legal updates, and other training in a variety of formats. Trial defender offices should provide entry-level training as well as continuing legal education, possibly to assigned counsel lawyers as well as staff attorneys in the jurisdiction.[11] All attorneys representing criminal defendants should have and utilize access to continuing legal education about criminal matters.

Knowing the applicable written rules and laws may not be sufficient to allow counsel to provide quality representation, however. The unwritten rules of a particular judge may also impact the disposition of some aspect of the case. While counsel should not eschew the filing of appropriate motions just because the trial judge reportedly denies *all* Fourth Amendment motions to suppress evidence, counsel should be prepared for -- and advise clients of -- idiosyncratic judicial notions known to the practicing bar.[12] The need to become familiar with a particular system before guiding clients through it is discussed further in the Commentary to Guideline 3.2, *infra*.

---

6 Procedural changes may include adoption of modern technology that changes how counsel and/or clients interact with the court, such as telephone conferences with the prosecutor in court or chambers with the judge while defense counsel (or the client) is present only by telephone or video conferencing. ABA, *Attacking Litigation Costs and Delay* (Final report of The Action Commission to Reduce Court Costs and Delay) (1984) pg. 45-55 and Introduction, Project Reports and Research Findings.

7 Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1872).

8 "Counsel shall be familiar with the law applicable to the offense(s) charged, lesser included offenses, potential defenses, and the admissibility of potential prosecution and defense evidence." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 19, 72 Mich. Bar Journal (#8 August 1993) pp. 818, 820.

9 *E.g.*, *Medeiros v. State*, 733 S.W.2d 605 (Tx. Ct. App. 1987), where defendant elected assessment of sentence by court rather than jury and received a prison sentence. Counsel was unaware that statutory law did not allow the court to impose probation, but only a jury. Reversed on appeal for ineffective assistance of counsel.

10. See, e.g., *Padilla v. Kentucky,*130 S.Ct. 1473 (2010); AACD *Statement, supra* n. 5, p. 8 - 10.

11. See ABA *Standards*, Providing Defense Services (3d.Ed.), Standard 5-1.5 and commentary.
See also, The Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases, Standard M (comprehensive plans shall provide effective training, professional development and continuing education of all counsel and staff).

12. These notions may range from ideas about proper courtroom decorum, such as a custom that parties should speak seated from counsel table rather than standing (Douglas Frazer, "Too Many Notes: Rethinking Local Rules in the Context of Federal Multi-District Litigation," 39 Fed. B. News and J. 519 (Oct. 1992)), to personal sentencing policies, such as imposition of a maximum sentence for all drug convictions despite any individualized information in the presentence report.

As set out in Guideline 1.3, *infra*, counsel has a duty to determine whether counsel's education, training and other experience are sufficient to allow counsel to provide quality representation in a particular matter.

Guideline 1.3 General Duties of Defense Counsel

(a) Before agreeing to act as counsel or accepting appointment by a court, or assignment of a case by the head of a defender organization, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If after exhausting every effort to obtain additional time, resources or otherwise remedy the deficiency, counsel is unable to offer quality representation in the case, counsel should move to withdraw.

(b) Counsel must be alert to and take appropriate action regarding all potential and actual conflicts of interest that would impair counsel's ability to represent a client.

(c) Counsel has the obligation to maintain communication with the client and keep the client informed of the progress of the case, where it is possible to do so.

Related Standards

Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases, Standard K.

Indiana Rules of Criminal Procedure, Rule 24(B)(3) (workload of attorney appointed to capital case)

Indiana Rules of Professional Conduct, Rule 1.16 (withdrawing from representation)

Indiana Rules of Professional Conduct, Rules 1.7 to 1.13 (conflicts of interest)

Indiana Rules of Professional Conduct, Rule 1.4 (communication with client)

ABA *Standards*, The Defense Function (3d ed.), Standard 4-1.2(e), (h); Standard 4-1.3 (e); Standard 4-1.6 (a); Standard 4-3.8.

ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-5.3

ABA *Ten Principles*, Principles 4, 5 and 8

ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-441(2006) [Hereinafter ABA Formal Op. 06-441]

AACD *Statement*

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 1.3.

NAC, *Courts*, Standard 13.12.

NLADA, *Standards for Defender Services*, IV.1., IV.1.a.iii., IV.1.b.

NSC *Guidelines*, Recommendation 5.1.

Washington State Bar *Standards*, Standards 1, 3, 4, 5, 6 and 7.

Commentary

Failure to meet the paramount obligation of defense counsel to provide zealous and quality representation (Guideline 1.1, *supra*) cannot be justified by inexperience, caseload pressure, or lack of money or other resources. It is counsel's duty to refuse at the outset any case which can reasonably be expected to outstrip counsel's ability to provide quality representation.[30]

How does an attorney decide whether he or she has "sufficient" time, resources, knowledge and experience to handle a given criminal matter as required by paragraph (a)? Clearly, some case must be an attorney's first. A neophyte lawyer may not be as good as the best experienced attorney, but lack of experience can in many instances be compensated for.[31] Whether a particular attorney can provide quality representation in a given case depends on several factors. Because defender offices and assigned counsel programs have had a great deal of experience in determining whether to assign particular cases or types of cases to individual attorneys, program rules or guidelines

30 See Indiana Public Defender Commission Standard K.1. (Individual public defenders required to inform county public defender or other designated authorities that acceptance of additional cases will lead to representation violating professional obligations). "A lawyer's workload should be controlled so that each matter can be handled adequately." See Comment to Prof. Cond. R. 1.3. *See also* comment to Prof. Cond. R. 6.2 : "For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, ..." (Emphasis added). However, Rule 1.16 (C) provides "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

31 The comment to Prof. Cond. R. 1.1 (Competence) says:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
>
> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, *for ill-considered action under emergency conditions can jeopardize the client's interest*.
>
> A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2." [emphasis added].

concerning attorney qualifications provide one source of objective criteria for counsel's use.[32] One factor in determining whether enough time and resources are available is the attorney's existing workload. While only one national standard establishes numerical caseload limits for defender offices[33] (which could be utilized by private attorneys as well), all national standards agree that excessive caseloads which interfere with the provision of proper representation should be avoided.[34]

While it may be obvious that attorneys should never accept responsibility for any legal matter in which they know or should know they cannot offer zealous and quality representation,[35]

---

32 For example, the Indiana Public Defender Commission sets different minimum requirements for several types of cases at the trial level, including:

A. Murder -- Active trial practitioner with at least 3 years of criminal litigation experience, and lead or co-counsel in no fewer than 3 felony jury trials that were Class C or higher which were tried to completion. See Commission Standard E.1.

B. Class A or B felony -- active trial practitioner with at least 2 years of criminal litigation experience, and lead or co-counsel in at least 2 felony jury trials which were tried to completion. See Commission Standard E.2.

C. Class C felony -- active trial practitioner with at least 1 year of criminal litigation experience; or lead or co-counsel in at least 3 criminal jury trials tried to completion. Commission Standard E.3.

D. Juvenile delinquency and other criminal cases -- See Commission Standards E.4. and E.5.

33 NAC, *Courts*, Standard 13.12: ". . .The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."

- Full time defender lawyers assigned solely to felonies represent on the average 173 defendants per year.
- In the opinion of the reporting defenders, however, the maximum number of felony defendants who can be effectively represented per year is 140; both the mode and median response was 100 felony defendants per year..."

NAC, *Courts* (1973), commentary pg. 407, quoting NLADA, L. Benner and B. Lynch-Neary, The Other Face of Justice: a Report of the National Defender Survey 29 (1973).

In 1972-73, "extensive questionnaires were sent to defender offices throughout the country. Among the questions asked of chief defenders was the average number of misdemeanor and felony cases represented by their attorneys each year where the assignment of counsel took place at an early point in the proceedings and where the case was retained through disposition. The Defender Directors were also asked what they believed to be maximum effective caseloads for their attorneys per year. The answers were summarized...

34 ABA, *Standards*, The Defense Function (3d ed.), Standard 4-1.3(e); ABA *Standards*, Providing Defense Services (3d ed.), Standards 5-3.3(b)(v); 5-5.3; NAC, *Courts*, Standard 13.12; NLADA, *Standards for Defender Services*, IV.1., IV.1.a.iii., IV.1.b; NSC *Guidelines*, Recommendation 5.1.

States may set similar standards. Standard K.2. of the Indiana Public Defender Commission provides:

> Whenever the chief public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations. The chief public defender is required to inform the appropriate judges and refuse to accept the appointment of additional cases.

The PD Commission has adopted two caseload standards, one for county public defender offices with adequate support staff and another for counties without adequate support staff. *See* PD Commission Standards J.1 and J.2.

35 Guideline 1.1, *supra*. See ABA *Code of Prof. Resp.*, DR 6-101, adopted, *inter alia* as Part 3 of *Rules and Regulations for the Organization and Government of the State Bar of Georgia.*

Comment to Prof. Cond. R. 1.3 provides in part: "A lawyer's workload should be controlled so that each matter can be

contrary political or social pressures (see Commentary to Guideline 1.1, *supra*) may be applied, especially with regard to handling of additional criminal cases despite an already excessive workload. Attorneys in defender offices, or in jurisdictions where courts assign lawyers to represent poor persons accused of crime regardless of the attorneys' desire to accept the cases,[36] may face difficulties in controlling their caseload.

NLADA, in *Standards for Defender Services*, IV.1, has stated that "No defender office or defender attorney shall accept a workload which, by reason of the excessive size thereof, threatens to deny clients due process of law or places the office or attorney in imminent danger of violating any ethical canons. . ."[37]

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating unequivocally that "All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation."[38]

This formal opinion specifically addressed what lawyers providing indigent defense services should do when workloads prevent them from providing competent and diligent representation. The opinion notes that the Rules of Professional Conduct do not prescribe a formula for determining whether a particular workload is excessive. The opinion cites the national caseload numerical standards set out by the National Advisory Commission on Criminal Justice Standards and Goals,[39] but reasons that "they are not the sole factor in determining if a workload

---

handled adequately."

36 Alabama Ethics Opinion 87-20 (1/28/87), reported in ABA/BNA *Lawyers' Manual on Professional Conduct, Ethics Opinions*, 901:1019. "A lawyer who believes that he [or she] is not competent to represent indigent defendants in felony cases pursuant to a county bar program which requires the county's lawyers who have practiced for less than ten years to accept such cases may seek to withdraw from the representation . . . [citing] his [or her] inexperience and lack of qualification in criminal law, as well as the appropriate Code provision and Ethical Considerations governing competency." If the motion to withdraw is denied, the lawyer "may suggest to the court that co-counsel be appointed to assist him [or her] in the representation." Counsel could cite this or similar opinions when an excessive caseload would result from mandatory appointment(s), resulting in counsel's inability to ethically proceed.

37. See also NLADA, *Standards and Evaluation Design for Appellate Defender Offices*, 1980, Standards I.F and I. H; NSC, *Guidelines*, Recommendation 5.3; ABA *Model Code*, DR 6-101(A)(2) and EC 2.30; Prof. Cond. R. 1.7(b); *ABA Standards*, The Defense Function (3d ed.) Standard 4-1.2(h); Standard 4-1. 3(e); NLADA, *Death Penalty Standards*, Standard 6.1.

38. ABA Formal Op. 06-441. The Opinion went on to state:

> Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of the representation. These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable in a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.

p.3 (citations omitted).

39. See note 4, *supra*.

is excessive."[40] Rather, they form a high-end which should not be exceeded. A determination regarding whether a workload is excessive "depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties."[41]

The opinion clearly states that "if a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."[42] The opinion stresses that a lawyer's primary duty is owed to existing clients, so that the lawyer must generally decline to accept new cases rather than withdraw from existing ones.

The opinion goes on to set out a separate course of action for lawyers who receive their appointments directly from the court, and for those who receive them as part of a public defender office or law firm:

> When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:
>
> • requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
>
> • if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.
>
> If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.[43]
>
> When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:
>
> • transferring non-representational responsibilities within the office, including managerial responsibilities, to others;

40. ABA Formal Op. 06-441, at p. 4.

41. Id.

42. Id.

43. Id., at p. 5 (citations omitted). All feasible steps would include any available means of appealing such a ruling. Id., at p. 1. "Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such a notification. *See* Rule 1.4." Id., n.15.

> • refusing new cases; and
> • transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).
>
> If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.
>
> In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors. When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty" as discussed in Rule 5.2(b). In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.
>
> Such further action might include:
> • if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office; and
> • if the lawyer is still not able to obtain relief, filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.
>
> If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to ensure that her client receives competent and diligent representation.[44]

The American Council of Chief Defenders issued a *Statement on Caseloads and Workloads* in 2007, describing the NAC numerical caseload standards as "the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified."[45] The Council recommended adjusting caseloads in light of local practice, such as a prosecutor's office that routinely overcharges or refuses to plea bargain, as well as the complexity of certain types of cases and emerging practice areas, such as sexually violent offender proceedings.[46]

Excessive workloads plague not only defender offices and assigned counsel programs,[47]

44. Id., at pp. 5-6.(citations omitted). Again, counsel should notify the client of efforts to withdraw from representation and should pursue available means of appealing the court's order.

45. AACD *Statement,* p. 7

46. *Id.,* at pp. 2, 6 – 7.

47. *See e.g.,* Special Committee on Criminal Justice in a Free Society. ABA Criminal Justice Section, *Criminal Justice in Crisis* (Nov. 1988).

but individual retained counsel, who may be urged by prospective clients to take their cases despite the attorneys' already full caseloads.[48]

Such pressures must be resisted. Counsel's *desire* to take a particular case, whether for personal gratification and enrichment, to meet judicial or other systemic demands, or for philanthropic reasons, should never take precedence over objective reasons to believe counsel is unqualified, due to inexperience or lack of time/resources, to handle that particular case.[49]

Counsel's duty to honestly evaluate his or her experience and training is mandated by Guideline 1.2(b) as well as this Guideline. But counsel, especially if inexperienced, may underestimate the complexity of a case at the initial stage, and find out in mid-proceedings that he or she is unable to adequately represent the client, due to deficiencies of time, money, or skill. While in some instances, extra effort, assistance of more experienced counsel or further specialized training may suffice to overcome counsel's discovered deficiencies, time may not be available for counsel to acquire the necessary skill before the case proceeds. In such instances, under paragraph (a) of this Guideline, counsel should seek to withdraw.

Furthermore, counsel qualified at the beginning of a case may become unable to provide the proper level of representation. Illness, substance abuse, or other handicaps preventing zealous and quality representation may develop in the course of representation. Any problem which renders an attorney -- whether a defender office staff attorney, assigned counsel, or retained counsel -- incapable of fulfilling his or her paramount obligation under Guideline 1.1, *supra*, requires that the attorney withdraw from further representation of the client. When counsel believes he or she is unable to ethically continue, counsel's efforts to withdraw should be as zealous as in any other aspect of client representation.[50]

A conflict of interest that affects or could affect criminal defense counsel's ability to provide zealous and quality representation to his or her client, paragraph (b), can arise in a number of ways in addition to counsel having an excessive caseload as discussed above.

Perhaps the most common type of conflict is that which arises between the interests of two

48. "Some sophisticated defendants have been known to engage a lawyer because the lawyer had so many cases on the calendar that normal priorities of the docket would preclude an additional case from trial for an inordinate period. Obviously, it is improper for a lawyer to participate in such a fraud on the courts; apart from that, the lawyer has a duty to accept no more employment than can be effectively performed without unreasonable delay..." ABA *Standards*, The Defense Function (3d ed.), Standard 4-1.2(h), commentary; see also ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-5.3.

49. In practice, attorneys may find themselves weighing Guideline 1.1's mandate of zealous and quality representation against what they believe will happen if a case is refused. Some attorneys conclude that an overworked but experienced attorney is better than none. A newspaper account of a trial week for one Dade County, Florida, assistant public defender reported that, facing an average annual caseload of 320 felony cases a year, and juggling 15 scheduled trials for the week (of which 9 were plea-bargained, with 6 ending in jail time, and 6 were postponed, 1 because the client failed to appear), the lawyer said: "...there are a lot of different kind of victories. In every case, because I represented them, they got a better break than they would have." John Dorschner, "Rush to Judgment," *Tropic* (magazine of the *Miami Herald*, Nov. 25, 1990. Guidelines 1.3(a) and 1.1, however, mandate the provision of *zealous and quality* representation, not just of representation that is better than none.

50. See *ABA Formal Op. 06*-441, n. 9 - 15, *supra*, and accompanying text. *See also* Norman Lefstein and Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action,* The Champion, December 2006, p. 10, regarding contents of Motions to Withdraw. See also Indiana Public Defender Commission Standard K.1.

clients, for example, the conflict of interest between codefendants being represented by the same attorney on the same case.[51] Conflicts can also arise between a current client defendant and a former client or a current client who is not a codefendant.[52] Persons who are or have been represented by the attorney or the attorney's office may turn up as victims, as witnesses or in some other role in another client's case.[53] A lawyer must decline representation of a client whose interests are materially adverse to those of a former client.[54]

Conflicts of interest may also develop directly between an attorney and a client. One example is a client who has sought professional sanctions or brought a malpractice action against the attorney for alleged actions or inactions by the lawyer in the course of the representation.

Another subject that may cause a conflict of interest between the attorney and the client is fees. Conflicts can arise in a variety of ways. A client may simply fail to pay an agreed-upon amount at the end of a given stage of the proceedings. Professional ethics rules and courts have set out counsel's options in such an instance.[55] If the cost of representation is being paid by a third

---

51. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. See Comment 23 to Prof. Cond. R. 1.7. See also, Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (joint representation of conflicting interest is suspect because of what it tends to prevent the attorney from doing). ABA *Standards*, The Defense Function, (3d ed.), Standard 4-3.5(c).

    A client may consent to representation notwithstanding a conflict. *See* Prof. Cond. R. 1.7(b). However, trial court may override defendant's attempt to waive 6th amendment right to conflict-free counsel. Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140(1988). See also Latta v. State, 743 N.E.2d 1121 (Ind. 2001) (discussing inquiry required before trial court decides whether to accept or override defendant's attempt to waive).

    Note also, conflicts of interest set out in Prof. Cond. R. 1.7, 1.8, and 1.9 will be imputed to attorney's office or public defender office if it functions as a "firm" or "law firm." Prof. Cond. R. 1.0; 1.10; ABA *Model Code*, DR 5-105 (d). But see *In re* Recker, 902 N.E.2d (Ind. 2009) (discussing when public defenders constitute a firm.)

52. See *generally* Prof. Cond. R. 1.9.

53. For example, a current client who wants to provide information to the prosecution about unsolved crimes in return for a plea bargain in his or her own case may turn out to be informing against another client.

54. See Prof. Cond. R. 1.9(a). "The principles of *Prof.Cond.R.* 1.7 determine whether the interests of the present and former clients are adverse." *Matter of Robak,* 654 N.E.2d 731, 734 (Ind. 1995).

    The Louisiana Public Defender Board's (LPDB) *Trial Court Performance Standards* (2010) 707(B), adds the following requirement:

    > When appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

    In its contract for public defender services, LPDB includes the following requirement:

    > **2.15 Conflict-Free Representational Services.** Screen all cases for conflicts upon assignment and throughout the discovery process and ensure that Representational Services are delivered to Eligible Clients conflict-free. In determining whether a case is conflict-free, District Defender agrees to refer to the Louisiana Rules of Professional Conduct, relevant jurisprudence, opinions of the Louisiana State Bar Association, the American Bar Association Standards for Criminal Justice, and rules, guidelines and policies that may be adopted by the LPDB from time to time.

55. Prof. Cond. R. 1.16 (b)(5); *See also* ABA *Model Code*, DR 2-110 (C) (1) (f); Rhode Island Ethics Opinion 91-15 (5/23/91), reported in ABA/BNA *Lawyers' Manual on Professional Conduct*, 1001:7802 (1992).

    Attorney has right to retain possession of client's documents, money or other property which come into hands of attorney

party, counsel must be careful to avoid any interference by that party with counsel's representation of the client, to whom the attorney's duty is owed.[56] And if counsel is assigned (or represents the client through a defender office), counsel must avoid letting low fees or fee/salary disputes create a conflict of interest.[57]

The professional obligation of attorneys to keep their clients informed of the progress of their cases[58] certainly applies in criminal cases.[59] The duty to communicate with the client includes

---

professionally, until general balance due attorney for professional services has been paid. Stewart & Irwin v. Johnson Realty, 625 N.E.2d 1305 (Ind. 1993), *reh'g den. See also,* Prof. Cond. R. 1.15.

Prof. Cond. R. 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

See also Matter of Dahlberg, 611 N.E.2d 641, 643 (Ind. 1993) (*citing* Rule 1.16(d)).

Ind. Code 33-43-1-9 provides:

> If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which the action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

See Pigg v. State, 929 N.E.2d 799 (Ind. App. 2010) (Trial court did not abuse discretion in finding that attorney had earned entire retainer.)

56 ABA *Standards*, The Defense Function (3d ed.), Standard 4-3.5(e). See also, Prof. Cond. R. 1.8(f) and 5.4(c). For discussion of potential 6th Amendment and due process ramifications of conflicts arising out of defense counsel's employment by a third party, see Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

57. Low fees may lead to excessive caseloads, which counsel has a duty to avoid, see *supra*; text at notes 4-16. And delayed or reduced payment of fees to court-appointed counsel may work such financial hardship on attorneys that the quality of representation is damaged. See e.g., Audrey Duff, "Slaves of St. Louis," *The American Lawyer*, Jan./Feb. 1993, p. 85-86. See also **Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases, Standards G, H, and L and commentary**.

58. ABA *Standards*, The Defense Function (3d ed.), Standard 4-3.8; Prof. Cond. R. 1.4; See also ABA *Model Code* EC-9.2. Where client is a child or suffers from mental disability see Rule 1.14. Attorneys must be careful in conveying information to, or obtaining tactical and strategic information and decisions from, such clients. See generally, Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Impaired defendant: Zealous Advocate or Officer of the Court,* Wis.L.Rev. 65 (1988).

A lawyer who receives a proffered plea bargain should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Prof. Cond. R. 1.2(a). A lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation. See comment, Prof. Cond. R. 1.4.

Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Prof. Cond. R. 3.4(c) directs compliance with such orders.

59. Prof. Cond. R. 1.4(a) violated by failing to keep client reasonably informed about status of case, and Prof. Cond. R. 1.4(b)

taking whatever steps are necessary to overcome barriers to communication, such as differences in language, or literacy, Guideline 3.2(b)(1) *infra*.[60] Where clients are incarcerated and therefore handicapped in their ability to contact counsel, counsel may have a particular duty to keep them informed.[61]

Systemic obstacles may exist to communication with clients. Jail personnel, jail visiting facilities and rules, court efforts to speed up proceedings, and the ever-present threat of excessive caseloads may interfere with counsel's ability to speak, and speak in confidence, with clients. But privileged attorney/client communication is inherent in the right to counsel and must not be subverted by security concerns or systemic disregard for a particular client's need to talk to his or her attorney.[62]

Counsel should provide or demand facilities in which privileged attorney/client conferences can be held.[63] That excessive caseloads must not be allowed to preclude the provision of zealous and quality representation has already been discussed. Adequate communication with clients is an integral part of quality representation; the time necessary for such communication must be included in counsel's consideration of whether counsel has sufficient time to take on any given case.

violated by failing to explain plea agreement to extent necessary to permit defendant to make informed decisions. *Matter of Dahlberg* 611 N.E.2d 641, 643 (1993). See also Missouri v. Frye, 132 S.Ct. 1399 (2012) (ineffective assistance for failure to communicate favorable plea offer; plea negotiations a critical state of criminal proceedings).

60. See, e.g., Mass. Publ. Counsel Ser. *Manual*, Sec. IV, Performance Standards and Complaint Procedures, Standard 1.3.

61. Id. NLADA, *Assigned Counsel Standards*, Standard 4.7.3, commentary re: collect calls.

62. Counsel must be aware that many detention facilities condition telephone use by inmates on monitoring and recording by security personnel. If counsel goes ahead with a telephone conversation knowing that it is being monitored or recorded, it will not be deemed confidential and privileged. Bassett v. State, 895 N.E.2d 1201, 1207 (Ind. 2008) ("Bassett's decision to proceed with calls to his attorney after receiving the automated warnings and understanding their implications constituted a knowing waiver of the attorney-client privilege. The telephone communications to his attorney from jail were not protected by the privilege and were not confidential. Since these communications were not confidential, the State did not violate Bassett's Sixth Amendment or article I, section 13 right to counsel when it reviewed recordings of them before trial.")

63. NLADA, *Assigned Counsel Standards*, Standard 3.6; NLADA, *Standards for Defender Services*, IV.7; ABA *Ten Principles,* Principle 4.

Guideline 2.1 First Appearance

(a) For purposes of this guideline, the term "first appearance" means the first hearing at which an individual appears after an arrest and any subsequent hearing wherein there is an opportunity to advocate for the person's release pursuant to Ind. Crim. Rule 26. This includes, but not limited to: an arraignment, advisement of rights, bail hearing, initial hearing.

(b) Counsel who is appointed or retained at or before the first appearance in which a person appears after being arrested should attend the hearing and should preserve the client's rights by doing the following:

- **(1) meet with the individual in order to collect any important information needed to advocate for the individual's release pursuant to Ind. Crim. Rule 26;**
- **(2) prepare the client for any interview or assessment that will be conducted prior to the first appearance by any person who is not counsel;**
- **(3) determine whether any information filed with the court contains sufficient facts to support probable cause to hold the individual. If there is insufficient probable cause to hold the individual, counsel should advocate for the individual's immediate release from custody and challenge any effort to hold the individual in custody without probable cause;**
- **(4) review any assessments or reports created for the purposes of determining release and conditions;**
- **(5) advocate for the individual's release from custody pursuant to Ind. Crim. Rule 26; and,**
- **(6) pursuant to Ind. Crim. Rule 26, advocate for the most appropriate and least restrictive release conditions for the individual. Release conditions should be the least restrictive conditions that are tailored to the individual's needs.**

Guideline 2.2 Initial Hearing

(a) In addition to the actions outlined in Guideline 2.1, counsel who is appointed or retained before the initial hearing on the charges should attend the initial hearing and should preserve the client's rights by:

- **(1) entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;**
- **(2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;**
- **(3) seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, see to the client's immediate release from custody;**

(4) request an immediate review of bail.

(b) Whether present at the initial hearing or not, counsel

(1) should be aware of constitutional and statutory requirements with respect to the initial hearing,

(2) should seek to suppress any evidence obtained during an unreasonable delay between arrest and initial hearing, and

(3) should be aware of the omnibus date and its significance for the filing of motions and other pleadings and notice of affirmative defenses such as alibi and insanity.

Related Standards

ABA Standards, The Defense Function (3d ed.), Standard 4-3.6.

ABA Standards, Providing Defense Services (3d 3d.), Standard 5-6.1

NLADA, *Assigned Counsel Standards*, Standard 2.5.

NSC Guidelines, Guideline 1.2

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.1(b).

Commentary

Counsel should be provided to assist indigent persons accused of crimes at the earliest possible time,[64] and should be present for the initial hearing or the first hearing at which the person appears before the Court.[65] The usual practice in Indiana, however, is that the determination of indigency and the appointment of counsel to indigent defendants who request it are made at the initial hearing itself and typically this occurs near the conclusion of the initial hearing. See Ind. Code 35-33-7-6. As a result, indigent defendants are generally not afforded the same protections as defendants who have the financial means to retain counsel prior to the first or initial hearing. Indigent defendants who are in jail lack the guidance of counsel at a particularly vulnerable time, may sit in jail longer before bail is reviewed, may lose the benefit of early investigation, and may sit in jail on charges that are ultimately dismissed.[66]

64. NLADA *Assigned Counsel Standards,* Standard 2.5.

65. ABA Standards, Providing Defense Services, Standard 5-6.1 provides:

> Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest….The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

66. *See, e.g., Stack v. Boyle,* 342 U.S. 1 (1951); Flanagan v. U. S., 465 U.S. 259 (1970); Rothgery v. Gillespie County, Texas, 554

The right to counsel attaches at the time when formal judicial proceedings have begun. See Rothgery v. Gillespie County, 554 U.S. 191, 211 (2008). Once attachment occurs, the accused is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings …unless a valid waiver of the right is made. An initial appearance before a judge, where one learns the charge against the person and the person's liberty is subject to restriction is considered a critical stage of the proceedings requiring meaningful representation. In addition to the initial hearing, in Indiana, the right to counsel attaches at the time of arrest. State v. Taylor, 49 NE 3rd 1019.

Regardless of when the attachment occurs, these Guidelines "advocate the provision of zealous and quality legal representation to all clients charged with crime…,"[67] not merely the minimum required by the constitution. Whether appointed or retained before the initial hearing or after, counsel should move quickly to protect the client's rights, to meet with the client, and to seek pre-trial release of the client pursuant to Indiana's Rule 26 of the Rules of Criminal Procedure. See Guidelines 3.1 – 3.3, *infra*, regarding pre-trial release advocacy and the initial client interview.

Counsel should secure and/or preserve the trial rights of the client unless there is an overriding reason to waive trial rights at that time. An example of an extraordinary circumstance warranting a guilty plea at this stage would be to avoid the real possibility of facing more serious charges or enhancements[68]. Rushing into a plea of guilty,[69] whether at the behest of the client, the prosecution or others, may result in a plea taken without the client's full knowledge and understanding.[70]

In Indiana felony cases, the constitutional right to a trial by jury[71] is generally self-enforcing and automatic. Right to jury trial in a felony case must be personally waived by the accused,[72] must be knowing, voluntary and intelligent, and requires the assent of the

U.S. 191(2008).

67. Guideline 1.1

68 See I.C. 35-41-4-4(a), which provides, in part, that where there was a former prosecution of the defendant for a different offense and the former prosecution resulted in a conviction of the defendant, and the instant prosecution is for an offense with which the defendant should have been charged in the former prosecution, the instant prosecution is barred. Pursuant to I.C. 35-34-1-10(c), courts are also authorized to dismiss later charges that could have been joined in the earlier prosecution. See, e.g., State v. Wiggins, 661 N.E.2d 878, 879-80 (Ind. Ct. App.1996).

69. Guidelines 6.1 through 6.4, *infra*, describe counsel's duties during negotiation and entry of a guilty plea.

70. Guideline 6.2 *infra*, See also, Mass Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.1(b)(1): "A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare instances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later. . ."

71. U.S. Const., Amend. VI. See also *Constitution of Indiana,* Article I, Section 13.

72. Kellems v. State, 849 N.E.2d 1110 (Ind. 2006).

prosecutor and the judge.[73] Indiana misdemeanor defendants also have the right to trial by jury,[74] but this right will be forfeited if a jury trial is not requested in writing at least ten days before the first scheduled trial date.[75] Failure of counsel to protect the client's vital jury trial right (when it is not being knowingly and voluntarily waived by the defendant) constitutes ineffective assistance of counsel.[76]

For a discussion of the law, procedure and timing of the initial hearing and the probable cause determination in Indiana, see IPDC's Pre-Trial Manual, Ch. 2. Some jurisdictions are experimenting with the use of video conferencing technology to conduct initial hearings with defendants remaining in jail during their court "appearance,"[77] a practice which has been questioned by some defense attorneys.[78]

The purpose of the initial hearing is to prevent defendants from being "unduly detained or held in custody without showing of probable cause"[79] and in violation of Crim. R. 26 requiring the release without cash bond in most cases.

A further purpose of the statutes governing the initial hearing "is to prevent delay during

---

73. Ind. Code 35-37-1-2 provides: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury." For Indiana law on the right to a jury trial, see IPDC's Criminal Trial Law Manual, Ch. 2.

74. See Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250, 252 (1951) (language of Article I, Sec. 13 includes prosecutions for misdemeanors); *see also,* Criminal Rule 22.

75. Ind. Crim. Rule 22 (misdemeanors); See e.g. Fiandt v. State, 996 N.E.2d 421 (Ind.Ct.App. 2013) (right to a jury trial in a misdemeanor case is not self-executing and must be demanded by a defendant not later than 10 days before first trial date); Eldridge v. State, 627 N.E.2d 844 (Ind.Ct.App. 1994).

76. See, e.g., Stevens v. State, 689 N.E.2d 487, 490 (Ind.Ct.App. 1997) (trial counsel's failure to request jury trial where Defendant had expressed a desire for it was not a matter of strategy, but rather resulted from a combination of a change in representation, a burdensome case load, and confusion over the trial date, and constituted IAC); Lewis v. State, 929 N.E.2d 261 (Ind.Ct.App. 2010) (trial counsel's failure to request jury trial was IAC where Chronological Case Summary indicated Defendant wanted a jury trial, even though Defendant had not communicated this directly to counsel); Duncan v. State, 975 N.E.2d 838 (Ind.Ct.App. 2012) (having counsel is not itself a sufficient substitute for the defendant being expressly advised of his rights; likewise, it does not matter whether the defendant requested a jury trial).

77. See, e.g., 10 *Indiana Court Times* 2 (2001), p.1, "Video Conferencing Increases Court Efficiency."

78. Where appointed or retained before a video-conferenced initial hearing, defense counsel must decide whether to be at the jail with his or her client, or in court with the prosecutor and judge (or have another attorney from counsel's office at the second location). Also, video arraignments may be but a first step in technologically isolating defendants, lessening or destroying "the important personal encounter between defendant and judge." Saundra Terry, "Courtrooms Boost Use of Video Camera Technology," *The Washington Post*, 1993. (Including interview with Dade County (FL) Public Defender Bennett Brummer.) See also Patricia Raburn-Remphry, *Due Process Concerns in Video Production of Defendants,* 23 Stetson L. Rev. 805 (1994).

79. May v. State, 502 N.E.2d 96 (Ind. 1986).

which investigating officers might solicit confessions or attempt to procure other evidence."[80] Thus, the "normal remedy" for denial of a defendant's right to prompt determination of probable cause is suppression of evidence obtained during the delay,[81] and counsel should be prepared to seek suppression where appropriate.

While current law holds only that Defendants cannot be held to answer charges which are not supported by probable cause, "[o]ne authority has noted that by advocating for early release *and dismissal* in appropriate cases, defense counsel helps minimize the wasteful costs of unnecessary pretrial incarceration and unfounded arrests."[82]

For a discussion of pre-trial motions practice, see Guideline 5.1, *infra*, and for a discussion of the law and procedure regarding motions to dismiss, see IPDC's Pre-Trial Manual, Ch. 9.

80. Buie v. State, 633 N.E.2d 250, 258 (Ind. 1994), *overruled on other grounds,* Richardson v. State, 717 N.E.2d. 32, 49 (Ind. 1999).

81. Id.

82. NLADA, *Assigned Counsel Standards*, Standard 2.5, Early Representation, Commentary, pg. 41 [*citing* New York State Defenders Association, [NYSDA], *Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program* (1984), pg. 40-45.]

Guideline 3.1 General Obligations of Counsel Regarding Pretrial Release

The attorney should promptly attempt to secure the pretrial release of the client, pursuant to Ind. Crim. Rule 26, under conditions that are the least restrictive and most favorable and acceptable to the client.

Related Standards

Ind. Crim. Rule 26 (paste language here "courts shall consider…." From the rule)

Ind. Code 35-33-8-4 (amount of bail; order; indorsement; facts taken into account)

Ind. Code 35-33-8-5(C) (alteration or revocation of bail)

Constitution of Indiana, Article I, sections 16 and 17

8th Amendment to U.S. Constitution

ABA Standards, The Defense Function (3d ed.), Standard 4-3.6; Pretrial Release (2d ed.) Standard 10-1.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.1(a) & 2.3.

Commentary

"Where [the] accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant's pretrial release from custody."[83] However, the attorney's duty does not extend to actual provision of bail.[84] Defense attorney's general obligations to the judicial system and to the community[85] cannot override counsel's primary duty to the client.[86] Television dramas, novels and public commentaries to the contrary, defense counsel bears no responsibility for acts committed by (or against)

83. ABA Standards, Providing Defense Services (3d Ed.), Standard 5-6.1 commentary. *See also* Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.3.

84. "Defense counsel should not act as surety on a bond either for the accused represented by counsel, or for any other accused in the same or a related case." ABA *Standards*, The Defense Function (3d ed.), Standard 4-3.5(j). Counsel representing clients who assert eligibility for representation without cost due to indigency should be aware of authority for the proposition that it is improper for the court or other agency to refuse provision of counsel because bond has been or can be posted. *Moore v. State*, 401 N.E.2d 676, 679 (Ind. 1980); Graves v. State, 503 N.E.2d 1258 (Ind.Ct.App. 1987). *See also* **Indiana Public Defender Commission Standard C.1.a**.; and ABA Standards, Providing Defense Services (3d. ed.), Standard 5-7.1).

    "A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client" See Prof. Cond. R. 1.8(f). Under Ind. Code 33-40-3-7, indigent persons in criminal cases may be ordered to pay some or all of the costs of defense services. See also **Indiana Public Defender Commission Standard D**.

85. See ABA *Standards*, The Defense Function (3d ed.) Standard 4-1.2 (b).

86. Guideline 1.1. *See also* NLADA, *Assigned Counsel Standards*, Standard 2.1.

the client following pretrial release secured through the operation of the judicial system.[87]

The importance of counsel's early entry into criminal proceedings for the purpose of seeking bail has been noted in case law.[88] The client's freedom on bail is important to counsel's representation of the client during the investigative/preparatory stages of the case.[89] When the defendant is not incarcerated, counsel can more easily consult with him or her. (Difficulties have been known to arise concerning counsel's ability to communicate confidentially with an incarcerated client. Counsel should consider ways to prevent interference with private communication between counsel and an incarcerated client if bond cannot be made.)[90]

Pretrial detention may have other detrimental effects on clients. It may unduly influence clients with triable cases to plead guilty and may even improperly influence decision-makers adversely (e.g., confined defendants may appear less "presentable" at trial).[91]

Counsel should consider whether some form of supervised pretrial release, which might generate positive information at sentencing if a conviction occurs, would be in the best interests of a particular client, and should discuss that possibility with the client where appropriate.[92] And in some cases, it may

---

87. Lord Henry Brougham (1778-1868) stated:

> There are many whom it may be needful to remind, that an advocate -- by the sacred duty of his [or her] connection with his [or her] client -- knows, in the discharge of that office, but one person in the world -- that client and none other. To serve that client by all expedient means; to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself [or herself], is the highest and most unquestioned of his [or her] duties. And he [or she] must not regard the alarm, the suffering, the torment, the destruction, which he [or she] may bring upon any others... Quoted in 15 *The Advocate* 50 (June 1992) (publication of the KY Department of Public Advocacy.)

88. E.g., Dancy v. United States, 361 F. 2d 75, 77, 124 App. D.C. 58 (D.C. Cir. 1966): "The need for professional assistance in this case is underscored by appellant's jail confinement for about two months prior to the preliminary hearing. With counsel he might have been at liberty on bail." [footnotes omitted.] See also Stack v. Boyle, 342 U.S. 1, (1951); Rothgery v. Gillespie County, Texas, 554 U.S. 191 (2008).

89. Pretrial bail allows accused opportunity to properly prepare defense while insuring presence at trial. Sherelis v. State, 452 N.E.2d 411 (Ind.Ct.App. 1983). "Freeing the defendant under bond is important because he or she is perhaps counsel's greatest discovery tool. Thus, where possible, the defendant should be on the street searching for witnesses and collecting and investigating the factual circumstances of his [or her] charge. Excessive bail is not to be constitutionally tolerated." Fred Lane, *Goldstein Trial Techniques*, 2d ed. (1983 Cum. Supp.) Sec. 4.19, *citing* Stack v. Boyle, 342 U.S. 1(1951) and *Meechaicum v. Fountain*, 696 F.2d 790 (10th Cir. 1983); see also Fry v. State, 990 N.E.2d 429 (Ind. 2013) (noting that the right to bail is deeply valued but not unqualified).

90. See Guideline 1.3, *supra*, f.n. 30 – 31 and accompanying text.

91. Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion* (2d ed. 1988), Plenum Press, pg. 82.

92. "About 90% of all criminal defendants ultimately get convicted and sentenced. That likelihood ought to inform *every* tactical decision the attorney makes in the case." [footnotes omitted emphasis added]. Marcia G. Shein and Jana L. Jopson, *Sentencing Defense Manual: Advocacy/Practice/Procedure* (1992) Clark Boardman Callaghan, ' 3.2 [1], pg. 3-5 to 3-6. Counsel should also be aware that a client with a prior unrelated conviction for any offense who is placed under the supervision of a probation officer or pretrial services agency may be ordered to pay the cost of those services, if the court determines that the client is financially able to pay and finds clear and convincing evidence that the supervision services are necessary to ensure the client's appearance or the physical

actually be better for a client to remain in jail.[93]

As noted in the Commentary to Guideline 3.3, *infra*, counsel is not required to continue to seek unrealistically favorable terms of pretrial release.

safety of the community or another person. Ind. Code 35-33-8-3.3.

93. Anthony G. Amsterdam (Reporter) *Trial Manual 5 for the Defense of Criminal Cases*, (1988) (ALI/ABA Committee on Continuing Professional Education, American College of Trial Lawyers, National Defender Project of the National Legal Aid and Defender Association) [hereinafter, Amsterdam, *Trial Manual 5*], Section 75-A. Counsel may consider, for example, that the offense charged usually carries, by local practice, a sentence of "time served" whereas bailed defendants receive longer sentences to give them a "taste of jail."

Guideline 3.2 Initial Interview

(a) ***Preparation:***

In addition to the requirements of Guideline 2.1 and 2.2, the attorney should, prior to conducting the first interview with the client:

- **(1) In conjunction with Guideline 2.1, communicate with any attorney who represented the client at any prior hearing in the matter in order to obtain any important or necessary information to properly advise and advocate for the client.**
- **(2) be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;**
- **(2) obtain copies of any 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;**
- **(3) be familiar with the legal criteria for determining pretrial release, including Ind. Crim. Rule 26, any pre-trial risk assessment tool used, and the procedures that will be followed in setting those conditions;**
- **(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;**
- **(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.**

(b) ***The Interview:***

- **(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and time sensitive information, 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.**
- **(2) Information that should be acquired includes, but is not limited to:**
  - **(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;**
  - **(B) the client's physical and mental health, educational and armed services records;**
  - **(C) the client's immediate needs, including, but not limited to, medical, mental health, housing, public assistance needs;**
  - **(D) 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 and also whether he or she is or has participated in any problem solving court, diversion, expungement program or is on probation or parole, as well as the client's past or present performance under supervision;

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

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

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

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

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

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case or anything related to the case without first consulting with the attorney, and a special advisement that his or her social media accounts will be monitored an any images, videos, statements and the like will be used as evidence against the person;

(D) the charges and the potential penalties;

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

(F) instructions to maintain contact with the attorney, including any change of address, phone number, email address or the like.

(c) ***Time-Sensitive Information***

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

(1) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved;

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

(d) ***Prosecution Requests for Non-Testimonial Evidence***

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting

exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-3.2; see also Standard 4-3.1(a).

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 1.3(l); Guideline 2.2.

Commentary

Counsel's duty to seek the freedom of his or her incarcerated client, and to seek that freedom at a cost -- financial and otherwise -- that the client is willing and able to pay, is set out in Guideline 3.1, *supra*. To fulfill that duty, counsel has to know the desires of the client and the operation of the system. This Guideline sets out in some detail counsel's preparation for and conducting of the initial interview which is of major importance in advocating for pretrial release.[1]

Like a multi-highway interchange that has been added to and patched but never re-built, the pretrial byways of a busy urban criminal court can baffle the uninitiated. Written signs may be unclear or contradictory, routes may be unmarked or poorly marked, and the traffic pattern may be based on unarticulated assumptions by regular users that can baffle new arrivals. Rural courts, like rural roads, offer their own pitfalls to the newcomer. Therefore, attorneys who contemplate criminal trial work would be well advised to secure available "maps" and guides,[2] confer with those who have traveled the road before, and make a few "dry runs" through the courts, bail offices, etc. before trying to transport a client through the convoluted courses of pretrial detention. As used in paragraph (a) of this Guideline, then, "preparation" means more than just looking up the particular statute(s) involved in a client's case. It also includes learning local rules, and acquiring relevant information concerning practices and procedures in the jurisdiction.[3]

An attorney's obligation to keep up with changes in the law relating to all aspects of a

1. Willie J. Davis, Massachusetts Continuing Legal Education Inc. [hereafter, Mass CLE], Effective Criminal Defense Techniques: Tricks of the Trade from the Experts (1990), chapter entitled "Bail-- Is the Determination Made Fairly," An attorney cannot argue for bail until he or she has spoken with the client, and necessary information cannot be obtained in the courtroom. For more on counsel's initial contact and interview with client, *see* IPDC's Pre-Trial Manual, Ch. 2, Sec. I.

2. *E.g.*, IPDC's Pre-Trial Manual.

3. This is true for all stages of representation, not just pretrial detention proceedings. The National Study Commission recommended in its 1976 report that defender offices provide an orientation program for new staff attorneys, that intensive entry-level training be provided at the state or local level (during which the new attorneys would not be assigned regular office duties), and that new assigned counsel panel members receive special training and support materials. NSC *Guidelines*, Guidelines 5.7 and 5.8. See also ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-1.5; NLADA, *Standards for Defender Services*, Standards V.2 and V. 5; NLADA, *Assigned Counsel Standards*, Standard 4.3.1, commentary, p. 129 ("In the interest of improving criminal defense generally, entry-level training should be open to all defense attorneys.") See also, **Indiana Public Defender Commission Standard M**.

client's case is noted in Guideline 1.2, *supra*. This obligation obviously applies to the law regarding pretrial practice. (For Indiana law on pretrial practice, see the latest edition of the IPDC Pre-Trial Manual). It also applies to knowledge of any informal "rules" or practices applied to charging and detention procedures.[4]

Counsel's preparation should include efforts to reveal communications barriers such as differences in language, or literacy. Counsel should take immediate steps to insure that at the initial interview and all subsequent interviews and procedures, counsel and client are able to understand one another, as set out in subparagraph (b)(1) of this Guideline.

Counsel must be able to communicate effectively with the client. This is true at an initial interview for the specific purposes of acquiring information concerning pretrial release and providing the client with information about the case, subparagraph (b)(1), as well as for the general purpose of gathering information from the client about the case, subparagraph (c). Counsel must be able to communicate effectively during all subsequent portions of the case. Counsel cannot keep the client informed about the case (Guideline 1.3(c)), explore with the client plea negotiations (Guideline 6.1(a) *et seq*.), advise the client about trial proceedings (Guideline 7.1(f) and (g)) or prepare the client for sentencing (Guideline 8.3) without effective communication. If no interpreter is available to translate when counsel does not speak the client's language, if the client cannot read counsel's letter on these topics, if no area for privileged communications exists, etc., counsel must act to correct these problems.[5]

Once counsel has the general and particular knowledge called for in Guidelines 1.2 and paragraph (a) above, counsel is ready to proceed with the interview as set out in paragraph (b). Subparagraphs (2)(A) through (2)(F) of this Guideline contain a detailed list of information usually needed for representation of a client during bail proceedings. The list is not exhaustive. Peculiarities of a given bail statute or judge, the facts of a given case, and counsel's creative and zealous representation of his or her client may require that other information be obtained. Whenever pretrial diversion/deferred prosecution programs exist (Ind. Code 34-28-5-1 (deferral program for infraction and ordinance violations); Ind. Code 33-39-1-8 (Pretrial diversion for misdemeanors, level 4 and level 5 felonies), counsel should explore these programs' possible applicability to the client's case as early as possible. Similarly, the noncitizen client's immigration status should be determined early, and potential immigration consequences of the criminal prosecution explored.

The list of information generally to be provided to a client, subparagraphs (b)(iii)(A) through (E), is not exhaustive. Absence of a particular type of information from that list does not justify a failure or refusal by counsel to discuss other relevant aspects of the client's case. Nearly all information gathered for bail proceedings will be vital for trial and/or sentencing as well. See,

---

4. See also Guideline 1.2(a), *supra*, (Guideline 4.2(a), *infra*, and Guideline 6.2 (d), *infra*, regarding the need to know actual practices in the particular jurisdiction.

5. "Where counsel is unable to communicate with client because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance to assist with the matter." Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 1.3(l).

   See also Prof. Cond. R 1.14 regarding lawyer=s conduct when client is a minor or suffers from mental disorder or disability.

for example, Guideline 4.1 and Commentary, *infra*, Guideline 4.3 and Commentary, *infra*, Guideline 6.2 and Commentary, *infra*, and Guideline 7.1 and Commentary, *infra*. Information gathered and decisions made concerning pretrial release may be especially important (again) at the sentencing phase, Guideline 8.3 and Commentary, *infra*.

In explaining the attorney-client privilege, subparagraph (b)(iii)(C)), counsel should be aware of laws and professional regulations concerning any duty counsel might have to divulge any information divulged by the client[6] and should include applicable limitations in his or her explanation of confidentiality.[7]

Time sensitive evidence -- i.e. information relevant to preparation of the defense rather than to pretrial release -- such as that listed in subparagraphs (c)(1) through (5),[8] not obtained at the initial interview, should be obtained as soon thereafter as possible.[9] Guideline 4.1 (b)(2), *infra*. Counsel should aggressively pursue the preservation of videos, drugs, and other time sensitive evidence, and should also promptly look into Facebook, MySpace and other social media of witnesses, co-defendants, victims, etc., that may be pertinent to the case.[10] By conducting in-depth interviews before clients are released on bond, counsel may insure that needed information is obtained -- in some instances, clients released on bond may be difficult to schedule for additional interviews.

Delay in the initial interview, whether due to counsel's late entry into the case or otherwise,[11] can hinder overall case preparation. As memories fade, witnesses become unavailable for interviews, etc.[12] Counsel who has been unable to obtain the information listed in

---

6. *Prof. Cond. R.* 1.6(b) provides in part: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing any criminal act" (emphasis added). It is not a violation of Rule 1.6(b)(1) if a lawyer does not take preventive action against prospective conduct that is criminal. See Comment, Rule 1.6.

   Attorney-client privilege protects confidential communications. See Ind. Code 34-46-3-1(1). It applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. Attorney-client privilege does not protect communications to perpetrate future crime or fraud. Green v. State, 257 Ind. 244, 274 N.E.2d 267, 273 (1971).

7. Under *Rule 1.6, a* lawyer shall not reveal any information relating to the representation, without the client's consent. IC 34-1-60-4 provides: "It shall be the duty of an attorney . . . [t]o maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client." ABA *Standards*, The Defense Function (3d ed.), Standard 4-3.1 (a).

8. A client information form listing this and/or any information the attorney believes to be important, prepared ahead of time, can assist counsel in not forgetting any point during the interview. *See, e.g.,* Initial Client Interview Form, Office of the State Public Defender for Montana, http://publicdefender.mt.gov/forms/pdf/opd-initialclientintakeadultmh1.pdf ; 1-1 California Criminal Defense Practice §1.13(2011).

9. Certainly, an in-depth interview must be conducted before a guilty plea or trial. See, e.g., Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guidelines 1.3, 2.2, & 5.1.

10. See Frongillo & Gelb, "It's Time to Level the Playing Field – The Defense's Use of Evidence from Social Networking Sites," reprinted in February 2011 "Indiana Defender." For general practice tips, see IPDC Pre-Trial Manual, Ch. 6.

11. The importance of early representation is stressed in national standards and elsewhere. *E.g.*, ABA, *Standards*, Providing Defense Services (3d ed.) Standard 5-6.1; NLADA, *Assigned Counsel Standards*, Standard 2.5.

12. This basic tenet of case preparation transcends differences in jurisdictions or even legal systems. David Napley, a solicitor, noted the importance of early interviews with clients and witnesses in his book, *The Technique of Persuasion* (1970), p. 15,

subparagraphs (a)(1) - (5) prior to a first interview need not delay the interview solely for that reason. Counsel can at least seek to establish the attorney-client relationship and obtain a good amount of information even if charging documents are not yet available or counsel has not been able to research the charge.

While persons accused of a crime have a right not to provide incriminating testimonial evidence against themselves,[13] they may be obligated to provide (upon request) certain types of non-testimonial evidence.[14] What constitutes "testimonial" or "non-testimonial" evidence is often a close question.[15] Counsel should consider whether the law and facts call for counsel to advise the client to refuse a request for such evidence, to provide such evidence with an objection for later ruling by the trial court or an appellate court, or to provide the evidence without objection.[16] While counsel cannot reasonably be expected to anticipate every development in this (or any other) area of the law,[17] counsel should be generally knowledgeable about the law regarding the prosecution's

---

aimed at practitioners in Britain.

13. U.S. Const., Amend. V. Compulsory polygraph exams are testimonial. McDonald v. State, 164 Ind.App. 285, 328 N.E.2d 436 (1975).

14. Accused may be compelled to participate in lineup. Owens v. State, 427 N.E.2d 880, 885 (Ind. 1981). Fifth Amendment does not shield defendant from compulsory submission to physical tests to produce identification evidence; however, the Fourth Amendment constrains against bodily intrusions that are not justified in the circumstances, or which are made in an improper manner. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. 2d 908 (1966). See also IPDC Pre-Trial Manual, Ch. 6, Sec. II.

15. See, e.g., Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). "Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilemma" of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component." Id., 496 U.S. at 597(footnotes omitted). Muniz, who was suspected of DUI, was asked if he knew the date of his 6th birthday. He answered truthfully that he did not, and the Court held that "the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response." Id., 496 U.S. at 599.

See also Allred v. State, 622 So. 2d 984 (Fla. 1993). Lower Florida courts disagreed about the admission of evidence of the defendant's failure to accurately recite alphabet or number sequences following arrest for driving while intoxicated. The state Supreme Court ruled that "failure to accurately recite the alphabet `discloses information' beyond possible slurred speech; it is the *content* [emphasis in original] (incorrect recitation), rather than merely the manner (slurring) of speech" that is relevant. The court refused to apply Schmerber and held that, as a matter of state constitutional law, the evidence was to be suppressed. Id., 622 So. 2d at 987. In State v. Greasley, 619 N.E. 2d 1086, (Ohio App. 1993), a lower court's suppression of a videotape of a defendant's questioning after arrest for driving under the influence of alcohol was upheld in part and reversed in part, depending on the content of the statements made.

16. This Guideline and Commentary are specific about counsel's choices. Guideline 3.2(d), while still general enough to encompass the variety of situations counsel may face concerning non-testimonial evidence, focuses on problems raised by non-testimonial evidence. Guideline 3.2(d) specifically recognizes that defendants may rightly refuse to provide certain non-testimonial evidence and that the extent of counsel's participation varies depending on the evidence sought by the prosecution.

17. In United States v. Washington, 12 F. 3d 1128, 1138-1139 (D.C. Cir. 1994), the court found that a jury instruction complained of for the first time on appeal would have required reversal had the defendant objected at trial, under caselaw decided only after the trial was completed. The defendant's failure to object could not be justified on the basis of the "supervening-decision" doctrine, the court said, because the constitutionality of the instruction in question "was not so well established that any objection would have seemed futile." The instruction could not be reversed on the grounds of "plain error,"

right to demand non-testimonial evidence before accepting a criminal case.[18] Counsel should advise his or her client about the prosecution's power to seek such evidence whenever a prosecution demand has been made or can reasonably be anticipated.[19]

Whenever counsel may legally participate in proceedings surrounding a prosecution demand for non-testimonial evidence, counsel should do so absent substantial strategic reasons for not participating. Counsel's personal belief that a given prosecutor, law enforcement officer or other person(s) involved in acquiring the evidence will act properly should not alone preclude counsel from participating in the proceedings.[20]

Counsel should insist that the record of the proceedings regarding non-testimonial evidence be as complete as the law of the jurisdiction allows.[21]

however, because "at the time of trial...this circuit had not yet held that the phrase [at issue] was constitutionally deficient." In other words, the error should have been obvious to defense counsel although it could not be said to have been obvious to the trial court. See also Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004)(It is true that appellate counsel cannot be held ineffective for failing to anticipate or effectuate a change in existing law. Trueblood v. State, 715 N.E.2d 1242, 1258 (Ind. 1999). However, precisely because the law in this area was unsettled and in a state of flux at the time of Fisher's trial and appeal, the issue of whether the trial court erred in refusing to give a lesser-included instruction on reckless homicide was both significant and obvious as well as clearly stronger than the issues raised. *See* Pelmer v. White, 877 F.2d 1518, 1523 (11th Cir. 1989) ("That the law is unsettled on a point does not mean the legal basis for arguing the point is unavailable.").

18. See generally, IPDC Pretrial Manual (6th Ed. 2013), pp. 6-40 – 6-49; Guidelines 1.2 and 1.3, *supra*.

19. See, e.g., Amsterdam, *Trial Manual 5*, section 37. The manual states that advice to clients who initially contact the attorney by telephone should include instructions "that if anyone attempts to inspect or examine his or her body, to take swabs or washes or scrapings from it, to cut nails or take hair samples, the client should tell them, `My attorney said to wait until s/he got here,' but if they go ahead anyway, the client should not try to fight them off."

20. See, *generally,* Id. and citations therein.

21. Counsel's duty to establish a proper record for possible review is discussed in more detail, in the context of trial proceedings, at Guideline 7.1 (e) and Commentary, *infra*.

Guideline 3.3 Pretrial Release Proceedings

(a) Counsel should understand that the nature of the charges in no way indicate the dangerousness of the person for purposes of advocating for release or for appropriate and least restrictive conditions.

(b) Counsel should understand that Ind. Crim. Rule 26 strongly presumes that a person charged should be released without the payment of a cash bond and without conditions unless the State can prove that a person is a high risk of not appearing as ordered at future hearings or that the person is a high risk to be rearrested while on pretrial release.

(c) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria, including the requirements of Ind. Crim. Rule 26, supporting release and, where appropriate, to make a proposal concerning conditions of release.

(d) 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.

(e) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and/or facility where the client is incarcerated 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.

(f) Counsel should be knowledgeable on any remedies that may be available should the client not be released appropriately and make an informed decision whether or not to pursue them.

Related Standards

ABA Standards, The Defense Function (3d ed.), Standard 4-3.6

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.3.

Commentary

From material gathered from the client,[1] any report(s) from bail agencies, law enforcement

1. Guideline 3.2(b)(2), *supra*.

agencies,[2] and other sources,[3] counsel should distill information to support the client's pretrial release under the legal criteria applicable in the jurisdiction.[4] The method (formal motion or informal discussion), form (written or oral), and timing of counsel's presentation of this material to the appropriate judicial officer may vary.[5]

Similarly, the propriety of defense proposals concerning conditions of pretrial release (e.g., continued employment or school attendance, type of supervision [if any]) may vary. Such proposals may be designed to counter specific prosecutorial or judicial concerns, to meet particular wishes of the client, to further trial/sentencing strategy, etc.[6] Potential conditions of pretrial release are set out in Ind. Code 35-33-8-3.2(a)(3) – (a)(7).

However, counsel should not forego preparation of a proposal concerning conditions of release just because such proposals are routinely not made in the jurisdiction or because counsel assumes such proposals will be rejected.[7] Guideline 1.1, not the prevailing practice of other attorneys in a given jurisdiction, must be counsel's touchstone.

The different types of bond that may be required are set out in Ind. Code 35-33-8-3.2(a) & (b), and local rules may also govern the bond payment transaction. Counsel should be familiar with the law and rules in this regard, and aware of the impact of various options. For instance, commercial bonding agents are required by statute[8] to collect a 10% premium, which is retained as a charge for writing the bond. Ind. Code 35-33-8-3.2 (a) & (b) sets out what portion of cash posted with the Court may be retained to cover fees, fines, costs, restitution, publicly paid costs of representation and other costs. The defendant or the person posting bail on her behalf will receive notice that amounts may be retained, or that the entire amount will be forfeited if defendant fails to appear. Even so, counsel should be aware of these and other distinctions among available bond

2. Guideline 3.2(a)(2), *supra*. To determine whether reports have been prepared, counsel may talk to the probation officer(s), police officer(s) and/or the prosecuting attorney handling the case. Mass CLE, Effective Criminal Defense Techniques: Tricks of the Trade from the Experts (1990), chapter entitled "Bail-- Is the Determination Made Fairly," by Willie J. Davis.
3. e.g., the client's family.
4. Guideline 3.2(a)(2)(3), *supra*. For legal criteria applicable in Indiana check your county's local rules, and IC 35-33-8.
5. See, e.g., Amsterdam, *Trial Manual 5*, ' 62.
6. "Advocate for imposition of pretrial probationary conditions if that's what it takes to get the defendant released, e.g., stay away order, surrender of license or passport, report to court clinic. Have the defendant consent to these, if appropriate." Mass CLE, Inc. Effective Criminal Defense Techniques: Tricks of the trade from the Experts (1990), chapter entitled "Issues at Arraignment: Bail and Chapter 123 Examinations," by Kevin Connelly. See also IPDC Pre-Trial Manual, Ch. 3, Sec. II.
7. This is not to say that counsel must tilt at windmills. In some instances, counsel may want to explain to his or her client that counsel's time might be better spent in preparation for trial. Examples might include cases where bail has been denied under a pretrial detention statute which has already survived constitutional and other challenges and the factual requirements of the statute have been met. On the other hand, counsel may choose to seek bail in a murder case, which "is not bailable when the proof is evident or the presumption strong," in part for the opportunity to preview the state's case and to take testimony under oath from the state's witnesses.
8. Ind. Code 27-10-4-5.

options and should explain them to the client so that there are no surprises later.[9]

Counsel's obligations are to his or her client, not to the client's family or others who may provide bond money or otherwise act to assist the client.[10] Therefore, it would be inappropriate for counsel to talk a client's grandparents out of offering their home as collateral for the client's appearance based on counsel's knowledge or belief that the client would abscond. However, counsel should advise anyone acting on the client's behalf about the procedures to follow for posting the client's bail/bond.

An incarcerated client may seek from his or her lawyer solutions to institutional problems such as unavailability of specific medical treatment. (Prisoners have a right to humane treatment, Constitution of the State of Indiana, Article I, Section 15). While some attorneys may find such requests for assistance to be outside their role as legal counsel,[11] certain institutional problems may impact not just on the personal comfort and well-being of a client, but the legal case.

For example, a client who is offered an advantageous plea agreement in exchange for testimony against a co-defendant may be unwilling to accept the otherwise desirable deal in the absence of jail security procedures to protect him or her from the co-defendant or the co-defendant's agents. In Indiana, pretrial detainees in danger of serious bodily injury or death shall be transferred. See Ind. Code 35-33-11-1. A client who has psychiatric or other medical needs which are not being met may be or become unable to assist counsel in the preparation of a defense, and may fall prey to pressure to accept a detrimental plea offer.

Counsel's belief that efforts to affect jail policy or treatment of a particular client would be futile does not, alone, justify inaction. If counsel seeks a court order to protect the client's interest and obtains it, the client will presumably benefit.[12] On the other hand, fear that a particular jailer or other person will retaliate against a client for seeking court protection cannot be entirely discounted, and where relevant should be considered in determining any course of action. Where a client has suffered retaliation or violation of the order, relief resulting in a favorable disposition of the case may be sought (e.g., outright dismissal of some or all charges, or at least suppression of any evidence [e.g., a confession] that arguably resulted from the prohibited jail practice). If the request for a court order is denied, a record will have been created for possible later appeal.

9. A further discussion on bail procedures, see the latest version of IPDC's Pre-Trial Manual, Ch. 3.

10. See Prof. Cond. R. 1.8(f); ABA/BNA *Lawyers' Manual on Professional Conduct* (1984), pg. 51:902.

11. "Social work" is considered outside the realm of legal practice by some members of the bar. But see Amsterdam, *Trial Manual 5,* §51(B), p. 60:

    The importance of apparently small matters (for example, securing the return of the client's eyeglasses or medications that were taken away at the time of arrest; arranging the release of cash from the client's time of arrest) cannot be overstated: These provide opportunities for counsel to do something for the client and thereby win the client's confidence.

12. Even if the court order is ignored, the client may then have other recourse such as appellate relief that would not have been available in the event of counsel's inaction.

Guideline 4.1 Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible, particularly with respect to time-sensitive evidence, such as publicly accessible information on Facebook, MySpace, and other social media accounts of potential witnesses.

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

(1) *charging documents*

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

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

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, failure to specifically identify persons or property, charging in the alternative, or double jeopardy issues.

(2) *the accused*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;

(B) explore the existence of other potential sources of information relating to the offense;

(C) collect information relevant to sentencing.

(3) *potential witnesses*

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

(4) *the police and prosecution*

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, dispatch and officer to officer communications that were recorded, as well as radio logs, incident history detail, or computer aided dispatch print-out. Where necessary, counsel should pursue such efforts through formal and informal discovery and public records requests unless a sound tactical reason exists for not doing so.

(5) *physical evidence*

Where appropriate, counsel should make a prompt request to the police or

investigative agency for physical evidence and expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.

(6) *the scene*

Counsel should attempt to view the scene of the alleged offense, as well as sites of other important events, such as the arrest or a search and seizure. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions);

(7) *expert assistance*

Counsel should secure the assistance of experts where it is reasonably necessary to:

(A) the preparation and presentation of the defense, including supporting an affirmative defense;

(B) adequate understanding of the prosecution's case; or

(C) rebut the prosecution's case.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standards 4-4.1, 4-4.2, and 4-6.1.

ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-1.4.

ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, (hereafter ABA *Death Penalty Guidelines*) (Rev. Ed. 2003), Guideline 10.7

Mass. Publ. Counsel Ser., *Manual*, Ser. IV, Performance Guidelines, Guideline 4.1.

Commentary

The importance of a "prompt and thoroughgoing investigation" by defense counsel has long been recognized.[1] In this day of social media and other electronic information which can be publicly available one day and inaccessible the next, promptness remains crucial. [2]

"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction….The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."[3]

1. See, e.g., *Powell v. Alabama,* 287 U.S. 45, 57 (1932); Amsterdam, *Trial Manual 5,* §106 ("The *facts* are counsel's most important asset not only in arguing before a jury but also in every other function counsel performs: seeking advantageous terms of bail, urging the prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, urging a favorable sentencing recommendation on a probation officer or sentencing disposition on a judge. Investigation is counsel's instrument for getting the facts.")

2. See Frongillo & Gelb, "It's Time to Level the Playing Field – The Defense's Use of Evidence from Social Networking Sites," reprinted in February 2011 "Indiana Defender."

3. ABA *Standards,* The Defense Function (3d ed.), Standard 4-4.1 (a), *cited with approval* in *Wiggins v. Smith,* 539 U.S. 510 (2003) (reaffirming that ABA *Standards* have been recognized as "guides to determining what is reasonable," *citing Strickland v.*

Regardless of the client's desire to plead guilty, counsel "has a duty to investigate the case before recommending that a guilty plea be taken (or sought) or proceeding to trial."[4] While the decision to enter a plea of guilty ultimately belongs to the defendant,[5] counsel's duty to investigate is not negated solely by a client's initial stated desire to plead guilty. Investigation is necessary for proper legal advice to the client, and proper legal advice is necessary for entry of a knowing and voluntary plea.[6]

Counsel's role is not that of jury or judge. Persons charged with one or more crimes are entitled to present a defense to the charge(s),[7] and regardless of initial information provided to a lawyer by his or her client that indicates guilt, counsel's obligation to investigate remains. Counsel may not "sit idly by, thinking that investigation would be futile."[8]

Just as counsel cannot competently advise her client without investigation, neither can counsel make decisions with respect to trial strategy without the information that can only come from a thorough investigation. "[I]n order to make a **reasonable** tactical decision, counsel must have adequately investigated the client's case because "strategic choices made after less than complete investigation are **reasonable precisely** to the extent that **reasonable** professional judgments support the limitations on investigation."[9]

Counsel should begin her investigation promptly. Delay in investigation may result in loss of potential evidence or testimony that would support a defense.[10] Furthermore, investigation may

Washington, 466 U.S. 668, 688 (1984) and *Williams v. Taylor,* 529 U.S. 362, 396 (2000).

4. *See Smith v. State*, 565 N.E.2d 1114 (Ind.Ct.App. 1991) *reh=g den.* (Effective representation requires at least cursory inquiry into factual background of case before advising defendant to enter guilty plea).

5. *Indiana Rules of Professional Conduct* Rule 1.2(a). See *Lyles v. State*, 382 N.E. 2d 991, 993, 178 Ind. App. 398 (1978). ABA *Standards*, The Defense Function (3d ed.), Standard 4-5.2(a)(I),(ii); ABA, *Model Code of Professional Responsibility* (1980), EC 7-7.

6. *See* ABA *Standards*, The Defense Function (3d ed.), Standard 4-6.1 (b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.").

7. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed. 2d. 1019 (1967).

8. ABA *Death Penalty Guidelines,* Guideline 10.7, commentary, 31 Hoffstra L. Rev. 913, 1021 (2003), citing *Voyles v. Watkins*, 489 F. Supp. 901, 910 (ND Miss 1980). *See also, e.g., Abraham v. State*, 91 N.E. 2d 358, 360, 228 Ind. 179 (1950) (AHe has the right to expect that his court-appointed counsel will make such investigation of the facts as the circumstances require.@).

9. *State v. Holmes,* 728 N.E.2d 164, 172 (Ind. 2000), *quoting Strickland v. Washington,* 466 U.S. 668, 690-91. *See also Parish v. State,* 838 N.E.2d 495, 501-02 (Ind.Ct.App. 2005) ("[W]e cannot conclude that Doty's decision not to investigate the shooting--and instead rely solely on the alibi defense--was reasonable. In other words, Doty did not make a reasonable decision not to investigate the shooting, which would have uncovered evidence that perhaps the crime did not occur as the State's eyewitnesses testified at trial. At the least, this information would have seriously undermined the eyewitnesses' testimony that the crime occurred inside the apartment. That is, if the eyewitnesses were not telling the truth about where the crime occurred, then that could cast doubt on their account of how the crime occurred and who was involved, thereby strengthening Parish's alibi defense.").

10. *See, generally,* Amsterdam, *Trial Manual 5,* §108.

reveal information that could be utilized in plea negotiations,[11] pretrial motions,[12] and motions concerning pretrial detention.[13] Therefore, this Guideline urges in paragraph (a) that investigation be conducted "as promptly as possible."[14]

This Guideline's recognition that prompt investigation may not be possible does not condone undue delays in investigation due to routine, continuing time pressures. Counsel has a duty to decline to represent a client if counsel does not have the time or resources to conduct a timely investigation.[15] Investigation and preparation are widely recognized as the keys to zealous and quality representation.[16]

The list of potential sources of investigative information following paragraph (b) is not intended to be exhaustive, but is only a compilation of common sources of information that should be considered. Counsel must also consider any sources of information revealed by the initial or later interviews with the client.[17]

Case preparation is a continuum, not an unconnected series of events.[18] Unless counsel enters the case subsequent to preliminary proceedings, or the initial charges against the client change, counsel should have become familiar with the elements of the offense(s), subparagraph (b)(1)(A), early in the case.[19] Similarly, counsel should examine the initial charging documents, subparagraph (b)(1), for, among other things, defects that could be challenged in preliminary

11. Guideline 6.2, *infra*; *see also* NLADA, *Assigned Counsel Standards*, Standard 4.6, commentary pg. 155.

12. Guidelines 5.1(b) and 5.3, *infra*; *see also* NLADA, *Assigned Counsel Standards*, Standard 4.6, commentary pg. 155.

13. Guideline 3.3, *supra*; *see also* NLADA, *Assigned Counsel Standards*, Standard 4.6, commentary pg. 155.

14. *See* NLADA, *Assigned Counsel Standards*, Standard 4.6, commentary pg. 155.

15. *See* Guideline 1.3, *supra*.

16. For example, "The heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). That is, "any experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all." *Brooks v. Texas*, 381 F.2d 619, 634 (5th Cir. 1967). "A carefully prepared case may be brought to a successful conclusion by one who, by nature or otherwise, is a poor advocate when on his feet; but an inadequately prepared case is unlikely to be won unless presented by an unusually able advocate, on one of his [or her] lucky days, before either a singularly good or a singularly bad judge. There has never been a great advocate who could have achieved his [or her] position without the conscientious preparation which must have gone into the case before it was presented to the court. . .the extent and quality of preparation is infinitely more important, significant and essential than the manner of presentation." David Napley (solicitor), *The Technique of Persuasion* (1970).

    Comment to Ind. Prof. Cond. Rule 1.1 provides: ACompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.@

17. Guideline 3.2(c), *supra*.

18. If one attorney within a law firm or defender office takes over the client's case from another, as much information as possible about what the first attorney has learned and done should be passed along. This not only ensures quality representation of the client (Guideline 1.1, *supra*) but saves office resources by preventing unnecessary repetition of work.

19. Guidelines 3.2(a)(1), *supra*.

proceedings (subparagraph (b)(1)(C))[20] and/or pretrial motions.[21]

The initial interview with the accused, subparagraph (b)(2), is discussed in detail at Guideline 3.2, *supra*.

Utilizing the assistance of investigators for the interviewing of potential witnesses, subparagraph (b)(3), and whenever else it is necessary or appropriate, subparagraph (b)(7), is encouraged.[22] One benefit is that the fees of experienced investigators are generally lower than those of attorneys, and such economy is laudable whether the money saved is the client's, the attorney's, or that of a defender office, or assigned counsel program. Furthermore, investigators often have special training and community contacts that allow them to do a *better* job than counsel alone.[23] Another important benefit is that investigators can be called to testify if conflicts develop between what a witness says at trial and what they said when interviewed by the defense.[24] It is important, however, that investigators and other support service providers not substitute for counsel in the performance of counsel's duties, nor interfere with counsel's representation of the client.[25]

Use of discovery methods to obtain materials in the possession of the police and prosecution, subparagraph (b)(4), is discussed in Guideline 4.2, *infra*.

Physical evidence in the possession of the state, subparagraph (b)(5), should be obtained or viewed and, where appropriate, tested.[26] The specific reference to physical evidence in the possession of the state does not supersede the need for defense counsel to pursue investigation of potential physical evidence *not* in the state's possession. Counsel must consider how and whether to use *any* potential physical evidence provided or mentioned by the client or potential witnesses, or suggested by other investigation.

Where defense investigation yields physical evidence *not* in the possession of the state, counsel should be familiar with the ethical considerations raised by possession of such evidence. Ind. Prof. Cond. Rule 3.4(a) provides: "A lawyer shall not … unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having

20. Guideline 2.1 (a)(3), *supra*.

21. Guideline 5.1(b)(4), *infra*.

22. *See, e.g.,* Amsterdam *Trial Manual 5* §110. See the latest version of the IPDC Pre-Trial Manual , Ch. 7, for tips on utilizing investigators to interview witnesses.

23. All national standards regarding the provision of defense services to defendants unable to retain counsel call for the use of support services. ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-1.4; NAC, *Courts*, Standard 13.14; NLADA, *Assigned Counsel Standards*, Standard 4.6; NLADA, *Standards for Defender Services*, IV.3; NSC, *Guidelines*, Guideline 4.1 (4th paragraph).

24. *See, e.g.,* Amsterdam, *Trial Manual 5,* §110.

25. NSC, *Guidelines*, Guideline 4.4 discusses the use of law students to help in the representation of indigent defendants, and condemns the substitution of students for lawyers in the provision of representation to poor people.

26. "The defendant in a criminal case has the right to examine physical evidence in the hands of the prosecution," *Turnpaugh v. State,* 521 N.E.2d 690, 192 (1986), *citing Miller v. Pate,* 386 U.S. 1 (1967). Counsel must decide in each case whether defense testing will help the defendant or merely corroborate test results already obtained by the state. But counsel's decision should be based on knowledge about the testing procedures in question, not on a mere assumption that state test results are accurate, particularly in the wake of. Counsel should be familiar with weaknesses in a number of long-recognized forensic "sciences," as discussed in National Academy of Sciences*, Strengthening Forensic Science Science in the United States: A Path Forward* (hereafter NAS Report).

potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Comment 2 to this rule provides, in part: "Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter its potential evidentiary value. In such a case, applicable law may require the lawyer to turn the evidence over to the police or prosecuting authority, depending on the circumstances." Because neither the rule nor the comment provide much constructive guidance for counsel who come into possession of such evidence or knowledge of its whereabouts, some commentators and courts point to ABA *Standards*, The Defense Function (3d ed.), Standard 4-4.6 as the best source for guidance.[27]

While viewing the crime scene, in addition to checking the physical dimensions, special relations, viewing obstacles, lighting, etc., counsel should look for surveillance cameras and seek to discover any video or images made at the time of the offense.

Counsel should secure the assistance of experts where they are reasonably necessary to understand and prepare to rebut the state's case and or prepare and present a defense. For a discussion on the procedure and necessary showing for obtaining funds for experts, see IPDC's

27. *See, e.g.,* Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance,* 62 Hastings L. J. 1177 (2011), available for download at http://ssrn.com/abstract=1863354; *In re Olson,* 222 P.3d 632 (Mont. 2009). Standard 4-4.6 provides as follows:

    (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

    (b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). 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.

    (c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) 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 his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

    (d) If the item received is contraband, i.e., 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, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

    (e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

"Getting Funds for Experts."[28]

Throughout the investigation, counsel (and any support person such as an investigator) should consider the potential sentencing impact of developing evidence. The use of expert assistance and the need for investigation in the context of sentencing is discussed *infra* in Commentary to Guidelines 8.3(a)(9), 8.6, and 8.7(b) through (d).

28. Also reprinted in large part in Chapter 7, Section II of IPDC's Pre-Trial Manual.

Guideline 4.2 Formal and Informal Discovery

(a) In addition to the independent investigation described in Guideline 4.1, counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction, to pursue public records requests where necessary, and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

(b) Among the discovery material that counsel should consider seeking are the following items:

(1) potential exculpatory information, identified as specifically as possible, and including any promises, rewards or inducements made to or contracts entered into with witnesses;

(2) the names and addresses of all prosecution witnesses, their prior statements, their criminal record, if any, and any prior police reports regarding them;

(3) the names of all persons interviewed by police but not listed as witnesses;

(4) dispatch and officer to officer communications that were recorded, as well as radio logs, incident history detail, or computer aided dispatch print-out;

(5) officer notes, emails between officers and prosecutors or between officers, and reports to supervisors;

(6) all oral and/ or written statements by the accused, and the details of the circumstances under which the statements were made;

(7) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

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

(9) all results or reports of relevant physical or mental examinations, and all requests for scientific tests or experiments and reported results or copies thereof;

(10) statements of co-defendants;

(11) notice of excited utterance evidence;

(12) details of all identification procedures, including examination of any photographs that were shown and selected.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-4.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.4; Guideline 4.4; Guideline 4.5; Guideline 4.9.

Commentary

Independent investigation of the case by defense counsel, while necessary,[1] is not sufficient preparation for determining whether to go to trial, or for the trial itself. Counsel needs to know what information (whether correct or incorrect) the prosecution may be relying on.

In Indiana, discovery in criminal cases is governed by the Rules of Trial Procedure,[2] with the scope governed by Trial Proc. R. 26.

> "Specifically, in the context of a defendant's discovery request in a criminal case, the following test has been applied to determine whether the information is discoverable: (1) there must be a sufficient designation of the items sought to be discovered (particularity); (2) the items requested must be material to the defense (relevance); and (3) if the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of "paramount interest" in non-disclosure.[3]

This three-part test applies to discovery requests to third parties as well as those made to the state, and case law has developed further fleshing out the concerns addressed by each prong. [4] Trial Court discovery rulings made within this framework are reviewed for abuse of discretion.[5]

It is crucial to seek any and all potentially exculpatory information, both through independent investigation and through discovery. For advice on how to get exculpatory material, see page IPDC's Pretrial Manual, Chapter 6. The requirements of specificity and materiality apply, and the defendant must also exercise reasonable diligence in obtaining evidence.[6] However, there is still a prosecutorial duty to disclose that which might be expected to play a significant role in the defense.[7]

Some Indiana counties have local rules imposing automatic, mandatory disclosure requirements on both the state and defense, while in other counties, seeking formal discovery may trigger a reciprocal duty of disclosure. Counsel should be aware of local rules and practice and

1. Guideline 4.1, *supra*.

2. *State v. Cline (In re WTHR-TV),* 693 N.E.2d 1, 6 (Ind. 1998).

3. *Id., citing Kindred v. State,* 540 N.E.2d 1161, 1174 (Ind. 1989).

4. *Id.*

5. *Id.*

6. Requesting "all *Brady* [*Brady v. Maryland*, 373 U.S. 83, 835 S.Ct. 1194, 10 L.Ed. 2d 215 (1963)] material" or "anything exculpatory" has been said to equal no request at all. *United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342, 351 (1976). *See also, Kindred v. State,* 540 N.E.2d 1161 (Ind. 1989) (there must be sufficient designation of items, and items sought to be discovered must be material to defense); *State v. Nikolaenko,* 687 N.E.2d 581 (Ind.Ct.App. 1997) (State will not be found to have suppressed material information where information was available to defendant through exercise of reasonable diligence).

7. *See Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (regardless of request, favorable evidence is material, and constitutional error results from its suppression, if reasonable probability that had evidence been disclosed the result of proceeding would have been different). *See also Goodner v. State,* 714 N.E.2d 638 (Ind. 1999) (Ind. Prof. Cond. R. 3.8(d) requires a prosecutor to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.)

the discovery opportunities and disclosure obligations they dictate.[8]

Counsel should also be aware of informal methods that may exist for gaining knowledge about the state's case.[9] Counsel should also be aware of potential pitfalls generally associated with informal discovery. For example, reliance on informal discovery when formal discovery procedures exist may preclude later recourse for the failure of prosecutors and/or law enforcement to provide all expected material.[10] Furthermore, the prosecutor may *later* demand information from the defense in "exchange" for earlier-provided discovery.[11]

The list of potential discovery items in paragraph (b) of this Guideline does not purport to contain all items that may be or should be the subject of discovery in a given case.[12] Rather, it contains items commonly within the knowledge of the government that should routinely be considered when discovery is contemplated.

8. *See*, *e.g.*, ABA *Standards*, The Defense Function, (3d ed.), Standard 4-4.5; Discovery & Procedure Before Trial (2d ed.), Standard 11.32; Fed. Rules Crim. Proc. 16(b). Indiana Supreme Court requires that discovery requirements be fairly balanced between State and defendant, in both issuing and in enforcing discovery orders. *Wiseheart v. State,* 491 N.E.2d 985 (Ind. 1986).

9. This requirement that counsel have knowledge of more than the formal legal procedures concerning discovery is consistent with the requirements in other areas. Guideline 1.2 requires counsel to be aware of the practices of the judge before whom a case is pending, where appropriate, and to have sufficient experience to provide quality representation. Inherent in the "experience" requirement is a need to know the "real" ways in which a particular criminal justice system functions. *See also,* the Commentary to Guideline 3.2, *supra*.

10. It is for this reason that Guideline 4.2 states counsel has a duty to pursue discovery under the rules of the jurisdiction *and* informal discovery. Another approach is taken in the proposal of the Michigan State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 14, 72 Michigan Bar Journal #8 (August 1993) pg. 818, 820. That proposed standard requires counsel to pursue discovery "by informal methods if available, and by formal methods if necessary." *See also* ABA *Standards*, The Defense Function (3d. ed.), Standard 4-4.5, Commentary. For discussion of formal and informal discovery see page IPDC Pre-Trial Manual , Chapter 6 (5th edition) page 87.

11. *United States v. Milano*, 443 F.2d 1022, 1027 at n. 1 (10th Cir. 1971) (footnote says that condition of reciprocity need not be imposed at the time the initial defense request for discovery is granted). See discussion of informal versus formal discovery in IPDC Pre-Trial Manual, Ch. 6.

12. For a discussion of “What you can get from the State” see the IPDC Pre-Trial Manual, Chapter 6, Sec. I.

Guideline 4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. No trial of a cause should be commenced without a carefully conceived "theory of the case," nor should a case be seriously negotiated until the "theory of the case" is developed.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. III, Performance Guidelines, Guideline 6.1(a).

Commentary

A major underlying theme of these Guidelines, made more specific in the Commentary, is that quality criminal defense representation involves not a series of separate, unrelated actions but a connected set of actions directed at achieving the best results for the client. Decisions made and actions taken by counsel early in the representation of a client may impact on later aspects of the defense. For example, if counsel arranges the client's pretrial release (Guideline 3.1, *supra*) based on certain conditions, fulfillment of those conditions by the client may become an argument in support of a conditional, probationary sentence; failure of the client to meet release conditions will also have an effect on sentencing strategy. Similarly, a decision to acknowledge the client's proprietary interest in seized evidence (to show standing in a pretrial motion to challenge the legality of its seizure) may hamper a trial objection that the seized evidence is inadmissible because not sufficiently linked to the client, and would certainly have a negative impact on a defense sentencing posture of maintaining innocence. Developing a theory of the case[1] that encompasses the best interests of the client and the realities of the client's situation will help counsel evaluate various choices throughout representation, from pretrial release and exploration of pretrial diversion programs and plea negotiation, through taking of a guilty plea or trial, and sentencing.

As counsel pursues his or her investigation, having a theory of the case can help counsel prioritize and make the best use of what may be limited resources. Counsel must not let a theory limit the investigation, however, and must be open to facts that do not support it and that suggest a preferable theory. As information is gathered, counsel must continually re-evaluate whether to follow the same tack or pursue a new one.

At trial, it is important to have a definite theory of the case. Presenting multiple theories will generally confuse the trier of fact and damage your credibility. During your investigation, be alert to facts that suggest a preferable theory and to those facts that do not support your theory. Be flexible and reconsider as the investigation progresses.

Counsel may wish to include the theory of the case in counsel's trial notebook (Guideline 7.1, *infra*, Commentary at note 20). Writing out aspects of the theory -- which are the weak and

1. One proposed standard calls for counsel to develop an overall "strategy" for the defense, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 24, 72 Michigan Bar Journal #8 (August 1993) pg. 818, 821.

strong points, how can the weak points best be supported and bad facts be dealt with, what prosecution response can be expected, etc. - may be helpful.[2] (Counsel should not rely solely on memory to keep track of information about the case.[3]

2. J. Eric Smithburn and James H. Seckinger, *Criminal Trial Advocacy* (2d ed.) (1985) (National Institute for Trial Advocacy) pg. 2-9.

3. "Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client." Mass. Publ. Counsel Ser., *Manual*, Sec. III, Performance Guidelines, Guideline 1.3(d).

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant, or a good-faith argument for an extension, modification, or reversal of existing law.

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

(1) the pretrial custody of the accused;

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

(3) the potential defects in the charging process;

(4) the sufficiency of the charging document;

(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, or corresponding or additional state constitutional provisions, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

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

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

(8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

(9) access to reasonably necessary resources and experts for an indigent client;

(10) the defendant's right to a speedy trial;

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

(12) matters of *voir dire*, opening statement, trial evidence, and closing argument which may be appropriately litigated by means of a pretrial motion *in limine*;

(13) matters of trial or courtroom procedure.

(c) Counsel should withdraw 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 defendant'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 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.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-5.2(b).

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 4.3 and Guideline 4.7.

Commentary

This Guideline does not mandate the filing of any particular motion in any given case. Criminal cases vary endlessly in factual details and circumstances; a difference in just one aspect may warrant the filing of a pretrial motion in one case but not another.

This Guideline does mandate that counsel *consider* all potentially appropriate pretrial motions, so that the absence of pretrial motions is a result of professional choice, not negligence or inexcusable error. When deciding the appropriateness of filing motions, always weigh the state law, including state constitutional aspects, and the U.S. Constitution.

Motions concerning the pretrial custody of the accused, subparagraph (b)(1), could raise legal challenges to pretrial detention rules as well as factual bases for pretrial release. Pretrial release is discussed in the Guidelines in Section 3, *supra*.

The need for counsel to keep abreast of legal developments (Guideline 1.2(a), *supra*) and to examine the statutes and precedents relevant to the charges in the client's case (Guideline 4.1(b)(1), *supra*) relate to the requirement of subparagraph (b)(2) of the instant Guideline. The constitutionality of the implicated statute can only be challenged when counsel can proffer arguable grounds for such a challenge.

Similarly, when deciding whether to file a pretrial motion concerning potential defects in the charging process, subparagraphs (b)(3) and (4), counsel should have examined the charging documents and done any other investigation relevant to that decision (Guideline 4.1(b)(1)(C), *supra*). Research and investigation will likewise be needed, in cases where there has been joinder of charges and/or defendants, for counsel to determine whether such joinder is arguably improper, and whether it is likely to harm the defendant's case at trial or sentencing, subparagraph (b)(5).

In considering whether to file a motion related to pretrial discovery, counsel should consider not only the reciprocal discovery obligations that may be triggered by filing such a motion, but also what information counsel has otherwise obtained, whether there is a need to make the motion to preserve a right to later-developed prosecutorial information, etc. For more on the state's *Brady* obligation and defense discovery, see Guidelines 4.2 and commentary, as well as Chapter 6 of IPDC's Pretrial Manual.

When contemplating motions to suppress pre-trial statements or other evidence obtained in violation of federal and/or state constitutional provisions, counsel should think beyond the usual police interrogation setting and review the bail interview as well, particularly as it has been expanded as part of Indiana's Risk Assessment system. Some prosecutors have sought to use bail

interview responses at trial, and some defense attorneys have been successful in suppressing them under the 6th Amendment as a critical stage at which counsel was not present. Complicated legal questions may arise concerning the issues set forth for consideration in subparagraphs (b)(7) through (b)(8). These Guidelines do not purport to constitute a treatise on constitutional questions arising in criminal cases; counsel is urged to keep abreast of these and other issues through individual research and continuing legal education.

Poor persons accused of crime should not, because of their indigence, be denied access to the resources necessary for effective defense participation in every phase of the prosecution.[1] Whenever counsel representing a poor person believes that the client is being denied access to needed defense resources because of the lack of an ability to pay for such resources, counsel should consider, under subparagraph (b)(9), motions to secure such resources at government expense. Request an *ex parte* proceeding on the appointment of experts. The State should not be permitted to be present and participate in appointment of expert proceeding. Trial Rule 26(B)(4) prohibits premature discovery of information, including mental impressions and legal theories concerning the defendant's case. An *ex parte* proceeding is the only way to protect the work product privilege and the defendant's right to equal protection guaranteed by the 14th Amendment and the Ind. Const. Art. I, Sec. 23.

The defendant's right to a speedy trial may be violated by undue prosecutorial delay, and in extreme cases by court or defense attorney delay.[2] Conversely, undue speed in bringing a defendant to trial may violate his or her constitutional rights to present a defense, have effective assistance of counsel, etc.[3] Each of these issues may be the basis for a pretrial motion in a given case, subparagraphs (b)(10) and (11).

Questions concerning trial evidence may be litigated by pretrial motions *in limine*, subparagraph (b)(12), where such litigation is required by rule or practice, where such litigation may prevent jury prejudice from exposure to improperly offered prosecutorial evidence, from long courtroom delays while such questions are argued during trial, etc. These questions include the admissibility of evidence of prior bad acts or the testimony of experts.

Matters of trial or courtroom procedure, subparagraph (b)(13), include the conditions for and length of voir dire. They will vary from case to case and county to county, and must be conceived and researched by counsel as needed.

In considering the many possible objectives of filing pretrial motions, paragraph (c), counsel should remember that professional ethics may prohibit the pursuit of certain objectives

1. ABA *Standards*, Providing Defense Services, Standard 5-1.4. *See also* NSC, *Guidelines*, Guidelines 3.1 and 4.1; NLADA, Standards for Defender Services, Standard IV.2; NAC, *Courts*, Standard 13.14.

2. Speedy trial rights exist under the Federal constitution (U.S. Const. Amend. VI), *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972) and a variety of statutes and court rules, *e.g.*, See *Indiana Rules of Criminal Procedure*, Rule 4; Constitution of Indiana Article I, sec. 12; IC 35-33-10-4 (Interstate Agreement on Detainers speedy trial rights when prisoner in another jurisdiction). For a discussion of these provisions see IPDC Pretrial Manual, Chapter 11.

3. For example, where trial was held on the same day that defense counsel was appointed, and counsel had no prior knowledge of the case, the defendant was denied effective assistance of counsel, *Singer v. Court of Common Pleas, Bucks County, PA*,879 F. 2d 1203 (CA3, 1989).

through the filing of motions.[4] And counsel should keep in mind the theory of the case[5] (Guideline 4.3, *supra*).

4. The ABA *Standards for Criminal Justice*, The Defense Function (3d ed.) Standard 4-1.3(d) states that counsel "should not intentionally use procedural devices for delay for which there is no legitimate basis."

5. "The relevance of each pretrial motion must be clear. The purpose is not to burden the court or your opponent, but to make headway inspired by the theory of the defense which you have developed." New York State Bar Association, Criminal Justice Section and the Committee on Continuing Legal Education, *Criminal Motion Practice* (1988), pg. 6. *See also*, J. Eric Smithburn and James H. Seckinger, *Criminal Trial Advocacy* (2d ed.) (1985) (National Institute for Trial Advocacy), (pg. 1-36) quoting Millard C. Farmer, Joseph M. Nursey and Andrea I. Young, *Motions in Criminal Cases* (Team Defense Project, Inc.): "Using motions as an integral part of the problem solving process in criminal cases is an essential means of affording an accused person full representation."

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner and should comport with the formal requirements of the court rules. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

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

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

(2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses; including a discovery request for known rebuttal witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

(c) Counsel shall consider whether a written request for recording the hearing should be made.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 4.3 and Guideline 4.7.

Commentary

To file timely pretrial motions that comport with the applicable rules, counsel obviously must *know* the applicable rules. Guideline 1.2, *supra*, requires counsel to maintain current knowledge of law and procedure, including knowledge of pretrial motion practice,[1] paragraph (a), and the substantive law that would support pretrial motions.

To convince a court to rule favorably on any pretrial motion, counsel must provide the court with the legal basis and persuasive reasons. Busy trial courts may frown upon lengthy briefs, memoranda, argument and even testimony. Counsel should be as concise as possible in offering support for pretrial motions, but should seek to present to the court sufficient information to support the motion and (in case of denial of the motion) possible appellate review.[2] Boilerplate motions are discouraged, except perhaps for standard invocations of rights that are automatically granted.[3]

Filing a pretrial motion may delay resolution of the case. The prosecution is entitled to time

1 Counsel may wish to refer to or create a "timetable" for pretrial motions. *E.g.*, United States Code Annotated, Title 18, Fed. Rules Crim. Proc. (Vol. Rules 1-11) contains a "Time Table for Lawyers in Federal Criminal Cases" which refers counsel to the applicable rule and time limitation for various motions, updated in the pocket part. In Indiana, the omnibus date is the controlling date for filing of motions and other pleadings. IC 35-36-8-1. For a list of statutory motions with time limits see IPDC Pretrial Manual, Chapter 2, Section II.

2 The Commentary to Guidelines 1.2, 3.3, and 5.1, *supra*, have denounced the practice of eschewing appropriate motions solely because the trial judge is known to routinely deny such motions.

3 *e.g.*, motions invoking the Sixth Amendment right to a jury trial, or for discovery in automatic discovery jurisdictions.

to respond to defense motions. Argument and perhaps an evidentiary hearing may need to be scheduled. And the court may take a motion under advisement, delaying a decision even after all legal and factual presentations by the parties are complete. (See Criminal Rule 15 as to the time limitation for a court holding issue under advisement).

If the defense has brought a pretrial motion, delays attributed to that motion are likely to count against the defense in any later claim that the client's right to a speedy trial has been violated.[4] Counsel should consider this when deciding whether to file pretrial motions.

Some pretrial motions may be based on the record existing at the time they are made -- *e.g.*, motions regarding imperfections in the charging papers[5] or speedy trial issues (where the record is clear as to whom all delay is attributable). Many pretrial motions, however, will require evidentiary hearings, paragraph (b), to establish the defense claim -- *e.g.*, motions to suppress evidence allegedly acquired by the prosecution via unconstitutional means. Counsel's consideration of filing such motions may sometimes engender a dilemma. Without filing the motion, counsel may have difficulty obtaining discovery material needed to verify the claim being considered. But by filing a motion without having in hand the material needed to support the motion, counsel risks a determination that the motion was frivolous, warranting a judicial rebuke.[6]

Once a motion requiring an evidentiary hearing has been filed, counsel should fully prepare for the hearing, subparagraphs (b)(1) through (b)(3). Support personnel such as investigators and legal researchers may be utilized to gather information and prepare witnesses. (See Commentary to Guideline 4.1, *supra*.) Counsel should be sure to request discovery of all known and anticipated rebuttal witnesses.[7]

---

4 Although the Indiana Supreme Court has held that delays caused by defendant=s motions are chargeable to defendant, whatever their length, *Battle v. State*, 275 Ind. 70, 73, 415 N.E.2d 39, 41 (1981), more recent appellate cases hold that not all delays caused by the defendant=s motions are chargeable to the defendant. *Haston v. State,* 695 N.E 2d 1042 (Ind.Ct.App. 1998) (only delay attributable to defendant who sought interlocutory appeal was 30 days and not remaining 3 years it took State to bring him to trial); *Biggs v. State*, 546 N.E.2d 1271 (Ind.Ct.App. 1989) (defendant moved for continuance until State complied with discovery request; held, not delay chargeable to defendant); *See also, Crosby v. State*, 597 N.E.2d 984 (Ind. Ct.App. 1992). The right to speedy trial is guaranteed by the United States Constitution (U.S. Const. Amend. VI), as well as by several state constitutions and statutes. For a discussion of how delay time is counted for purposes of a speedy trial motion, see *e.g.*, *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and its progeny.

5 Counsel may choose to waive preliminary examination to avoid premature flagging of a potentially fatal defect in the prosecution's charge against the defendant, Guideline 2.1 Commentary, footnote 16, *supra*. Such deliberate inaction presents no ethical problem for counsel where the defect is fact-based. When determining whether to bring a pretrial motion on other potential defects in the charging process, counsel should keep in mind any ethical questions presented by failure to do so. For example, where a murder case was continued on the motion of the prosecutor, and defense counsel was unable to attend the docket call and did not consent to the continuance, and the continuance would carry the case one day beyond a time limit for proceeding, counsel sought an ethical opinion about the obligation to raise the time limit prior to its expiration. The opinion stated that an attorney has no legal obligation to reveal the expiration of a time limit and, therefore the attorney should not reveal it to the prejudice of the attorney's client. LEO #1215 (Virginia) (1989), reported in National Reporter on Legal Ethics & Professional Responsibility (1989). In another state, where both charges, rather than one, were dismissed following an agreement, defense counsel sought an ethical opinion about any duty to advise of this error. The opinion stated that counsel had no obligation to notify the prosecutor of the error, but did have an obligation to advise the court or court staff. WI-E-84-7, cited in the National Reporter on Legal Ethics & Professional Responsibility (1985), citing *State v. Barto*, 202 Wis. 329, 331, 232 N.W. 553 (1930) (defense counsel is an officer of the court) and *In re Integration of the Bar*, 5 Wis. 2d 618, 622, 93 N.W. 2d 601 (1958).

6 *See, e.g.*, *United States v. Quin*, 836 F.2d 654 (1st Cir. 1987), an unusual case applying the sanction of Fed. Rule. Civ. Proc. 11 to the quasi-criminal proceedings of habeas corpus.

7. *See McCullough v. Archbold Ladder Co.,* 605 N.E.2d 175, 179 (Ind. 1993).

Proper preparation for an evidentiary hearing takes time. To determine whether or not evidence and potential witnesses are "helpful," counsel must know what the evidence or potential testimony is, know what proofs are necessary for the defense position to prevail, and consider how the facts available in the case fit into the law. Last-minute preparations -- an extreme example is interviewing witnesses for the first time in the hall outside the courtroom minutes before the hearing -- precludes a full evaluation of what to present during the hearing, what *not* to present, how to overcome prosecution objections to certain evidence, what counter-evidence to expect from the prosecution, and what to argue.[8]

If an evidentiary hearing involves factual issues that are within the ken of the client, counsel should carefully consider all foreseeable advantages and dangers of putting the client on the stand. Questions to consider may include: Is cross-examination of the client likely to result in disclosure of information currently unknown and helpful to the prosecution? Will preservation of the client's testimony create the possibility that the client will be impeached should he or she testify at trial? Is the client able to present his or her information without displaying characteristics that could negatively affect sentencing in the event of an ultimate conviction? Can the information to be presented by the client's testimony be presented in any other way?

Indiana Rules of Criminal Procedure, Rule 5 requires trial judges to arrange and provide for the recording of all oral evidence, testimony, and other oral matters given in all cases and hearings. Testimony routinely recorded may not be transcribed unless specially ordered by a party. The Equal Protection Clause of the Fourteenth Amendment, as construed in *Griffin v. Illinois*, 351 U.S. 12 (1956), forbids the states to deny an indigent, for the sole reason of indigency, an important litigation tool that a solvent defendant could buy. *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Britt v. North Carolina*, 404 U.S. 226, 228 (1971).

8 In a particular case, counsel may be able to achieve beneficial results for a client by proceeding with a court hearing immediately upon entering the case, with little time for preparation. However, that would depend completely on facts and circumstances having arisen outside counsel's control. Such an instance does not belie the rule requiring more complete preparation.

Guideline 5.3 Subsequent Filing of Pretrial Motions

(a) Counsel shall renew all previous motions that have been denied and should be prepared to raise during the subsequent proceedings any issue which could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Commentary

Counsel is sometimes faced with a situation in which counsel knows or suspects that the rights of the client have been violated, or the client's interests need protecting, in a way that would make a pretrial motion appropriate if substantiated, but counsel lacks proof that would be acceptable in court to sustain such a motion. (*E.g.*, counsel may know that the government has in other instances improperly obtained informant testimony, and suspects that the government has done so in the client's case, but despite discovery and investigative efforts, counsel has been unable to obtain proof.[1]) In such an instance, counsel should continue to investigate the issue, and should be prepared to file a later motion if the investigation is ultimately fruitful. Counsel may be called upon, in the course of propounding the motion, to show that the evidence was not reasonably available to the defense when timely pretrial motions were due.[2]

Never forego filing just because a major deadline has been missed. Courts do grant many requests to file belated defenses (alibi, mental health, or other defenses) and motions.

Counsel should be aware of the rules for preservation of issues in counsel's jurisdiction, and take steps to preserve issues for appeal whenever necessary. If counsel fails to raise an issue during trial proceedings, counsel's inaction may deprive the client of later relief.[3] Issues which the courts conclude should have been raised before conviction or sentencing may be rejected on appeal or during post-conviction proceedings regardless of their legal merit.[4]

While interlocutory appeals are not specifically addressed in this Guideline, counsel should consider whether the denial of a particular pretrial motion creates the need for such an appeal.[5]

---

1 *See e.g.*, BNA, *Criminal Practice Manual*, "Jailhouse Informant Ruling Creates Catch-22 Conundrum," Vol. 8, p. 14 (1991).

2 This can be difficult. *See*, *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L. Ed. 2d 517 (1991), but not always impossible, *see Kirkpatrick v. Whitley*,992 F.2d 491, 495-496 (5th Cir. 1993).

3 See *Indiana Rules of Evidence,* Rule 103. (In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he [or she] desired the court to make if the specific grounds were not apparent from the context.) For more on this rule and its requirements, see discussion in IPDC's Evidence Manual, Chap. 1.

4 Post-conviction relief will not be granted for claims with legal merit that have been forfeited because not raised at the proper time. *See*, *Indiana Rules of Procedure for Post-Conviction Remedies,* Rule PC 1. Section 8.

5 See *Indiana Rules of Appellate Procedure, Rule 14(B).* For a discussion of categories of interlocutory orders that are appealable see IPDC Pretrial Manual, Chapter 13.IV; Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 4.11.

The erroneous denial of some motions cannot be properly rectified on appeal after conviction. For example, the denial of a motion to dismiss charges on double jeopardy grounds, if not appealed, will put the client through the burden of a trial when the appropriate relief of dismissal might be obtained through an interlocutory appeal. Denial of bail must be raised through interlocutory appeal and is moot after trial. *Hill v. State*, 592 N.E.2d 1229 (Ind. 1992).

Trial attorneys who feel unqualified to handle appellate matters may be able to secure the services of appellate attorneys through association or otherwise.[6] Even where no appellate office or division is available to handle the interlocutory appeal in a particular case, trial counsel may be able to obtain advice and assistance from practiced appellate lawyers through other formal or informal mechanisms such as bar association sections or simple "word-of-mouth" requests.

6 If trial counsel is representing an indigent client, the services of an appellate defender may be available. The 1980 NLADA publication *Standards and Evaluation Design for Appellate Defender Offices* says, in Standard I.D.4, that "The appellate defender may provide representation in interlocutory (pre-judgment) appeals, and shall make the availability of the office known to attorneys providing representation to criminal defendants at trial."

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) Counsel shall advise client of local plea negotiation practice and 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.
(b) Counsel shall keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.
(c) Counsel shall not accept any plea agreement without the client's express authorization.
(d) The existence of ongoing tentative plea negotiations with the prosecution shall not prevent counsel from taking steps necessary to preserve and present a defense.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standards 4-5.1(a), 4-6.1(b) and 4-6.2(a).

ABA *Standards*, Pleas of Guilty, Standard 14-1.6(c), 14-1.3 and 14-3.2

ABA *Model Code,* DR 1-102, EC 7-7, EC 7-8

ABA *Model Rules,* Rules 1.2, 1.4, 2.1, 3.3 and 4.2

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 5.1; Guideline 5.2; Guideline 5.4; Guideline 5.7.

NAC, *Courts*, Standard 13.13:1.

NLADA, *Death Penalty Standards*, Standard 11.6.1.

NSC, *Guidelines*, Recommendation 5.10.

Lousiana Public Defender Board Trial Court Performance Standards, § 729, 731

Commentary

Plea bargaining has become ubiquitous in the modern criminal justice system.[1] Judges and

1. *See*, *Santabello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) (plea bargaining is "an essential component of the administration of justice"). A November, 1990 newspaper article reported an American University study showing that 25% of felony cases go to trial in Detroit, MI, 20% in Chicago, IL, 8% in New York City, NY, 7% in Washington, DC, and 1% in Dade County, FL. John Dorschner, "Rush to Judgment," *Tropic* (magazine of the *Miami Herald*), Nov. 11, 1990. In approximately 1977, one secondary source stated that "estimates of the ubiquity of the plea bargaining process range from figures of 75% to 95% of dispositions of court case loads." Judith A. Lachman and William P. McLauchlan, Chapter 9

prosecutors, intent upon moving dockets and satisfying the public's perceived demand for convictions, may bring heavy pressure on defendants to plead. Such pressure is sometimes applied in a manner that violates the constitutionally guaranteed trial rights of defendants, and that does not differentiate between the possibly innocent and the certainly guilty.[2]

Authority exists for the proposition that judges, in their role of neutral arbiters, are not supposed to participate in plea bargaining other than to ratify or reject agreements.[3] If enforced, such judicial charge benefits the defense when it curbs undue judicial pressure on defendants to plead. Where judges might seek to cajole recalcitrant prosecutors into negotiations or agreements beneficial to defendants, limitations on judicial involvement in plea bargaining can hurt the defense.[4]

Prosecutors are supposed to seek justice, not simply convictions.[5] However, this limitation may often seem to the defense to be only theoretical.

The role of defense counsel in plea negotiations, however, is clear -- as in all other areas of representation, counsel is to zealously represent the best interests of each client.[6] In many circumstances, this will mean trying to shield the client from improper overt or veiled pressure to plead. (Under no circumstances should counsel *add* undue pressure on a client to plead, Guideline

---

(Models of Plea Bargaining). pg. 147, in *Modeling the Criminal Justice System*, Stuart S. Nagel, ed., (1977).

2. Coercive tactics in plea bargaining are not new. "The practice of plea bargaining in the United States dates back at least as far as the witch trials of Salem, where one 'witch' was crushed to death under stones while being offered--before each additional stone was dumped upon the existing pile -- the opportunity to confess his witch status and thereby be released." Judith A. Lachman and William P. McLauchlan, *supra* note 1, at pg. 146.

3. ABA *Standards*, Pleas of Guilty, Standard 14-3.3(C) says that when the parties are unable to reach an agreement, they may request to meet with the judge to discuss negotiations. If the court agrees to meet, "the judge shall serve as a moderator..." After hearing the parties, the court may "indicate what charge or sentence concession would be acceptable or whether the judge wishes to have a preplea report before rendering a decision." The parties may then decide among themselves, outside the judge's presence, whether to accept or reject the plea agreement "tendered by the court." If the parties have not approached the court with any agreement or request to meet, the judge "may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur." But, other than the provisions noted, the "judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be offered." (The original standard barred any judicial participation in plea discussions; the commentary cites a number of court decisions expressing the view that any judicial involvement in plea discussions is coercive, and notes that virtually all standards in the area, as well as the Federal Rules, bar judge participation in plea discussions.)

4. It is not hard to imagine that some action would be contemplated by judges facing burgeoning dockets in the wake of a prosecutorial decision to end all plea bargaining (*see e.g.*, the "no-bargaining" policy of the Bronx District Attorney announced in late 1992. "No More Plea Bargains in the Bronx?", VII Public Defense Backup Center *Report*, publication of the New York State Defender Association Defender Institute (#10, Nov./Dec. 1992) pg. 2, citing *The New York Law Journal* (November 25, 1992)).

5. *See Lewis v. State*, 629 N.E.2d 934 (Ind. Ct. App. 1994) (prosecution insure justice prevails, not procure convictions at any cost); *Vaughan v. State*, 215 Ind. 142, 19 N.E.2d 239, 241 (1939). See also I.C. 33-43-1-3(7) (attorney not to encourage commencement or continuance of action or proceeding from any motive of passion or interest). ABA *Standards*, The Prosecution Function (3d ed.), Standard 3-1.2(c); National District Attorneys Association, *National Prosecution Standards*, (2d ed., 1991), 1.1.

6. Indiana Rules of Professional Conduct, Rule 1.1; ABA, *Model Code*, DR6-101(A)(1); ABA, *Model Rules Rule 1.1*; see also Guideline 1.1., *supra*.

6.3(b), *infra*).[7] In other circumstances, it will mean actively pursuing the best possible plea agreement.[8]

Zealous representation of a client in plea bargaining does have limits. Counsel cannot ethically argue for imposition of a sentence that is beneficial to the client but does not comport with applicable law.[9]

In summary as to paragraph (a), counsel should discuss the possibility of negotiation with the client and advise the client of the ramifications of waiving the right to trial and the ramifications of refusing to reach a negotiated settlement.[10] But the ultimate decision to plead guilty or to go to trial rests with the defendant in a criminal case, not his or her counsel.[11]

Common practice in a jurisdiction of appointed counsel or defender office staff routinely discussing cases with the prosecution before interviewing clients should not be participated in by counsel.[12] If circumstances warrant counsel engaging in negotiations without the client's

---

7 See ABA Criminal Justice Standards, Standard 4-5.1: "Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea."

8. Some authorities would say active pursuit of a plea bargain should be the standard approach: "Absent some compelling strategic or tactical reason, defense counsel in every case must explore with the prosecution the possibility of disposition of the case by a negotiated guilty plea." J. Vincent Aprile II, "Negotiations: The Criminal Defense Attorney's Forgotten Skill", prepared for NLADA 65th Annual Conference (1987), pg. 4.

One proposed standard for trial counsel reads, "where appropriate, counsel shall attempt to negotiate the most favorable plea agreement possible under the circumstances." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 26, 72 Michigan Bar Journal (#8 August 1993) pg. 818, 821.

9. *See* ABA *Model Rules*, Rule 3.3(a)(3); ABA *Model Code*, DR 7-106(B)(1).

10. Public defenders and assigned counsel, in discussing plea possibilities with clients, may encounter distrust and/or hostility based on fear that the attorney's true function is to plead out cases to keep the system moving. "The reasons for this are not difficult to identify. Assembly line justice has not been uncommon in America and [some] public defenders have played their part in it..." NAC, *Courts*, Standard 13.13. Commentary pg. 278. *See also*, Robert Hermann, Eric Single and John Boston, *Counsel for the Poor* (1977): "In every system [studied], we found, defendants themselves were deeply dissatisfied with publicly-appointed counsel... Defendants viewed these lawyers as having primary allegiance to the state or to the court, rather than to their clients," pg. 156. While counsel's duty in each individual case is to the client, not any larger group [Standard 1.1 and commentary, *supra*] counsel may keep in mind "that plea negotiation, helpful as it may be to the defense, may also lead to suspicion on the part of the client community that they are being sold out. *Id.*, pg. 279. Increased emphasis on personalized representation of a client by one attorney rather than a series of lawyers from the office helps insure personal, not assembly-line representation. See, Randolph N. Stone, "The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases," 17 Am. J. of Trial Advocacy 205, 213, 215, 220 (1993). Avoidance of "excessive and unnecessary camaraderie in and around the courthouse and in his [or her] relations with law enforcement officials..." is also advised. NAC, *Courts*, *supra*, and at Standard 13.9. Commentary.

11. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983) See, *e.g.*, ABA *Standards*, The Defense Function (3d ed.), Standard 4-5.2(a)(I) and (ii); ABA *Standards*, Pleas of Guilty, Standard 14-3.2.

12. This is just one of many instances in which counsel, while remaining free to recognize case-specific circumstances that warrant extraordinary action, should not become complicit in a system that routinizes questionable practice. These Guidelines do not say that defense counsel can never engage in plea negotiations without the client's prior consent, just as they do not say counsel must always interview a client prior to bail/bond proceedings concerning the client's release (Guideline 2.2(c), *supra*, see Commentary at note 8) or even before preliminary hearing (Guideline 3.2, *supra*, Commentary at note 6). But counsel's paramount obligation set forth in Guideline 1.1, *supra*, does require that counsel not merely accept, on behalf of a client, systemic forces that are harmful to that client's interest.

consent,[13] counsel cannot make any final agreement before discussing it with the client, paragraph (c).[14] Counsel has an absolute duty to convey plea offers. Not to do so constitutes ineffective assistance even if defendant allegedly would not have accepted the offer. *Lyles v. State*, 382 N.E. 2d 991 (Ind.Ct.App. 1978); *Dew v. State*, 843 N.E.2d 556, 562 (Ind.Ct.App. 2006).15

For the client to knowingly exercise his or her right to decide whether to plead guilty,[16] the client may need to know more than the current plea offer. If the plea negotiations have a history -- *e.g.*, the prosecutor has consistently been offering better deals, or has consistently said this is the one and only deal -- that history may impact on the client's evaluation (in consultation with counsel) of whether the current offer is the best that can be expected. Counsel should keep the client advised of ongoing plea discussions, paragraph (b).[17]

If plea negotiations reach a stage where the client is personally called upon to make a statement of any kind relating to the offense charged to anyone other than defense counsel, the client should be advised as to possible consequences of such statement in the event no guilty plea is finalized.[18] Evidence of a withdrawn plea of guilty or an offer so to plead is not admissible. See Ind.Evid. Rule 410. *See also*, *Bell v. State*, 622 N.E.2d 450 (Ind. 1993).

No matter how certain counsel may be that a case will be settled before trial, counsel must not refrain from steps necessary to preserve the client's defense(s) because plea negotiations are pending, paragraph (d).[19] After appropriate investigation, counsel should advise the client of

13. For example, if a client free on bond cannot be reached by counsel before counsel is approached by the prosecutor for negotiations.

14. That the final decision on whether to plead guilty must be made by the client has already been noted, *Jones v. Barnes*, *supra* note 11. Especially where the client has not chosen the lawyer -- where counsel is court-appointed, or is being paid by a third party -- counsel must be sure the client's interest's, not those of counsel, "the system," or anyone else, are being served when a plea agreement is recommended. (For instance, if it is to counsel's financial benefit that the case be resolved by plea under a fee schedule that pays the same money for quick guilty pleas and full trials, counsel's agreement to a plea bargain without the client's involvement in negotiation would be (at best) highly suspect). [Supporters of a flat fee schedule in Detroit MI have asserted that "no specific example of an attorney breaching his or her duty because of the flat fee schedule ... has ever been documented." Richard C. Kaufman, "Assignment of Counsel in Wayne County," 72 Michigan Bar Journal #1 (January 1993) pg. 78, 80. Suspicions remain.]

15. *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (Sixth Amendment's right to effective assistance of counsel extends to the plea bargaining process).

16. *Jones v. Barnes*, *supra*, note 11.

17. This constitutes a specific, practical example of the client's general right to be informed, and counsel's corresponding duty to inform, about the progression of the case (Guideline 1.3, *supra*). *See Missouri v. Frye*, 132 S.Ct. 1399 (2012) (a defendant who validly pleads guilty may still assert a claim of ineffective assistance of counsel by establishing that but for counsel's error in failing to communicate a plea offer, the defendant would have pleaded guilty with more favorable terms); *see also Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

    See Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 5.1(d).

18. ABA *Standards*, Pleas of Guilty, Standard 14-2.2 says that guilty (or nolo contendere) pleas which are not accepted or are withdrawn, and "any statements made by the defendant in connection with entering such a plea" should not be received against the defendant except for perjury or false statement if made under oath, on record, in the presence of counsel."

19. "Thorough investigation must precede any serious negotiation." Trial Manual for the Defense of Criminal Cases 4 ' 210. *See also* Guideline 4.1, *supra*, noting counsel's duty to conduct a prompt, independent investigation of the case regardless of admissions by the client.

available alternatives and of considerations deemed important by the client and/or counsel.[20]

If counsel's law school and other formal training has not included study of the art of negotiation, counsel would do well to consider obtaining such training.[21]

Guideline 6.2 The Contents of the Negotiations

(a) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:

(1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;

(2) the possibility of forfeiture of assets;

(3) other consequences of conviction such as deportation, denial of naturalization or refusal of reentry into the United States and other civil disabilities;

(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;

(7) possible loss or suspension of driver's license;

(8) possible adverse consequences on the client's employment or education;

(9) Sex Offender Registration Act (I.C. 11-8-8 et. seq.)

(10) the possibility or lack thereof of future modifications.

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

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

(A) not to proceed to trial on the merits of the charges;

(B) to decline from asserting or litigating any particular pretrial motions;

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

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

(2) benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

---

20. Counsel's duty to advise the client as to the ramifications of a tentative plea agreement is discussed further in the Commentary to Guideline 6.3(a)), *infra*.

21. Negotiation skills may be learned outside the criminal law area. J. Vincent Aprile II states in "Negotiations: The Criminal Defense Attorney's Forgotten Skill", *supra* note 7, at pg. 4: 97-10 "A defense attorney, particularly in a felony case, must have familiarity with negotiation tactics and skills." *See*, *e.g.*, Fisher and Ury, *Getting to Yes*, (Penguin Books, 1986), a discussion of 'principled negotiations'--one methodology of negotiations."

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(C) that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(D) 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;

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

(F) that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official presentence report, certain information.

(G) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.

(H) reserving the right to file a motion for modification of sentence.

(c) In conducting plea negotiations, counsel shall be familiar with:

(1) the various types of pleas that may be agreed to;

(2) the advantages and disadvantages of each available plea according to the circumstances of the case;

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

(4) alternative sentencing options and placements.

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

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 5.4.; Guideline 5.10.

NLADA, *Death Penalty Standards*, Standard 11.6.2.

Lousiana Public Defender Board Trial Court Performance Standards, §731

Commentary

A multitude of factual and legal considerations may be involved in plea negotiations, and

no checklist could encompass them all. Many criteria that guide judges and prosecutors in the exercise of their discretion concerning plea negotiations cannot be found in codes, case reports or other formal sources of legal information. Yet, defense counsel must master the complex plea process, including jurisdictional peculiarities, in order to offer quality representation to his or her clients.[1] The items listed in this Guideline for counsel's consideration are not therefore offered as a comprehensive checklist, but rather as a reference point to assist counsel in perfecting his or her plea negotiation skills.[2] (Plea negotiations are actually one of the steps in sentencing advocacy [Guidelines 8.1 *et seq*, *infra*] -- obtaining the best possible sentence for the client is a primary defense goal. Many of the steps in preparing for sentencing therefore apply at the plea negotiation stage.)

Many of the items listed for counsel to consider will be obvious even to neophyte defense lawyers, *e.g.*, the maximum term of imprisonment and/or maximum fine, subparagraph (a)(1). Other items, less patent and not applicable in every case, constitute hidden traps for some defendants and their attorneys. Deportation, subparagraph (a)(3), for example, need not be of concern to citizen defendants, but can be a devastating effect of conviction for non-citizens.[3] The trial court has no duty to inform a non-citizen of possible collateral consequences of a guilty plea, including deportation at the conclusion of a sentence. *Williams v. State*, 641 N.E.2d 44 (Ind.Ct.App. 1994). Likewise, different clients will have different concerns as to the civil disabilities that may be incurred as a result of a criminal conviction. All foreseeable potential consequences of a conviction by plea should be discussed with the client.[4] This includes potential sentence enhancement based on special allegations of fact (*e.g.*, underage victim) or on prior convictions (See habitual offender statutes, IC 35-50-2-8; habitual substance offender, IC 35-50-2-10(b)). For example, 18 U.S.C. 922 (g)(9) prohibits a person from possessing a firearm if convicted in any court of a misdemeanor crime of domestic violence.

Without knowledge of potential collateral effects of a conviction, such as parole consequences, subparagraph (a)(4), for the crime(s) being considered in settlement negotiations, and of how sentences are actually implemented, counsel may secure for his or her client a deal that looks great on paper but provides less benefit to the client than anticipated. See differences in eligibility for consideration for release on parole depending upon whether sentence was for an indeterminate (IC 11-13-3-2(b)(1)) or determinate (IC 11-13-3-2(b)(2) term of imprisonment. If

1 See, ABA, *Standards*, The Defense Function, Standard 4-6.1 (3d ed.), commentary.

2 See the Commentary to Guideline 6.1, *supra*, for a discussion of the importance of counsel obtaining training in negotiation. See Guidelines 1.2, *supra*, and 2.2, *supra*, concerning the need for counsel to have current knowledge of substantive law, procedural rules, etc.

3 Failure to advise of consequences of deportation can, under some circumstances, constitute deficient performance; whether it is deficient in a given case is fact sensitive and turns on number of factors. *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001); *see also Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (Sixth Amendment requires criminal defense attorneys to advise their immigrant clients of the possible deportation consequences of a guilty plea).

4 For a checklist of possible consequences of conviction, see IPDC Pretrial Manual, Chapter 10. *See,* ABA *Standards*, Pleas of Guilty, Standard 14-3.2. The commentary to that standard notes that such considerations would include: loss of civil rights, court-martial, civil suit, and deportation/expatriation. The Constitution of Indiana, Article II Section 8 (loss of public office or employment, and ineligibility for future public office or employment.) Sex offender criminal registration requirements (IC 11-8-8-1 *et seq)* and termination of employment contracts (IC 22-5-5-1). *See also* "Collateral Costs: The Hidden Impact of Adult Convictions and Juvenile Adjudications," *Public Defender Commission News,* August 2010, p.1. (available at http://www.in.gov/judiciary/pdc/files/pdc-pubs-vol3-no2-aug-2010.pdf)

counsel structures a sentence with probation, the DOC releases the person back to probation and he or she does not have to serve parole.

For example, in jurisdictions with indeterminate sentencing, a plea to a lesser included offense with a shorter minimum prison sentence may not shorten actual prison time served if the parole authority can consider alleged facts of the case that would support a conviction on the originally charged, higher offense. Keeping those alleged facts out of the record that will be considered by the parole authority is one potential benefit that may be negotiated for, subparagraph (b)(2)(F).

The potential consequences of a sentence -- parole consequences, place and manner of confinement, and good time, subparagraphs (a)(4) through (9) -- may not be easy to determine. Multiple factors may bear on the result, including good-time statutes (IC 35-50-6-3.3) providing for a reduction of the minimum prison sentence that must be served; separate statutes barring the application of general good-time statutes to sentences for specific crimes; and, credit for time served prior to sentencing.[5] A defendant is entitled to credit for the number of days spent in confinement from the date of arrest to the date of sentencing. *Dewees v. State*, 444 N.E.2d 332 (Ind.Ct.App.1983). Credit for time served can be very confusing if the defendant has multiple cases.[6] Multiple factors may also bear on the result of statutes and/or rules governing when the sentences for multiple offenses can or must be served consecutively. For example, where a person is incarcerated awaiting trial on more than one charge and is sentenced to concurrent terms for the separate crimes, he is entitled to receive credit time against each separate term. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms. *Simms v. State*, 421 N.E.2d 698, 702 (Ind.Ct.App. 1981).

Counsel may find that judges who impose sentence have little or no idea of what happens once sentenced individuals leave the courtroom. Such judges may include beneficial-sounding verbiage in sentencing a client that will, in fact, make no difference.[7]

Knowing the general range of sentences that have been imposed in the jurisdiction, or by a specific judge, for similar crimes by similarly-situated defendants, may help counsel advise the client of potential consequences of a plea agreement. However, counsel cannot assure the client of precisely what the client's own sentence(s) will be unless there is a specific sentence negotiated or specific statutory language controlling the court's sentence. If any discretion is vested in the sentencing court, the possibility exists that a particular sentence will vary -- perhaps

5. *See, e.g.*, IC 35-50-6-4(b)(effective July 1, 2008), giving only one day of credit for every six days confined awaiting sentencing upon conviction for specified sex offenses.

6. *See Duncan v. State*, 274 Ind. 457, 412 N.E.2d 770 (1980). *E.g., Sheil v. New Jersey State Parole Board*, 582 A.2d 1279, 244 N.J. Super. 521 (N.J. Super. A.D. 1990) (*appeal dismissed per stipulation* 589 A.2d 872, 126 N.J. 308) (appeal concerning "jail time" and "gap-time" credits).

7. In Indiana, for example, it is the Department of Correction that determines in which institution a sentenced individual will be incarcerated. Language in the sentencing transcript, or even in the written judgment of sentence, specifying a more desirable institution, will have no effect on where the defendant serves his or her time. The DOC, not the judge, determines the facility in which the convicted person will be imprisoned. *Barnes v. State,* 435 N.E.2d 235 (Ind. 1982); IC 35-38-3-5. The court's record of judgment may include a recommendation as to the degree of security, and the DOC must notify trial court and prosecutor if the degree of security assigned differs from the court=s recommendation. IC 35-38-3-5(a)(5).

   "[S]ubsequent actions taken by the Parole Commission - whether or not such actions accord with a trial judge's expectations at the time of sentencing - do not retroactively affect the validity of the final judgment itself." *United States v. Addonizio*, 442 U.S. 178, 60 L. Ed.2d 805, 814, 99 S. Ct. 2235 (1979).

dramatically -- from prior sentences. Counsel should advise the client of this possibility, along with information about the general range of sentences, when applicable (see Commentary to Guideline 6.3 (a), *infra*). For example, whether the term of imprisonment is a non-suspendable offense under IC 35-50-2-2 and IC 35-50-2-2.1.

Plea agreements should be in writing. See, IC 35-35-3-3(a); *Petty v. State*, 532 N.E.2d 610, 612 (Ind. 1989). For counsel to negotiate the best settlement for his or her client, counsel must know what might induce the prosecution to agree to terms beneficial to the client, subparagraph (b)(1).[8] Some concessions are built into the very idea of plea negotiation, *e.g.*, the client giving up the right to a trial, subparagraph (b)(1)(A).[9]

Less generic but still common concessions include payment of restitution (IC 35-38-2-2.3(a)(5); IC 35-50-5-3), or participation in established community programs (IC 35-38-2.6-3), subparagraph (b)(1)(C). Counsel may provide invaluable help to the client (and to the court) by locating or devising programs for the client to participate in (see Guidelines and Commentary in Section 8, *infra*).

Some concessions are completely fact-specific. A client who desperately wants to negotiate a plea settlement and who would have no qualms about informing on anyone still must have information the prosecution might conceivably want before any potential concession, subparagraph (b)(1)(D), can be said to exist. Potential benefits to the client from a negotiated settlement are *all* unique to that client. What is perceived by one client (and by counsel) to be beneficial may appear detrimental to another. On one extreme, a client may wish to plead guilty in the absence of any proffered case-related benefit, perhaps to spare a loved one -- or the client -- the ordeal of further proceedings. On another extreme, a client may refuse "the deal of the century" rather than forego a trial at which there is "no hope" of acquittal but which will provide a forum for airing certain grievances or opinions of the client. Therefore, counsel can work creatively with each client and the prosecution to find something -- *when* a negotiated settlement is the client's wish[10]-- they can agree on. Where information in the possession of the prosecution is asserted by the defense to be irrelevant, improper, or inappropriate for consideration by the court or other authorities, agreement by the prosecution to not present that information to the court, presentence report preparer, etc. is another subject for negotiation. The potential benefits listed in subparagraphs (b)(2)(A) through (H), then, are merely common examples, not an exhaustive catalog.

A waiver of pretrial motions, subparagraph (b)(1)(B), should not be advised by counsel until after full investigation of the facts, research of the law, and an assessment of the likelihood and consequences of success or failure of the motion(s). Pretrial motions are discussed in detail in Guidelines 5.1 - 5.3, *supra*.

Under subparagraph (b)(2)(H), counsel should consider reserving the right to file a motion to seek sentence modification. Any purported waiver of the right to sentence modification in a plea agreement is invalid and unenforceable as against public policy. IC 35-38-1-17(i). The court

8. J. Vincent Aprile II, "Negotiations: The Criminal Defense Attorney's Forgotten Skill", prepared for NLADA 65th Annual Conference (1987), pg. 2.

9. Or giving up the right to an appeal. See, *e.g.*, *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). Provisions waiving right to seek PCR are void and unenforceable. *Majors v. State,* 568 N.E.2d 1065 (Ind.Ct.App. 1991).

10. Where the client has refused to consent to plea negotiations, after counsel has clearly pointed out the ramifications of such a refusal, (see discussion *infra* this Commentary), counsel should not pressure the client. In death penalty cases, somewhat different rules for counsel may apply, see NLADA, *Death Penalty Standards*, Standard 11.6.1.

has the authority to modify "open-end" plea agreements where the defendant does not agree to serve a set term of years. *Walker v. State*, 420 N.E.2d 1374 (Ind.Ct.App. 1981). IC 35-35-3-3(e) prohibits reduction of any sentence imposed pursuant to a plea agreement. (See *Badger v. State*, 637 N.E.2d 800, 802 fn. 2 (Ind. 1994). When subsequent petitions for modification are presented, the court retains authority to modify sentences so long as modified sentence would not have violated plea agreement had it been originally imposed. *Pannarale v. State*, 638 N.E.2d 1247 (Ind. 1994) (judge could subsequently reduce 10-year sentence originally imposed where plea agreement provided court could sentence defendant for up to 10 years).

Sentences on guilty pleas are directly appealable and belatedly appealable under Post-Conviction Rule 2. *See Collins v. State*, 817 N.E.2d 230, 231-33 (Ind. 2004).

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) 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 and the potential consequences of the agreement.
(b) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.
(c) If the client is a juvenile, consideration should be given to the request that a guardian be appointed to advise the juvenile if an adult family member is not available to act in a surrogate role.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 5.3; Guideline 5.6.

NLADA, *Death Penalty Standards*, Standard 11.6.3.

Lousiana Public Defender Board Trial Court Performance Standards, § 733

Commentary

Counsel's duties to respect the client's right to make the final decision to plead guilty or go to trial[1] and to keep the client advised of offers from the prosecution[2], have already been noted in the Commentary to Guidelines 6.1 and 6.2, *supra*. Their importance is underscored by this separate Guideline.

In discussing with the client the potential consequences of the plea, paragraph (a), counsel should not limit his or her advice to direct consequences. Collateral consequences can, in some cases, be greater than direct ones. Such consequences may include loss of civil rights, court-martial, civil suit, and deportation/expatriation.[3]

As for "undue influence" on the client's decision to plead, paragraph (b), counsel may permissibly argue strongly that the client accept a reasonable offer where investigation and research have revealed no viable defense. However, counsel must avoid adding to systemic or other improper pressures on a client to plead guilty.[4] An excessive caseload can create a conflict of interest between counsel and client during plea negotiations -- counsel may be tempted to seek

1. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983).

2. *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

3. ABA *Standards*, Pleas of Guilty, Standard 14-3.2, commentary; *see also*, "Collateral Costs: The Hidden Impact of Adult Convictions and Juvenile Adjudications," *Public Defender Commission News,* August 2010, p.1. (available at http://www.in.gov/judiciary/pdc/files/pdc-pubs-vol3-no2-aug-2010.pdf)

4. These pressures have already been mentioned in the Commentary to Guideline 6.1, *supra*.

plea agreements to avoid trials for which counsel has no time to prepare.[5] Unreasonably low fees, such as exist for assigned counsel in many jurisdictions,[6] can also create a conflict,[7] as can a lawyer's desire to maintain a good relationship with the judge and/or prosecutor.[8] Where such conflicts exist, they must be resolved in the best interests of the client, not counsel.[9]

A reverse conflict of interest can also occur, and must also be resolved in the best interests of the client. That is, counsel must not reject a plea offer, or advise the client to reject a plea offer because it is to counsel's benefit to go to trial (*e.g.*, counsel will be paid a higher fee for going to trial than for pleading out the case,[10] or will be placed "in the forefront of developing new legal concepts" by trying the case).[11]

Counsel's duty to fully advise the client about the ramifications of a guilty plea has potential consequences beyond a client's initial acceptance of the proffered plea. When a defendant has had the assistance of counsel in a case disposed of by plea rather than a trial, that assistance may become a factor in any appellate proceedings regarding the validity of the plea, or in a subsequent case where the earlier conviction by plea may be relevant to sentencing. Defendants who challenge the voluntariness of their pleas must generally overcome a presumption that their counsel adequately advised them of their rights and the pros and cons of entering a guilty plea and waiving their rights.[12] However, courts have vacated guilty pleas on the basis of ineffective assistance of counsel.[13]

---

5. Under Guideline 1.3 and its Commentary, *supra*, counsel must not accept more cases than counsel can handle in a manner consistent with counsel's overarching duty to provide quality representation. Regarding conflict created by excessive caseloads, *see*, note 10 of Guideline 1.3's Commentary.

6. *See*, *e.g.*, NLADA, *Assigned Counsel Standards*, Standard 4.7.1, commentary; *see also*, Guideline 6.1 Commentary, *supra*, note 14.

7. "For example, it is possible that the lawyer for the defendant may simply wish to expend as little effort on the case as possible in order to increase his [or her] 'profit' in a fixed fee case or to save time for additional court-appointed work that will further increase his income." Judith A. Lachman and William P. McLauchlan, Chapter 9 (Models of Plea Bargaining). pg. 151, in *Modeling the Criminal Justice System*, Stuart S. Nagel, ed., (1977).

8. "[T]he defense counsel -- whether retained privately, court-appointed, or serving as public defender -- may seek to enhance his [or her] working relationship with the prosecutor and the judge, with whom he must contend in his [or her] day-to-day work." Id.

9. Counsel has a duty not to accept, or to withdraw from, cases that will create a conflict of interest (Guideline 1.3, *supra*). In cases where counsel feels no conflict substantial enough to warrant withdrawal exists, counsel should be aware of any financial or time pressures and not allow such pressures to interfere with the best interests of the client.

10. "A lawyer's need for income, for example, should not lead the lawyer to prolong matters that could be resolved swiftly and competently at a more reasonable fee." ABA *Standards*, The Defense Function, Standard 4-3.5, commentary.

11. ABA *Standards*, The Defense Function (2d ed.), Standard 4-1.6 commentary pg. 4-22. See now, ABA *Standards*, The Defense Function (3d ed.) Standard 4-3.5(a).

12. *e.g.*, *Gosnell v. State,* 439 N.E.2d 1153 (Ind. 1982) (erroneous advice of defense counsel as to parole rights does not render plea involuntary); *Scurry v. State*, 194 Ga. App. 165, 390 S.E.2d 255 (1990).

13. *See*, *e.g.*, *Sial v. State*, 862 N.E.2d 702 (Ind.Ct.App. 2007) (defendant received ineffective assistance of counsel as a result of his attorney's failure to advise him of deportation consequences of his felony theft conviction); *Willis v. State,* 498 N.E.2d 1029 (Ind.Ct.App. 1986) (erroneous advice as to possibility of parole eligibility following murder plea may be ineffective assistance, but defendant failed to show, but for confusion over sentence, he would have gone to trial); *State v. Cozart*, 897 N.E.2d 478 (Ind. 2008) (defendant alleged that his plea was product of ineffective assistance of counsel due to his counsel's misadvice); *Betancourt v. Willis*, 814 F.2d 1546 (11th Cir. 1987); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990).

The court may allow a defendant to withdraw a guilty plea prior to sentencing for any fair and just reason unless the State has been substantially prejudiced by reliance upon defendant's plea. The defendant must file a motion, verified, and supported by specific facts. See IC 35-35-1-4(b). The trial court is required to grant a request for a withdrawal of a plea agreement only if the defendant proves that withdrawal is necessary to correct a manifest injustice. *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998). An order granting or denying the motion to withdraw is appealable. See IC 35-35-1-4(e). A plea may be withdrawn after sentencing only to correct a manifest injustice. See IC 35-35-1-4(c). A conviction based upon a guilty plea may not be challenged by direct appeal. *Tumulty v. State*, 666 N.E.2d 394 (Ind. 1996). Post-conviction relief is the proper procedure.

As was noted in the Introduction and elsewhere, these Guidelines are not intended to apply in death penalty cases, where the duty to keep the client informed certainly applies, but the duty to let the client decide to plead guilty may not.[14]

14. Paragraph (b) of NLADA, *Death Penalty Standards*, Standard 11.6.3, states that "The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest." The commentary says that "If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights," and notes that in at least one jurisdiction, caselaw existed disallowing a plea of guilty over the objection of defense counsel. (Citing *People v. Chadd*, 28 Cal. 3d 739, 170 Cal. Rptr. 798, 621 P.2d 837 (1981)).

Guideline 6.4 Entry of the Plea before the Court

(a) 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 fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused 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 providing a statement concerning the offense.

(b) 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.

(c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where 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.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 5.8; Guideline 5.9; Guideline 5.10; Guideline 5.12

NLADA, *Death Penalty Standards*, Standard 11.6.4.

Lousiana Public Defender Board Trial Court Performance Standards, §735.

Commentary

As set out in Guidelines 6.1 and 6.3, *supra*, counsel should have discussed with the client the ramifications of negotiated settlements in general and the ramifications of any tentative settlements offered during negotiations, including the final settlement. Having done so, counsel may be tempted to assume that once the client agrees to a settlement, the client is ready to enter his or her plea before the court without further discussion.

Counsel should not so assume. Before the plea is to be entered, counsel should once again advise the client as to the rights about to be waived, subparagraph (a)(1), and the contents and expected consequences of the plea agreement, subparagraph (a)(2). The client's situation may have changed since earlier discussions: new physical or mental health problems may have arisen, affecting the client's understanding; a family member, a jail-mate, or a co-defendant may have applied new pressure to the client, substantial enough to overbear the client's real desires; counsel himself or herself may have inadvertently exerted undue influence on the client (*e.g.*, the client

may have concluded from some remark by counsel about the time and/or work left before trial that counsel will not be able to adequately prepare for trial, leaving a plea as the only option), etc.

Furthermore, clients suffer the human tendency to "hear what they want to hear." A client who says "yes" to an offered plea agreement may genuinely but erroneously believe that the offered deal contains more benefits than it actually does.

Finally, clients are no less apt than other people to have second thoughts about a decision just before it becomes irrevocable. Second thoughts may be especially likely if a client is free on bond and the plea agreement includes incarceration. It is much better for counsel and the client if such second thoughts are explored in the privacy of a final attorney/client discussion than in open court.

Courtrooms can be confusing, unfamiliar, and terrifying places to individuals brought there involuntarily. The plea hearing will be in many cases the client's only "real day in court" on the matter at hand before sentence is imposed. The more counsel can prepare the client for the plea hearing, subparagraph (a)(3), the less likely the client will be to surprise counsel, the prosecutor and court, and himself or herself, with panicked statements that do not comport with the negotiations leading up to the plea hearing.

A full record of the plea agreement, paragraph (b), is vital to the protection of the client's interest.[1] A written plea agreement shall be filed with the court prior to the defendant entering a plea of guilty. See, IC 35-35-3-3(a). A full record may be needed for any one of several reasons. For example, if an error is made in the sentencing document(s) accompanying a defendant to a place of incarceration (such documents will not necessarily be presented to counsel for approval) or for any reason the plea agreement is not fulfilled following the sentencing hearing, the client will need a record of the agreement in order to seek appellate or post-conviction relief. Or, if the plea agreement contains conditions that turn out to be unlawful, a record of the agreement will be needed for later appellate or post-conviction proceedings. A conviction based upon a guilty plea may not be challenged by direct appeal. *Tumulty v. State,* 666 N.E.2d 394 (Ind. 1996). Post-conviction relief is the proper procedure.

Preparing to address the court concerning release pending sentencing, paragraph (c), is similar in some ways to preparing to advocate for pretrial release.[2] Sources of information for both include the client, bail agencies, law enforcement and/or jail agencies, the client's family, etc.

Pre-sentencing release provides an opportunity for the client to begin or continue activities that may or will be part of a probationary or other non-incarceration sentence (*e.g.*, drug rehabilitation, school, employment, community service, etc.). If defense-based sentencing specialists are available in the jurisdiction, counsel should consider consulting with one or more of them.[3]

1. A written record should be made as soon as an agreement is reached, according to J. Vincent Aprile II, "Negotiations: The Criminal Defense Attorney's Forgotten Skill", prepared for NLADA 65th Annual Conference (1987), pg. 6. See *Page v. State,* 706 N.E.2d 230 (Ind.Ct.App. 1999) (to avoid mistakes and misrepresentations, counsel should reduce to writing all terms of a plea agreement).

2. Guideline 3.3, *supra*.

3. See Guidelines and Commentary in Section 8, *infra*.

Guideline 7.1 General Trial Preparation

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) 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 (*e.g.*, transcripts, police reports);
(9) prior statements of all witnesses;
(10) reports from all experts;
(11) a list of all exhibits, and the witnesses through whom they will be introduced;
(12) originals and copies of all documentary exhibits;
(13) proposed jury instructions with supporting case citations;
(14) copies of all relevant statutes and cases;
(15) copies of all orders in limine
(16) outline or draft of closing argument.

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

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

(e) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.

(f) 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, or restraints. If the client is indigent, counsel should move the court for funds for proper attire if necessary.

(g) 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.

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

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Performance Guidelines, Guideline 6.1; 6.3.

NLADA, *Death Penalty Standards*, Standard 11.7.1.

Indiana Rules of Professional Conduct, Rule 1.2.

Louisiana Public Defender Board Trial Court Performance Standards, §737

Commentary

In Indiana, all felony cases are tried to a jury, although the defendant may waive a jury trial with the assent of the prosecuting attorney and the court. See I.C. 35-37-1-2.

Like the decision to plead guilty or go to trial,[1] the decision to ask for a trial by the court alone[2] must be made by the client.[3] Counsel's duty is to advise the client of potential advantages and dangers of each type of trial in light of the client's particular case and circumstances.[4] Circumstances to be considered may include: whether the judge that would try the case is known/knowable in advance;[5] what is known about the jury pool from which the jury would be drawn;[6] how the jury would be selected;[7] what crime the client is accused of;[8] whether a trial by the court alone is expected to be a "slow plea";[9] etc. This list of

1. Guideline 6.3, *supra*.

2. Also known as a bench trial or waiver trial.

3. *Indiana Rules of Professional Conduct*, Rule 1.2(a) provides in part: A In a criminal case, the lawyer shall abide by the client=s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. A

   Waiver of jury trial must be made by defendant knowingly, voluntarily, personally expressed, and memorialized on court=s record. *Perkins v. State*, 541 N.E.2d 927, 928 (Ind. 1989). However, the prosecution may be able to demand a jury over defendant's waiver of one. *State ex rel. Helm v. Fraser,* 260 Ind. 585, 298 N.E.2d 423 (1973) (State may enforce defendant=s right to jury trial).

4. Mass. Publ. Counsel Ser., *Manual*, Performance Guidelines, Guideline 6.3(b) provides:

   > Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

5. And if so, what is known about him or her -- if not, how will he or she be selected and what is known about the group of judges from which the selection will be made. Must object immediately to the authority of a special judge or judge *pro tempore*. Failure to object at trial waives the issue for appeal. *Floyd v. State,* 650 N.E.2d 28, 32 (Ind. 1994).

6. *e.g.*, do they come from a community that is known for widely held negative attitudes toward people of a demographic group that includes the client.

7. *e.g.*, is there opportunity for counsel to question potential jurors to screen out persons that would be biased against the client. Voir dire, and the importance of case-specific, counsel-controlled questioning of potential jurors, is discussed in detail in Guideline 7.2 and Commentary, *infra*.

8. Some trial attorneys strongly advise bench trials in child molestation cases, for example, fearing that jurors would be too inflamed by the heinousness of the alleged crime to follow instructions concerning reasonable doubt, etc. Other lawyers feel that judges are no less likely to be inflamed.

9. A defendant who refuses to plead guilty in the face of overwhelming prosecutorial evidence (perhaps because of reliance on an obscure legal or unusual factual defense) may in some instances be convicted of a lesser offense and/or receive a lesser sentence upon conviction if he or she elects a bench trial, which requires fewer court resources than a jury trial. Andy Court, "Rush to Justice" *American Lawyer* (Jan/Feb 1993) pg. 56, 60. The danger of reliance on such "slow" or "long" pleas is

possible considerations is not exhaustive, only illustrative of the strategic considerations contemplated by paragraph (a) of this Guideline.

As noted in the Introduction and elsewhere in these Guidelines, criminal cases present a limitless variety of factual situations. Those in turn require a variety of materials to be gathered in preparation for trial. The list under paragraph (b) of the instant Guideline is not exhaustive, but contains items which counsel should at least consider in every case. Several of these items are further discussed in the following Commentary relating to paragraph (b) and its subparagraphs.

Relevant documents filed in the case, subparagraph (b)(1), may include: the charging document(s), which may provide not only information of a legal nature (the statute(s) under which the government is proceeding, any applicable sentence-enhancement statute, etc.) but also factual information about the time, place and manner of the alleged crime; pretrial motions and/or memoranda filed by either side; transcripts of prior proceedings;[10] and many more.

Under subparagraph (b)(2), all investigators' reports relating to the case should be secured, from both defense and (where obtainable through discovery, etc.) police and prosecution investigators. These reports may provide counsel with information about anticipated testimony by witnesses, physical attributes of the crime scene and/or exhibits, and missing witnesses or evidence. This information may be useful in, *inter alia*, devising further investigative plans, preparing questions for witnesses, and deciding which witnesses to call.[11] Subparagraph (b)(3) indicates counsel should consider having voir dire questions available for trial. If the case is to be tried to a jury, counsel should consider preparing voir dire questions (and/or, where voir dire will be conducted by the court, obtaining court-prepared questions).[12]

Preparation for opening statements, subparagraph (b) (4), is set out in Guideline 7.3, *infra*.

Cross-examination plans, subparagraphs (b)(5) and (6), are more inclusive than a simple list of proposed questions. Such plans might include alternative lines of questioning for potential variances in the witness' testimony, notes about non-verbal aspects of counsel's questioning (tone of voice, etc.), reasons to forgo entirely cross-examination of a particular witness, etc.[13] Subpoenas for defense witnesses, subparagraph (b)(7), should be served in a manner most likely to assure the presence of the desired witnesses at trial. Counsel's file copy of the subpoenas serves as a check that the necessary effort has been made. The copy may also support a later defense request for delay in the trial or for law-enforcement assistance to secure a recalcitrant witness' presence.

A witness' informal assurance that he or she will appear provides no avenue of relief for the client

---

that, unlike guilty plea agreements placed on the record, they are not enforceable on appeal if an unexpectedly harsh sentence is imposed.

10. [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 20, 72 Michigan Bar Journal #8 (August 1993), pg. 820, note 4. The proposed standard says prior-proceeding transcripts should be obtained and read by counsel "where necessary for preparation of the defense." The comment makes clear: 1) that transcripts of the preliminary examination and pretrial evidentiary hearings "should routinely be obtained for their potential utility as impeachment tools at trial;" 2) that if the case is a retrial, "[p]rior trial transcripts should be obtained;" 3) that transcripts of trials of any separate charges "may be invaluable not only for impeachment but for analyzing the prosecution's trial strategy." The comment contains no description of an instance where transcripts of prior proceedings need not be obtained.

11. The question of which witnesses to call, aside from the defendant him- or herself, is for counsel to decide after consultation with the client. ABA *Standards*, The Defense Function (3d ed.) Standard 4-5.2(b).

12. The desirability of attorney-conducted voir dire is discussed in Guideline 7.2(b) (1) and the Commentary thereto, *infra*. Preparation for voir dire is discussed in Guideline 7.2 (a), *infra*.

13. Cross-examination of prosecution witnesses is addressed in detail in Guideline 7.4(C) through (f). Examination of defense witnesses is addressed in detail in Guideline 7.5(d) (1) and (f).

should that witness have a change of heart before trial. Giving the witness a subpoena is a safer procedure.[14] Some witnesses' presence may or may not be required at trial, depending on testimony received during the prosecution's case or from earlier defense witnesses. If there is any possibility that a potential witness' presence will be needed, counsel should consider subpoenaing that witness. At the least, arrangements should be made in advance for notifying the potential witness as soon as the course of the trial dictates his or her presence.

Prior statements of prosecution witnesses, subparagraph (b) (8), are listed in Guideline 4.2(b)(2), *supra*, as one type of discovery material for counsel to consider seeking. If defense witnesses have made prior statements, subparagraph (b) (9), whether to the authorities or in earlier proceedings, those statements should be obtained as well.[15]

The possibility that counsel might secure the assistance of experts is noted in Guideline 4.1(b)(7), *supra*. Reports from such witnesses, subparagraph (b) (10), may help counsel formulate the examination plans for those witnesses.[16] However, not every expert consulted by defense counsel should be asked to prepare or submit a written report to counsel. Especially where funds for the expert's fees are being provided by the court, or where the law of the jurisdiction so provides, information compiled by some experts may be sought by the prosecution even if it is never presented by the defense,[17] including formulation of arguments for admission of potentially objectionable portions of such witnesses' testimony.

Smooth handling of defense exhibits will maximize their impact. Without a list of exhibits and the witnesses through whom the exhibits are to be introduced, subparagraph (b) (11), counsel may inadvertently fail to offer an exhibit, or to offer it at the most propitious time.

Paragraph (c) of this Guideline requires counsel to know evidentiary rules and the law relating to all trial stages;[18] this should include local practices concerning documentary exhibits. Copies of documentary exhibits (subparagraph (b) (12)) should be retained for reference throughout trial and possibly for appellate or post-conviction use.

Collecting jury instructions and supporting citations, subparagraph (b) (13), will require advance decision-making. If the jurisdiction uses standard jury instructions (See Indiana Pattern Jury Instructions - Criminal, published by LEXIS Law Publishing), counsel should prepare (in whatever manner the court requires) a list of the applicable, requested instructions. If the jurisdiction has no standard instructions, or

---

14. Informal comments to the witness about this "technicality" may reassure the witness that counsel is not distrusting. Counsel may wish to avoid a recorded subpoena if a witness is believed to be unknown to the prosecution (assuming there is no obligation to disclose witnesses in advance of trial), and counsel has not decided whether the witness will help the defense. See Trial Rule 45 (E) Subpoena for a hearing or trial.

15. Counsel should also know or have available applicable law concerning impeachment of one's own witness. Ind.Evid.R. 607 provides: “Any party, including the party that called the witness, may attack the witness’s credibility.”

16. Examination plans are referred to in subparagraph (b)(6) above.

17. For example, see The Sentencing Project, "The Sentencing Specialist and Attorney-Client Privilege," (A Briefing Paper) (1990), citing *State v. Carter*, 641 S.W. 2d 54 (Mo. 1982), *cert.den.* 461 U.S. 932, 103 S.Ct. 2096, Summary of expected defense witnesses= testimony is discoverable. *Hicks v. State,* 544 N.E.2d 500 (Ind. 1989).

    Defense counsel should hire expert consultants early in litigation. If the defendant is indigent, seek permission to make the funds application *ex parte*. Do not reveal consultant=s name or opinion to prosecutor until deciding testimony benefits defendant. Once consultant forms an opinion, if beneficial, then consultant should be disclosed to State as an expert. See IPDC Pretrial Manual, Chapter 7 (2013 edition) page 6-48. See also, Trial Rule 26(B)(4); S*tevens v. McBride,* 489 F.3d 883 (7th Cir. 2007).

18. Guideline 1.2, *supra*, mandates familiarity with substantive and procedural criminal law generally, and their application in the particular jurisdiction. See also [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 19, 72 Michigan Bar Journal #8 (August 1993) pg. 818, 820.

counsel is requesting special instructions not included in the standard set, counsel should prepare requested instructions for timely presentation to the court. Counsel should provide authority for the use of each requested instruction (unless, perhaps, the giving of certain instructions is automatic in all jury trials in the jurisdiction). Counsel should know the law on objecting and tendering alternative instructions.19

It is assumed that trial counsel would possess some form of a "trial book" containing, *inter alia*, commonly needed authorities arranged in a systematic fashion.[20] In preparation for a particular case, counsel should be sure the trial book is updated, and that materials relating to anticipated issues peculiar to the case have been added (or compiled separately). Relevant statutes and cases, subparagraph 14, would include: the statute(s) under which the client is charged (and any lesser included offenses); caselaw regarding the application of such statutes; statutes, caselaw, and/or court rules governing trial procedures; and, where the client is indigent, statutes, caselaw, and/or rules regarding any entitlement of indigent defendants.

Counsel should have a closing argument drafted before trial begins.[21] Advance preparation means that counsel will not, in the hurry of last-minute preparation or extemporaneous speaking, omit any point vital to the defense. Furthermore, the draft or outline, subparagraph (b) (15), will serve as a trial guide, helping counsel focus on the planned defense.[22] Of course, developments during trial may require some redrafting of both trial strategy and the closing argument.

Legal preparation for trial, embodied in paragraph (c) of this Guideline, is as vital as factual investigation. It is through the application of legal authority that counsel seeks to prevent improper prosecution use of alleged facts, and to present to the jury the fruits of defense investigative work.

Advance rulings on issues likely to arise at trial, paragraph (d), may be sought via motions in limine, discussed at Guideline 5.1(b)(12), *supra*. Anticipation that a particular issue will arise does not mean that an advance ruling on the issue should be sought. Legal and factual considerations may conflict, requiring counsel to weigh different courses of action. For example: counsel knows that the prosecution is currently unaware of a prior conviction of the defendant. The jurisdiction requires that any defense efforts to bar use of prior convictions for impeachment purposes be made in advance of trial. Counsel must weigh the likelihood that the defense would prevail in an effort to bar use of the prior, the likelihood that the prosecution will find out about the prior conviction before time for the defendant to take the stand, and the likely effect of the prosecution's discovery of the prior conviction (*e.g.*, would impeachment of the defendant with the prior conviction in all probability result in conviction, or can it be sufficiently explained; is the defendant's testimony vital, or can the defense risk having the defendant not testify if the prosecution does discover the prior conviction, etc.)[23]

It is the duty of trial counsel to act in furtherance of the client's overall interests. Counsel must not lose sight of the possibility that, despite counsel's best efforts, the client may be convicted. Therefore,

---

19 See, *e.g.*, *Scisney v. State*, 701 N.E.2d 847 (Ind. 1998) (appellate review of claim of error in giving of jury instruction requires timely trial objection clearly identifying both claimed objectionable matter and grounds for objection); See also Jury Rule 26, which addresses procedure and timing of final instructions.

20. *E.g.*, Fred Lane, *Lane's Goldstein Trial Technique*, 3d ed., Vol. I, section 5.02.; Trial Practice Manual V; J. Eric Smithburn and James H. Seckinger, *Criminal Trial Advocacy* (2d ed.) (1985) (National Institute for Trial Advocacy) pg. 2-5 through 2-14.

21. *E.g.*, *Goldstein Trial Techniques*, *supra* note 20, at section 23.89; Mass. CLE Inc., Effective Criminal Defense Techniques: Tricks of the Trade from the Experts (1990), chapter "The Closing Argument in a Criminal Case" by J.W. Carney, Jr. pg. 144.

22. *See e.g.*, Mass. Continuing Legal Ed. *Supra note 20. See also*, Your Day in the District Court: Merrimack Valley Presentation Practice (1986), "Selected Issues in the Defense of Criminal Cases in the District Court," Lawrence J. Murphy.

    Guideline 7.6(c)(1) through (4), *infra*, lists suggested contents for closing argument drafts.

23. Counsel's relevant ethical responsibilities as established in his or her jurisdiction must also be considered.

counsel should consider sentencing impacts of trial strategy[24] and how to preserve for appellate review all potential legal issues that arise at the trial level.

Establishing the record is not always an easy or cost-free task. It is important to request all hearings be recorded so that transcripts are attainable if needed. Trial court resources - judge time, prosecutor time, court reporter/recorder time, etc. - are usually required to preserve an issue, and counsel may face covert or overt pressure to avoid the resulting expense and hassle for the court.[25] Counsel may routinely be asked to waive the presence of a court reporter/recorder (or use of any official, automatic recording device) for portions of the trial, such as jury voir dire, opening statements, closing statements, and jury instructions. Counsel may be asked to waive any oral argument of written motions, or even be directed to eschew presentation of supporting authority for or an offer of proof regarding the defense position on an evidentiary matter arising during trial.[26]

While counsel must be aware of potential dangers of constantly demanding preservation of error (*e.g.*, antagonizing the jury, antagonizing the judge), counsel should not lose sight of the importance of establishing a record for appeal. Counsel must make an offer of proof at trial (either before or after the court rules on admissibility) regarding what a witness would say if he was allowed to testify.27

The language "whenever necessary" in paragraph (e) means that in jurisdictions where some portion(s) of trial proceedings will not be recorded unless counsel affirmatively requests it, counsel should make the necessary request. The Guideline does not mean that trial counsel is to determine what portions of the trial proceedings will be important in appellate review.[28]

Trial strategy includes more than preparing questions for witnesses. The jury's impression of the client (and counsel) will be based on more than the verbal exchanges between witnesses and attorneys. Paragraph (f) advises counsel to consider whether the client is familiar with and able to abide by the rules of courtroom decorum, and advise the client accordingly.

Caselaw exists that recognizes the potential prejudice to a defendant who is forced to appear before the jury in jail clothing,[29] and clients who are incarcerated because they cannot afford bail should not be

---

24. Guideline 8.1(4) and Commentary, *infra*.

25. Counsel's role as advocate for his or her client, not as a "team player" obligated to look out for the system as a whole, is discussed in the Commentary to Guideline 1.1, *supra*. That counsel's own lack of time is not a justifiable consideration in deciding whether to pursue a particular issue is discussed at Guideline 1.3(a) and Commentary thereto, *supra*.

26. *See Criminal Rule* 5 providing in part, AEvery trial judge exercising criminal jurisdiction of this state shall arrange and provide for the electronic recording ... of any and all oral evidence and testimony given in all cases and hearings ... all rulings of the judge in respect to the admission and rejection of evidence and objections thereto . . . .@) *E.g.*, "During trial, objections are often ruled upon by the court without any argument by either side. This can lead to erroneous rulings by the court." Patrick McCleskey and Ronald Schoenberg, *Criminal Law Deskbook* (updated 1994) Section 18.06, pg. 18-18. See also Georgi-Ann Oshagan, "Videotaped Trial Transcripts and Appellate Review, 38 *Wayne Law Review* 1639 (1992) (discussing the impact of newer recording technology (at that time, videotape) on the accuracy of transcription and the due process concern of preserving a full and accurate record for appellate review).

27 A statement by the attorney summarizing the anticipated testimony is adequate, and no particular level of detail is required, as long as the substance of excluded evidence is made known to the court. *State v. Wilson*, 836 N.E.2d 407, 409-10 (Ind. 2005). Indiana recognizes two other methods for making an offer to prove, *i.e*, question-and-answer format where witness gives proposed testimony, and question-and-offer format, where counsel states what specific questions he/she wuold have asked, and what testimony the witness would have given in response. See *Duso v. State*, 866 N.E.2d 321, 324 (Ind.Ct.App. 2007).

28. As cost-cutting measures, some jurisdictions may try to require that counsel state specific appellate issue(s) before the trial court will order that portions of the trial such as those set out above are recorded. But trial counsel cannot predict when potentially reversible error will arise, *e.g.*, when the prosecutor's exercise of peremptory challenges will fall into an unconstitutionally discriminatory pattern contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

29. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). See also, *Howard v. State,* 459 N.E.2d 29 (Ind. 1984)

penalized for their indigency.[30] Local practice may vary as to how counsel can prevent an indigent client from being prejudiced by jail-related appearance. Counsel should be aware of jail and courtroom rules and practices relating to clothing/clothing changes, grooming, etc., and should determine how incarcerated individuals are brought to and from the courtroom to anticipate how there might be inadvertent exposure to prospective jurors. Generally, a defendant should not appear before the jury in bonds or shackles. *Evans v. State*, 571 N.E.2d 1231, 1238 (Ind. 1991). However, restraints and other security measures are permitted to prevent escape, for protection, and to maintain order. *Nicols v. State*, 974 N.E.2d 531 (Ind.Ct.App. 2012); *Jessup v. State*, 256 Ind. 409, 269 N.E.2d 374 (1971); *Roche v. Anderson*, 132 F.Supp.2d 688 (N.D. Ind. 2001). Stun belts are strictly prohibited in Indiana courts. *Wrinkles v. State*, 749 N.E.2d 1179, 1194 (Ind. 2001).

Counsel's duty to keep the client informed of the progress of the case where possible, Guideline 1.3(c), *supra*, extends to the trial. Just because a client is physically present in the courtroom for trial events does not mean that the client automatically understands the implications of those events. Furthermore, the client may have information concerning the defense that needs to be communicated to counsel as the trial progresses. A plan for attorney-client communication during trial is therefore necessary, paragraph (g).

Several distinct questions may arise about attorney/client conferences during trial. Some questions will involve continuations of earlier communications issues such as how to deal with a client's incomprehension of English, hearing impairment, or inability to understand complex or abstract statements.[31] In the courtroom, counsel will not have time to steadily interpret or explain events to the client. Where a particular obstacle bars the client's understanding of courtroom events, counsel should consider how that obstacle can be overcome. Provision of an interpreter in the courtroom,[32] or a social worker/tutor, special arrangements for court recesses in which counsel can confer with the client, etc. may be tried.

In addition to unique problems, counsel and the client should routinely consider how they can best confer when the need arises in the midst of trial events. Some judges may allow periodic recesses, or breaks in testimony upon request, for brief attorney/client discussions in the courtroom. Such conferences may present problems -- the jury may feel counsel is scheming with the client to hide the truth; confidentiality is difficult to maintain in many courtrooms, etc.

When recesses occur and the courtroom is cleared, counsel may need to confer with an incarcerated client and find that security measures confound his or her efforts. "Lock-up" facilities in courthouses may not provide for private conversations. Procedures for transferring prisoners from the courthouse to the jail may make attorney access to the client difficult even after trial proceedings have ended for the day. This is the type of situation that may require a court order.

(Defendant must either object to appearing in jail clothes or request permission to wear civilian clothes); *Shackelford v. State,* 498 N.E.2d 382 (Ind. 1986) (defendant must show he was compelled to go to trial before jury in jail attire, and allege or show such clothing readily identifiable).

30. *Estelle v. Williams, supra,* note 27.

31. Language barriers, hearing impairment, illiteracy and mental retardation or learning disabilities are discussed in the Commentary to Guideline 1.3, *supra*.

32. The right to an interpreter may be statutory or constitutional, see *Arietta v. State*, 878 N.E.2d 1238 (Ind. 2008); *Martinez Chavez v. State,* 534 N.E.2d 731, 736-737 (Ind. 1989) (violation of due process clause of 14th amendment); IC 34-45-1-3 (civil cases); Indiana Trial Rule 44(F); 28 U.S.C. § 1827(d)(1). See also *United States v. Mayans*, 17 F.3d 1174, 1180-1181 (9th Cir. 1994). Deaf or hard-of-hearing clients may require an interpreter, *e.g.*, *State v. Barber*, 617 So.2d 974 (La. App. 4 Cir. 1993).

Guideline 7.2 Voir Dire and Jury Selection

(a) ***Preparation***

(1) 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.

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

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list and questionnaire.

(4) 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:

(A) to elicit information about the attitudes of individual jurors, which may provide a basis for peremptory strikes and challenges for cause;

(B) to convey to the panel certain legal principles which are critical to the defense case;

(C) 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;

(D) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

(E) to establish a relationship with the jury, when the voir dire is conducted by an attorney.

(5) 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.

(6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware that peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

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

(b) ***Examining the Prospective Jurors***

(1) Counsel should consider seeking permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.

(2) 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.

(3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors.

(4) In a group voir dire, counsel should consider the prejudicial impact of potential answers and be prepared to take remedial measures (e.g, moving to strike the panel, renewing request for individual voir dire, or simply addressing the topic with other jurors).

(5) Counsel should consider requesting individual voir dire in appropriate cases

or concerning appropriate issues, prior to commencement of voir dire (e.g. death penalty, sex offenses, child molesting or high-publicity cases).

(c) ***Challenges***

(1) 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.

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

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

(4) Counsel should make every effort to consult with the client in exercising challenges.

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

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.2.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.4.

NLADA, *Death Penalty Standards*, Standard 11.7.2.

Louisiana Public Defender Board Trial Court Performance Standards, § 739

Commentary

The important and complex nature of jury selection is reflected in the length and detail of the instant Guideline. Caselaw exists on constitutional questions arising from jury selection,[1] from the method for establishing the jury venire, through selecting the panel, to the use of peremptory challenges.[2] Specialists in the field of jury selection are available to assist in complex cases, either directly or through resource materials.[3]

While a few trial attorneys have maintained the opinion that jury selection requires no more than removal of potential jurors with stated or obvious biases or interests inimical to the defendant, recognition of the value of in-depth, skilled jury voir dire is widespread and growing.[4]

1. Federal caselaw and related state rules and rulings on voir dire are too extensive to cite here. Attorneys are referred to applicable secondary sources [*e.g.*, Marie Allison and Julie Namkin, "An Rx for V/D or: How to Protect Your Client's Rights to (1) A Fair Jury and (2) Due Process in Jury Selection," 15 *The Advocate* (publication of the KY Department of Public Advocacy) (#2 April 1993) pg. 18] and their own research.

   See AChallenging the Jury Selection System@ in IPDC=s Criminal Trial Law Manual (2013 edition), Ch. 3.

2. *e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and its progeny, concerning the use of peremptory challenges to exclude potential jurors because of their race or other improper classification, such as gender, *J.E.B. v. Alabama Ex Rel. TB*, U.S.,114 S.Ct. 1419, 128 L.Ed.2d 89, 98 (1994).

3. *e.g.*, NJP Litigation Consulting, *Jurywork: Systematic Techniques* (2011-2012 ed.).

4. "If this book has any message, it is that the work done before the trial begins determines the outcome of the trial. This is not to say that selection of the jury is the most critical feature in a trial, although some experienced lawyers believe this to be

Under subparagraphs (a)(1) and (2) of this Guideline, constitutional or other legal challenges to the written and informal procedures for selecting the pool of jurors from which individual jurors will be called (as well as for selecting the individuals themselves) should be considered whenever an argument can be made that such procedures are improper.[5] One common claim is that jury selection procedures systematically exclude members of a particular group, the exclusion of whom is improper under existing legal authority or arguable extensions of such authority.[6]

Challenges should be considered to practices which prevent counsel from fully investigating the possibility that potential jurors are improperly biased against any aspect of the defense. Counsel should consider making a supplemental questionnaire and having it mailed to prospective jurors. If the particular judge or the rules of the jurisdiction preclude counsel's own questioning of prospective jurors during voir dire, counsel should consider challenging that limitation, as well as using other methods (such as jury questionnaires) for obtaining information.[7] In other words, subparagraphs (a)(1) and (2) of this Guideline advise counsel to examine and question, not merely accept, the procedures of his or her jurisdiction relating to the vital jury selection portion of the trial.

The prospective juror list, subparagraph (a) (3), provides counsel with a basis for designing voir dire questions and even for further investigation. Investigation should proceed in a manner that will not harm the client's case by antagonizing prospective jurors.[8]

Where counsel is permitted to voir dire the jury personally, advance preparation of voir dire questions will nearly always be appropriate, because the questions should be tailored to the particular case, subparagraph (a)(4). Counsel should not rely on unsworn answers in juror questionnaires. Juror attitudes to be probed during voir dire will vary, depending on the circumstances of the particular case. A potential juror able to objectively listen to testimony concerning an alleged gangland slaying may be so consciously or unconsciously biased against anyone accused of child abuse that he or she could not objectively hear testimony in that type of case. Voir dire questions should be designed to detect such distinctions.

Open-ended questions usually produce more information about juror attitudes than do closed,

---

true. The underlying facts in the case must have an effect on the outcome. But pretrial work on jury selection, combined with pretrial education of the judge and prospective jurors concerning the nature of law, of the defendant, and of the society from which he comes, is essential to the proper presentation of evidence during the trial on the acts or omissions committed by the defendant." Ann Fagan Ginger, *Jury Selection in Criminal Trials: New Techniques and Concepts*, 1975, 1980, Sec. 1.1, pg. 6.

A proposed Michigan standard for court-appointed counsel would require counsel to seek personal information about prospective jurors "either through voir dire or examination of jury questionnaires," and to "ask voir dire questions pertinent to the case." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 29, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 821.

5. ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.2 advises defense counsel to be prepared to raise "any appropriate issues concerning the method by which the jury panel was selected. . ."

6. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L. Ed. 2d 690 (1975); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002). *See*, Wayne R. LaFave and Jerald H. Israel, Criminal Procedure, (Vol. 6) 2007 ' 22.2 and Supplement.

7. Subparagraph (b)(1), discussed *infra*, encourages counsel to consider conducting voir dire questioning when the court will allow. Indiana Rules of Trial Procedure, Rule 47(D) provides in part: A The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself.@ Where court conducts examination, parties allowed to submit written questions. *Hart v. State,* 265 Ind. 145, 352 N.E.2d 712 (1976). *See also* [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 4.

8. ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.2(b) recognizes that investigation of juror backgrounds may be necessary, but urges restraint: "[I]nvestigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence." The instant Guideline focuses on the need for counsel to obtain needed information.

leading questions, though leading questions may provide better vehicles for educating potential jurors about their duties or the theory of the case.[9] The "educational" function of voir dire reflected in subparagraphs (a)(4)(B) through (D), while not universally accepted, is considered by some attorneys to be nearly as important as the screening function reflected in subparagraph (a)(4)(A).

If the prosecutor (or the judge) objects to a particular question or line of inquiry, counsel must be ready to defend the proposed interrogation with authoritative citations. Counsel must therefore know the law controlling voir dire inquiries, subparagraph (a)(5). For a list of proper and improper inquiries under Indiana law, see IPDC Criminal Trial Law Manual (2013 edition), Chapter 4.

Counsel's need to know the law governing challenges for cause and peremptory strikes, subparagraph (a)(6), is two-fold. One, if counsel wants a potential juror excused, counsel will need to support that request if it is contested.[10] Two, if the prosecution wants to excuse a potential juror that counsel does not want to be removed, counsel must have a legal basis to challenge such excusal.[11]

If counsel seeks to have a prospective juror removed for cause, and the court refuses, counsel will presumably exercise a peremptory challenge to excuse the juror. As subparagraph (a)(6) cautions, an erroneous ruling by the trial court on a motion to excuse a prospective juror for cause will not be grounds for appellate relief in Indiana unless *all* defense peremptory challenges have been exercised.[12]

The development of modern jury selection experts, noted at the beginning of this Commentary, provides a resource which counsel should consider using, subparagraph (a)(7). The need for such specialists may be most obvious in extraordinary cases such as death penalty cases,[13] overtly political trials or high-publicity cases.[14] However, counsel should not rule out the possibility of using such specialists in other trials as well. Experts may assist counsel in a variety of ways. If prospective jurors differ from counsel or the client in cultural background, for example, an expert may assist the defense not only in ferreting out possible bias, but also in taking steps to avoid inadvertent cross-cultural misunderstandings based on dress or demeanor such as direct eye contact (which may be viewed by members of one culture as a sign of openness and trustworthiness, but by members of another culture as insolence or aggression). If the client is indigent, and counsel determines that a jury selection specialist's services should be obtained, counsel should consider requesting that funds for the specialist be provided by the government.[15]

---

9. Compare the possible, expected answers to these two questions: "How do you feel about someone who has been accused of hurting a child?" "You won't hold the mere fact that my client has been *accused* of child abuse against him, will you?"

10. For discussion of Indiana law on challenges for cause, see IPDC Criminal Trial Law Manual (2013 edition), Ch. 4. Examples of cases where for-cause challenges should have been granted are listed in Allison and Namkin, "An RX for V/D," *supra* note 1.

11. For discussion of Indiana law on peremptory challenges, see IPDC Criminal Trial Law Manual (2009 edition) Ch. 4. *E.g.*, *Batson*, *supra* note 2.

12. *See*, *Sutton v. State*, 237 Ind. 305, 145 N.E.2d 425 (1957) (defendants waived error on appeal by failing to show exhaustion of peremptory challenges when alleging error in court=s refusal to remove juror for cause); *Whiting v. State*, 969 N.E.2d 24 (Ind. 2012) (defendant procedurally defaulted claim that trial court erred in denying her motion to strike a prospective juror for cause who knew the defendant, the defendant's family, the victim's family, and the attorneys, by failing to use a peremptory challenge to strike the prospective juror); *Justice v. State*, 552 N.E.2d 884 (Ind.Ct.App. 1990). Exhaustion of peremptories allows counsel on appeal to argue that but for the trial court's error, defense counsel would have had another peremptory challenge to use.

13. 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in DP Cases, Guideline 10.10.2(c).

14. One of the first jury specialists, Cathy Bennett, was recognized by the National Association of Criminal Defense Lawyers in 1991 for her work assisting counsel in such famous cases as the rape charge against William Kennedy Smith (nephew of Senator Edward Kennedy), *The New York Times* (November 22, 1991).

15. Indiana has long provided expert assistance at the State's expense to indigent defendants. Expert's services within trial court's discretion. Showing of good cause required. *Scott v. State,* 593 N.E.2d 198, 199 (Ind. 1992). See IPDC Pre-trial manual (2013), Ch. 7; *Getting Funds for Experts* (IPDC); *See*, Guideline 5.1(B)(9), *supra*.

That attorney-conducted voir dire can be used to establish a relationship with the jury is noted earlier in this Guideline, subparagraph (a)(4)(E). Attorney questioning also allows counsel to smoothly follow up on responses of potential jurors that suggest realms of bias not covered, or not covered adequately, in prepared questions.[16] If the judge is conducting voir dire, it can be awkward if not impossible to get the court to pursue a previously uncontemplated line of questioning relevant to the defense.[17]

If a juror withholds information or lies during voir dire, counsel may wish to have judge ask questions. Prejudicial error if juror knowingly lies or gives incomplete answers to questions on matters relating to impartiality. *Dye v. State*, 784 N.E.2d 469 (Ind. 2003); *Lopez v. State*, 527 N.E.2d 1119 (Ind. 1988).

The importance of preserving the record throughout trial is noted at Guideline 7.1(e), *supra*. Subparagraph (b)(2) of this Guideline specifically notes that record preservation should apply to voir dire. Whether arising during actual voir dire questioning of potential jurors or at an earlier point in jury selection, legal issues relating to the vital right to a jury trial should be preserved.[18]

Individual voir dire -- the questioning of each potential juror outside the presence of other potential jurors -- is important when any one potential juror's response to questioning might "taint" other jurors. Questioning one potential juror about exposure to pretrial publicity may result in that juror revealing to the others precisely the information counsel is trying to contain.[19] If only group voir dire is allowed, subparagraph (b)(4) urges counsel to phrase questions in a way that minimizes the likelihood of prejudicial responses.[20]

Once counsel has established that a particular potential juror may have information that warrants further questioning about potential bias, and that such further questioning might prejudice other potential jurors, counsel should make or renew a request to voir dire that juror outside the presence of the others.

Jury selection involves the weighing of as many aspects of a potential juror's personality and background as possible. One factor that would suggest removal may be outweighed by other factors that make the potential juror desirable to the defense. For that reason, subparagraph (c)(1) of this Guideline directs counsel to consider challenging actually biased or prejudiced potential jurors, but does not purport to tell counsel that certain types of jurors must be challenged.

Enlisting the aid of jury selection specialists has already been mentioned as one way for counsel to deal with the complexities of jury selection. Another means may include development of some form of

---

16. For example, the ability to question prospective jurors regarding their beliefs and feelings concerning the doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case, is essential to a fair and impartial jury. *See, Everly v. State*, 395 N.E.2d 254 (Ind. 1979).

17. James J. Gobert and Walter E. Jordon, *Trial Practice Series: Jury Selection, the Law, Art, and Science of Selecting a Jury*, (2d ed.), 1992 Cumulative Suppl. p. 23, cited in Allison and Namkin, "An RX for V/D," *supra* note 1.

18. Always ask that voir dire be recorded. *See, Emmons v. State,* 492 N.E.2d 303, 305 (Ind. 1986) (trial court denied fundamental appellate rights by refusing to record voir dire proceedings; deprived defendant of appellate review of specific issues which concerned him and any other errors which may have occurred). Record preservation may not be easy. Voir dire may be one of the portions of trial that a judge does not routinely have recorded, in an effort to keep costs down and efficiency up. Counsel should know if affirmative actions by the defense are necessary in order to assure full preservation of the record.

19. "Have you heard anything about this case other than what has been said here in the courtroom?" "Yeah, I heard he already got convicted once and it got reversed on a technicality." Individual voir dire may be required where circumstances highly unusual or potentially damaging to defendant. *Hadley v. State,* 496 N.E.2d 67 (Ind. 1986); *Burris v. State,* 465 N.E.2d 171 (Ind. 1984). If venire hears prejudicial information, consider moving for a mistrial or quashing the venire. *See*, *Stroud v. State*, 787 N.E.2d 430 (Ind.Ct.App. 2003) (trial court committed reversible error in questioning jurors exposed to prejudicial newspaper article in presence of other jurors who had not read article, thereby contaminating other jurors).

20. "Without mentioning anything you have heard, please tell me whether you have heard anything about this case outside what has been said in the courtroom."

"rating scale" by which potential jurors can be evaluated during voir dire.

In whatever manner counsel handles the often fast-moving questioning of numerous people, counsel should try not to allow voir dire to speed by without client involvement. Circumstances that impede attorney-client consultation about potential jurors should not be merely accepted without thought of challenge.[21] A client's observations about potential jurors are important, and should be weighed along with other factors when counsel is deciding whether to accept or seek to excuse a potential juror.

21. Defendants have a right, at least in New York, to be present during voir dire. The highest court in New York ruled in late 1992 that a bench conference held on the record between the court, prospective jurors and counsel but without the defendant was grounds for reversal, *People v. Antommarchi*, 604 N.E. 2d 95, 590 N.Y.S. 2d 33, 80 N.Y. 2d 247 (1992).

Guideline 7.3 Opening Statement

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

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

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

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

(1) to provide an overview of the theory 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 personalize the client and counsel to the jury;

(8) to state the ultimate inferences which counsel wishes the jury to draw.

(e) Counsel should consider the promises of proof the prosecutor makes to the jury during opening statement for use in the defense summation.

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

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

(2) the possibility that an objection might enhance the significance of the information in the jury's mind;

(3) whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Related Standards

ABA *Standards*, The Defense Function, Standard 4-7.4.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.5.

Louisiana Public Defender Board Trial Court Performance Standards, § 741.

Commentary

While jury voir dire may have provided some opportunity for counsel to talk to at least some members of the jury about the case (see Guideline 7.2(a)(4)(C), *supra*), opening statements are the first formal presentations of what the prosecution, and defense counsel, want the factfinder to know about the case. Before opening statements are given, the judge should provide jurors with preliminary instructions. See Criminal Rule 8(F) and Trial Rule 51. Unless counsel has a reason for wanting prosecution witnesses to also learn the defense theory of the case at that point, counsel should ask the court to bar all witnesses from the courtroom during counsel's opening, paragraph (a). See *Indiana Rules of Evidence*, *Rule* 615 (separation of witnesses). Counsel should make sure the judge instructs witnesses not to discuss testimony

with anyone outside the courtroom.

It is axiomatic that opening remarks are to be "statements," not "arguments." Counsel should be aware of how those distinctions have been defined in the law of the jurisdiction (and of any known caprices of the trial judge on this subject) before presenting his or her remarks in a particular case, paragraph (b). Counsel must be aware of these constraints for at least two reasons. One, counsel will probably not wish his or her remarks to be interrupted by objections from the prosecution; counsel may avoid all but bad-faith interruptions by not going beyond the bounds of permissible opening remarks. Two, if counsel *is* interrupted by the prosecution (or the court) in the midst of opening argument, counsel will appear more credible if counsel is able to respond immediately with reasonable arguments that his or her remarks were in fact permissible.

Defense counsel must give opening statement immediately after the prosecution's opening, or it's waived.[1] Counsel cannot wait until the end of the prosecution's case to present an opening statement. See I.C. 35-37-2-2.

The timing of opening statement, and therefore what is known about the prosecution's case at the time defense counsel speaks, may affect counsel's decisions as to the content of opening remarks. A defense opening statement may need to be crafted in a way that does not provide clues to the prosecution of how to cure weaknesses in the state's case. Other factors to consider in deciding what information to include in opening statement include: the degree of certainty that particular evidence will be presented; the probability that the prosecution already knows what evidence the defense will proffer; and, the defense theory of the case.[2] Trial counsel must always be flexible and adjust to any changes in circumstances as the trial opens and progresses.

Several possible objectives for defense counsel's opening statement are set out in subparagraphs (1) through (8) of paragraph (d). This list is not exhaustive; as with other aspects of criminal law, the objectives and content of opening statement will depend on the facts and circumstances of each case.

As with any presentation, advance preparation of the opening statement is fundamental.[3] Opening statements need to be prepared in advance not only to ensure that the presentation itself will be successful -- will encourage the jury to find the defense persuasive -- but to allow that preparation to serve as an important tool in trial preparation. An opening statement can provide an overview of the defense case not only for the factfinder, subparagraph (d)(1), but (in conjunction with the closing argument, which should be drafted as early as opening remarks) for counsel as well.

Counsel should consider whether to incorporate into opening remarks any references to any discerned weaknesses of the prosecution's case, subparagraph (d)(2). Counsel should consider for use in closing argument promises made during the government's opening remarks, paragraph (e). Counsel's decision involves weighing the potential danger (having the prosecution cure the argued weakness) against the potential benefit (giving the jury a basis for reasonable doubt early in the case). What counsel knows about the prosecution's case in advance of trial (discovery is discussed in Guideline 4.2, *supra*), will play a large role in deciding what to say about that case in opening statement.

Similarly, counsel must consider the possible negative as well as positive impact of including in opening statement any of the factors listed in subparagraphs (d)(3) through (8). Opening statement is not evidence. However, your comments may "open the door" to prior conduct evidence. *Day v. State*, 643 N.E.2d 1,4 (Ind.Ct.App. 1994); *Whitehair v. State*,654 N.E.2d 296, 302 (Ind.Ct.App. 1995). For discussion

1. With the court's consent, Jury Rule 14 allows for "mini opening statements" in which the parties may "present brief statements of the facts and issues... to be determined by the jury."

2. Opening should be utilized to present defendant=s overall theory of the case. *McWherter v. State,* 569 N.E.2d 958 (Ind. 1991). Guideline 4.3, *supra*, and 7.5 (a), *infra*. *See also*, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 30, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822.

3. "Presentation is a skill where *preparation* and attitude are apparent almost instantly." [emphasis added] Ron Hoff, *I Can See You Naked: A Fearless Guide to Making Great Presentations* (1988) pg. 27.

of "Opening the Door" in Opening statement, see IPDC Criminal Trial Law manual (2013 edition) page 8-13.

Professional courtesy toward opposing counsel[4] does not include neglecting a client's interests during the opponent's opening remarks. Whenever a prosecutor makes an improper statement that runs counter to the defendant's interests, defense counsel should consider possible ways of obviating the harm, paragraph (f). For a list of grounds on which to object to prosecutor's opening, see IPDC Criminal Trial Law manual (2013 edition) pages 8-3 to 8-7; and IPDC Trial Objections Outline. Failure to object waives claim of error on appeal. *Suggs v. State*, 428 N.E.2d 226 (Ind. 1981). And, waiting to object until conclusion of State's opening statement constitutes waiver. *Gasaway v. State*, 547 N.E.2d 898 (Ind. Ct.App. 1989). Counsel should weigh not only trial considerations but also the need to maintain a full record for possible appeal, Guideline 7.1 (e), *supra*. Always request that opening statements be recorded. Trial counsel certainly wants a victory that precludes the need for an appeal, but should not disregard the possibility that a guilty verdict will be returned.

4. ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.1, calls for a "professional attitude toward the judge, opposing counsel, [etc.]"

Guideline 7.4 Confronting the Prosecution's Case

(a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment on the evidence, or involuntary dismissal.

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

(c) 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.

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

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

(2) consider whether cross-examination of each individual witness is likely to generate helpful information;

(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 significant omissions or deficiencies in the testimony of any witness;

(6) be alert to possible variations and inconsistencies within each witnesses' testimony or contradictions (including material omissions) in prior statements by the witness;

(7) review and organize all prior statements of the prospective witnesses including any prior testimony of the prospective witnesses;

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

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

(10) consider using certified copies of prior convictions or pending cases of witnesses;

(11) be alert to potential 5th Amendment issues that apply to any witness.

(e) 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 testimony in particular in order to be able to raise appropriate objections.

(f) 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.

(g) Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment on the evidence, or involuntary dismissal 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.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standards 3-2.8; 3-2.9; 3-5.2; 3-5.7; 4-4.6; 7.1.

ABA *Model Rules*, Rule 1.2; 1.3; 3.2; 3.3; 3.4; 3.5 and 4.1

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.6.

Louisiana Public Defender Board Trial Court Performance Standards, § 743

Commentary

As is noted in Commentary throughout these Guidelines, preparation for a criminal trial is a series of interconnected acts. Research and investigation will overlap from one part of the proceedings to another. Counsel's knowledge of the elements of the offense, acquired early in the case for initial hearing (Guideline 3.1, *supra*, and/or preliminary hearing, Guideline 3.2, *supra*), will also be needed in evaluating whether proof was offered on every element of the crime during the prosecution's case. But knowledge of the elements is not enough -- investigation into the facts of the case (Guideline 4.1, *supra*) is also necessary to help counsel anticipate element(s) that might be lacking in the prosecution's case. Such expected weakness may provide the basis for advance preparation of a motion for judgment on the evidence (directed verdict) (Trial Rule 50(A) for jury trials, or a motion for involuntary dismissal (Trial Rule 41(B) for bench trials, paragraph (a). (It may also be incorporated into opening statement (Guideline 7.3(d)(2), *supra*,) and impact on what (if any) defense should be offered (Guideline 7.5, *infra)*).

If inadmissible, damaging evidence is offered by the prosecution at trial, defense counsel should object.[1] How to phrase or present an objection may vary from court to court and case to case. Counsel may have to think not only about trying to prevent the error objected to, but about what impact an objection -- and the form of the objection -- will have on the jury, as well as about what is needed to preserve the error for appeal[2] (If, through advance preparation, counsel anticipates that the prosecution will offer inadmissible evidence, counsel may consider a motion in limine (Guideline 5.1 (b) (12), *supra*) to block such evidence. In Indiana, use of a motion in limine is limited to jury trials. *Capitol Neon Signs, Inc. v. Ind. Nat. Bank*, 501 N.E.2d 1082 (Ind. Ct. App. 1986). Also, the party opposing admission of the evidence must object at trial. *See*, *Leslie v. State*, 558 N.E.2d 813, 817 (Ind. 1990) (motion in limine prevents matter from being presented to jury until trial court has ruled upon admissibility in the context of the trial itself).

Stipulations concerning certain facts which the prosecution intends to prove, paragraph (b), can serve several functions. They can save time -- no witness need be called, sworn, and questioned about stipulated facts. They can lessen the emotional impact of certain facts -- *e.g.*, a stipulation that the cause of death was a shotgun wound to the head is much less graphic than a pathologist's recounting of an autopsy, perhaps complete with photographs. Stipulations can lessen the danger that legally irrelevant but factually related (and potentially harmful) information will be blurted out in court - if it is stipulated that the doorbell was not working on the day the complainant in an assault case entered defendant's house, there is no need

1. *E.g.*, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 35, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822; See IPDC Trial Objections Outline.

2. See Ind.Evid.R. 103.

". . .At times trial judges make it difficult to object, but, difficult or not, a proper objection is essential [for preservation of the issue on appeal] unless the trial court squarely prevents it." Charles M. Leibson (Justice, Kentucky Supreme Court), "Sorry! The Error is Not Preserved," *The Advocate* (publication of the KY Department of Public Advocacy) (#1 December 1991) pg. 14, 15.

to call a fellow-apartment dweller or landlord who might add that the defendant had punched out the doorbell with his fist the week before.

Advantages for the defense in entering into a stipulation may be disadvantages for the prosecution and vice versa. The prosecution may insist on calling the coroner despite an offer to stipulate to the cause of death. And when the prosecution seeks a stipulation, defense counsel should consider whether the prosecutor is seeking to just save time, or if potentially helpful information is being downplayed or avoided.[3]

In jurisdictions where the prosecution is required to list in advance all (potential) witnesses and must produce such witnesses at trial, counsel may consider stipulating that certain witnesses, whom the prosecution has listed but does not wish to call, may be waived. Obviously, this should only be done if the appearance of such witnesses would not assist the defense.[4]

Rules and case law regarding cross-examination in a given jurisdiction may be confusing or even contradictory, but counsel preparing to conduct cross-examination should be aware of applicable authority, paragraph (c). Where possible, counsel should also know the unique practices of the particular judge.

Cross-examination of witnesses should be undertaken not in a vacuum, but in relation to the defense case as a whole. Once defense counsel has developed a theory of defense (see Guideline 4.3, and Guideline 7.5(a), *infra*), and prepared a closing argument in advance (See Guideline 7.1(b)(15) and Commentary thereto, *supra*), consideration of how cross-examination of witnesses might fit into the overall defense scheme, subparagraph (d)(1), should be a natural and relatively easy task. A witness should not be cross-examined solely because some aspect of his or her circumstances provides an opportunity for counsel to apply cross-examination techniques. Counsel should consider whether the information that may be revealed to the fact-finder through cross-examination will be helpful to the defense case, subparagraph (d)(2).[5] Cross-examination should be conducted narrowly to avoid excessive repetition of the State's evidence on direct examination.

Preparation for cross-examination (or preparation that leads to a decision not to cross-examine) should include all foreseeable prosecution witnesses. Such preparation may lead counsel to consider conducting voir dire of some prosecution witnesses to demonstrate their incompetency to testify at all, paragraph (e). Objection to competency of a witness must be made before the witness is permitted to testify. *Binder v. State*, 248 Ind. 30, 221 N.E.2d 886, 887 (1966); *Roller v. State*, 602 N.E.2d 165 (Ind.Ct.App. 1992).[6] Witnesses may be incompetent to offer any testimony (for example, a child witness who cannot demonstrate an ability to know the truth from a lie or who's "view of reality has been forever changed or distorted" by improper interrogation[7]) or to offer a particular type of testimony. Witnesses who have acted as experts in prior cases may have no expertise bearing on the client's particular case, or may have no demonstrable expertise of any sort despite having testified as experts before.[8]

---

3. Mass. CLE, Your Day in the District Court: Merrimack Valley Presentation Practice 1986, Chapter "Criminal Practice in the Primary Court," by Joseph A. Grasso, Jr., says counsel should know the theory of the defense case before entering into any stipulations. *See* (Guideline 4.3, *supra*).

4. For discussion of Indiana law on "Witness list" see IPDC Pre-Trial Manual (2013 edition) page 6-11. [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards, supra* note 1, Proposed Standard 32, pg. 822.

5. "Counsel shall cross-examine and impeach prosecution witnesses to the extent and in the manner which reasonably appears likely to benefit the defense." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra*, note 1, Proposed Standard 31.

6. Where an objection to a witness's competence is made during trial, the court may satisfy its duty by permitting counsel to fully *voir dire* the witness before making a decision. *Young v. State*, 500 N.E.2d 735 (Ind. 1986).

7. *See, e.g.*, Nancy Hollander and JoAnn Chase, "The Incompetent Child Witness," 14 *The Advocate* (publication of the KY Department of Public Advocacy) (#5 October 1992) pg. 57.

8. Do not automatically accept the "myth of 'expert testimony,'" *see*, James J. Martorano and Max Solomon, "Drug Evidence

Counsel should have an opportunity to examine the prior statements of prosecution witnesses before the witnesses testify. Familiarity with prior statements will allow counsel to make a reasoned determination of whether discrepancies exist between the prior statements and the witnesses' testimony at trial, and whether any discrepancies warrant challenging on cross-examination. In Indiana, statements of witnesses taken in advance of trial may be obtained by the defendant for possible use in cross-examination after direct examination. *See, Antrobus v. State*, 253 Ind. 420, 254 N.E.2d 873, 876-77 (1970). The trial court may require pre-trial discovery if the person appears on the list of anticipated witnesses, or made statements to the police or grand jury. *See, State ex rel. Crawford v. Superior Court of Lake County*, 549 N.E.2d 374, 375-76 (Ind. 1990); *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387, 393 (1971). Counsel should review federal rules and local federal practice regarding *Jencks* material. Challenging a witness as to irrelevant discrepancies may harm, rather than help, the defense.

Counsel should not miss any opportunity to summarily end the prosecution of the client. A motion for judgment on the evidence at the end of the prosecution's case, out of the jury's presence, is such an opportunity, paragraph (g).[9]

Counsel is under no obligation to make the motion when it is clearly unwarranted (*e.g.*, where 5 witnesses have said they saw the client, whom they know, pull a gun and demand money from a store clerk). But in closer cases, the motion may serve one or more purposes in addition to the chance to win the case outright. The remarks of the judge in ruling on the motion may provide defense insights for preparing sentencing strategy. The court's comments may suggest other avenues of relief -- a motion for the judge to recuse him- or herself from sentencing due to unfair bias, or even a motion for new trial based on judicial prejudice. Or the prosecutor's response may suggest the State's position vis-a-vis a possible defense.

and Scientific Testimony: Rigorous Advocacy Put to the Test," 14 *The Cornerstone* [NLADA] (#4 Winter 1992/93) pg. 1, 6.

9. Must state specific grounds at the time motion is made. In a bench trial, the standard for involuntary dismissal is beyond a reasonable doubt. See, Trial Rule 50(D). Criminal Rule 8(E) provides: AThe court=s action in directing or refusing to direct a verdict shall be shown by order book entry. Error may be predicated upon such ruling or upon the giving or refusing to give a written instruction directing the verdict.@ For a thorough discussion of judgment on the evidence (Trial Rule 50) and involuntary dismissal (Trial Rule 41(B)), see IPDC Criminal Trial Law manual 2013 edition, Chapter 16.

Counsel Standards, *Proposed Minimum Standards*, *supra*, note 1, Proposed Standard 37, comment, pg. 822.

Guideline 7.5 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not 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.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify (including the likely areas of cross-examination and impeachment).

(c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

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

(1) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;

(2) after discussion with the client, make the decision whether to call any witnesses;

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

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

(5) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;

(6) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution.

(7) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;

(8) attempt to obtain the prior records of all defense witnesses.

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

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

(g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

(h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.

(i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.

(j) Counsel should guard against improper cross-examination by the prosecutor.

(k) Counsel should conduct redirect examination as appropriate.

(l) At the close of the defense case, counsel should renew the motion for judgment on the evidence, or involuntary dismissal on each charged count and/or aggravating element.

(m) Counsel should keep a record of all exhibits identified or admitted.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.7.

Louisiana Public Defender Board Trial Court Performance Standards, § 745

Commentary

Development of the defense strategy for trial, paragraph (a), is not a step to be taken after the general case preparation described in section 4. Rather, as noted in Guideline 4.3, *supra*, development of the defense strategy for trial should be a major activity during case preparation. All matters of trial strategy,[1] not just presentation of the defense case, should be congruent with the theory of the case.

The theory of the case, and the defense tactics for putting it forward, must be developed with the finder of fact in mind. That is, counsel cannot settle for the first theory that pleases his or her intellectual bent, or matches the client's world view. If it won't sell to a jury (or judge, if the trial is to the bench), it has no value as a *trial* strategy.[2] However, such caveat is not meant as an escape clause allowing counsel to provide less than quality representation. As noted in the Commentary to Guideline 1.1, *supra*, these Guidelines do not accept standards that would allow less than zealous and quality representation. Inherent in this Guideline as a whole is the assumption that defense counsel must present the defense case as persuasively as possible.[3]

Sentencing options and strategy, Guideline 8.1(a)(4), should be kept in mind during development of the trial defense.[4] For example, if the defendant takes the stand at trial and denies all connection with the offense, it will be difficult for that defendant to credibly claim remorse a short time later at sentencing. This may be one factor among many to weigh when discussing with the client whether the client will testify at trial, paragraph (b).[5]

As for affirmative defenses, paragraph (c), counsel must know the law concerning affirmative defenses *before* trial, so that timely notices may be filed if required by law.[6]

---

1. Trial strategy would include: what questions to ask during voir dire, Guideline 7.1(b)(3) and Guideline 7.2(a)(4); what to say in opening statement, Guideline 7.1(b)(4) and Guideline 7.3(d) and (e), and when to make it, Guideline 7.3 (b)(c); what to put in cross examination plans, Guideline 7.1 (b)(5) and Guideline 7.4(d), and direct examination plans, Guideline 7.1 (b)(6) and subparagraph (d)(1) of this Guideline; what witnesses to call, Guideline 7.1, Commentary; what exhibits to introduce, Guideline 7.1 (b)(11); what jury instructions to request or oppose, Guideline 7.1 (b)(13) and Guideline 7.7(b)and (c); and what to say in closing argument, Guideline 7.1 (b)(15) and Guideline 7.6(c).

2. This comment is not addressed to rare, blatantly political trials where clients may insist on certain tactics regardless of their effect on trial outcomes. It is addressed to situations such as having a client who wants to assume that the jury will take his or her word over that of 4 eyewitnesses (including a police officer) despite the client's extensive record for similar crimes.

3. This "as possible" caveat recognizes that perfection is to be strived for but will rarely be obtained. [A proposed minimum standard in Michigan says counsel "shall make *reasonable efforts* to produce witnesses and evidence necessary to present the defense case persuasively." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 36, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822, emphasis added.] *See also*, Sunwolf, "Persuasion," 15 *The Advocate* (publication of the KY Department of Public Advocacy) (#2 April 1993) pg. 24: "Persuasion is not an attempt to impose on the audience, but rather is a form of influence that predisposes them."

4. In non-death penalty cases, it may be that sentencing consequences will not be the *paramount* concern in choosing among possible strategies, but potential effects of trial strategy on sentencing should always be considered.

5. The decision whether or not to testify is ultimately the client's. For a discussion of factors that might impact on the decision, see [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, *supra* note 3, Proposed Standard 33, comment, pg. 822.

   For a checklist see, IPDC Criminal Trial Law manual (2013 edition), page 1-10.

6. Affirmative defenses include: self-defense (IC 35-41-3-2); insanity (IC 35-41-4-1); entrapment (IC 35-41-3-9 and IC 35-48-4-16); legal authority (IC 35-41-3-1); mistake of fact (IC 35-41-3-7); duress (IC 35-41-3-8); abandonment (IC 35-41-3-10); alibi (IC 35-36-4-1); sudden heat (IC 35-42-1-3(b). See generally, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 3, Proposed Standard 25, pg. 821.

Paragraph (d), concerning steps in preparation of the defense case, contains a "where appropriate" caveat. This should not be over-emphasized. It might not be "appropriate," for example, to prepare direct examination plans for defense witnesses when no such witnesses exist and the defense plans to rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt, paragraph (a). However, where potential defense witnesses do exist, but a decision has been made to rely on reasonable doubt, counsel might be well advised to plan a tentative direct examination of the witnesses. If the prosecution's case turns out to be stronger than anticipated, counsel may decide to call witnesses and present a defense after all.

The "where appropriate" clause does not exempt counsel from the need to act where counsel believes that character witnesses and/or expert witnesses discussed in subparagraphs (d)(5) and (6) would assist the client's case but the client has no money to locate and bring such witnesses to court. Counsel's duty to provide zealous and quality legal representation applies to all clients, regardless of financial status (Guideline 1.1 Commentary). Access to resources denied to a client because of his or her indigence constitutes an issue for pretrial motions (Guideline 5.1(b)(9), *supra*) which might produce government funds for investigation, witness fees, etc.[7]

Keeping the prosecution's possible rebuttal case in mind while preparing the defense, paragraph (e), is just common sense. The most brilliantly constructed and presented defense can be destroyed by one credible witness negating it. (Similarly, a sustained prosecution objection to a vital piece of evidence can destroy the defense. "Where defense evidence is excluded, counsel should make such offer of proof as is necessary to protect the record."[8])

Preparation of defense witnesses for both direct and cross- examination can not only improve the witnesses' credibility by helping to alleviate potential nervousness, but can also prevent inadvertent sabotage of the case by witnesses due to failure to understand what is needed. Experienced counsel know that witnesses will not necessarily recite information in court in the same manner that the witnesses have recited it to counsel, the client, or a defense investigator. Witnesses who have been prepared with counsel so that they understand, for example, the need to limit their testimony to respond only to the actual question asked are less likely to blurt out irrelevant and potentially damaging information. Witnesses may also need to be alerted to the importance of demeanor (including eye contact) and dress, subparagraph (f), including any cross-cultural issues that might arise regarding proper demeanor.[9]

Redirect examination, paragraph (k), is not required of every witness. Counsel should keep the theory of defense in mind when conducting redirect examination.

A renewed motion, at the close of the defense case, for directed verdict on each charged count, paragraph (l), may be needed even if counsel believes there is no chance the trial court will grant the motion, if such a renewal is required for later appeal of the issue.[10]

---

7. *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1984) providing funds for mental health experts.

8. See Ind.Evid.R. 103(a)(2), and (b). [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 3, Proposed Standard 35, pg. 822.

9. For an example of a cross-cultural demeanor issue, see Guideline 7.2 Commentary between notes 14 and 15.

10. [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 3, Proposed Standard 37, comment, pg. 822, citing *People v. Patterson*, 428 Mich. 502, 410 N.W.2d 733 (1987).

Guideline 7.6 Closing Argument

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

(b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

- **(1) reviewing promises made by the prosecution in opening statement;**
- **(2) highlighting weaknesses in the prosecution's case;**
- **(3) describing favorable inferences to be drawn from the evidence;**
- **(4) incorporating into the argument:**
  - **(A) helpful testimony from direct and cross-examinations;**
  - **(B) verbatim instructions drawn from the jury charge;**
  - **(C) responses to anticipated prosecution arguments;**
- **(5) the effects of the defense argument on the prosecutor's rebuttal argument.**

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

- **(1) the need to preserve the objection for a double jeopardy motion;**
- **(2) the possibility that an objection might enhance the significance of the information in the jury's mind.**

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.7

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.8.

Louisiana Public Defender Board Trial Court Performance Standards, § 747.

Indiana Jury Rule 27, Final Arguments.

Commentary

Closing argument is the lens through which the entire case is focused for maximum impact on the fact finder. The argument may act as a light-gathering telescope, allowing the jury to perceive information otherwise shrouded in dimness, or a surgical laser, cutting away material that would otherwise block the jury's view of the defense version of the case. Counsel must decide what type of closing argument is needed, then craft that argument so that it (unlike the Hubble Telescope after initial launch) focuses properly.[1]

1. "Counsel shall present a closing argument which explains why the client should not be found guilty as charged." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 38, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822.

A draft of closing argument should have been completed before trial began (Guideline 7.1(b)(15) and Commentary, *supra*). The argument should be drafted in keeping with known substantive and procedural limitations of the jurisdiction and particular judge, paragraphs (a) and (b).[2] The argument should be tailored to the particular case using, where helpful, the considerations set forth in subparagraphs (c)(1) through (5). Events during trial, paragraph (c), may warrant changes in the originally drafted argument which will have served as a framework for the defense case. There may have been changes in expected testimony. Observations about jurors' responses to trial events[3] may constitute important considerations for closing argument.

When weighing the verbatim use of jury instructions in the closing argument, subparagraph (c)(4)(B),[4] counsel should consider also whether there is a need to provide a "Plain English translation" of perplexing, overly legalistic instructions.[5]

In fact, counsel should keep "Plain English" and other methods of clear communication in mind for all portions of the closing argument. The object of the closing argument is not to persuade the jury that counsel is erudite or that the defense theory is brilliant. The purpose is to persuade the factfinder that counsel's client should be found "not guilty." Many sources of tips on how to be persuasive are available, dealing not only with making the substance of the argument persuasive[6] but with presenting the argument persuasively -- that is, getting the message across.[7]

There are limits, of course, to what counsel can do in closing argument no matter what is "needed." Counsel cannot deliberately inject reversible error into the case (or abandon an unpopular client for the sake of the attorney's own standing in the community) by arguing that no reasonable doubt exists as to all charges. *See United States v. Swanson*, 943 F.2d 1070 (CA 9 1991); see also *Christian v. State*, 712 N.E.2d 4 (Ind.Ct.App. 1999) (where defense counsel conceded that there was penetration in rape case despite defendant's testimony that there was no penetration, defendant was denied effective assistance of counsel).

2. Scope and content of final argument within sound discretion of trial court. *Rouster v. State,* 600 N.E.2d 1342 (Ind. 1992). *See also*, *Hashfield v. State,* 247 Ind. 95, 110, 210 N.E.2d 429, 438 (1965) (time allotted for closing within sound discretion of trial court).

   Counsel may consider previewing the closing argument to the court, seeking a ruling on certain lines of argument if objection is anticipated. Mass. CLE Inc, *Effective Criminal Defense Techniques: Tricks of the Trade from the Experts* (1990), chapter, "The Closing Argument in a Criminal Case" by J. W. Carney, Jr.

3. The client, and perhaps an additional defense team member, may be helpful to counsel in observing jury reactions to trial events. Especially during counsel's own endeavors in the jury's presence, counsel's attention cannot remain focused on all jurors all the time; another observer may pick up on juror reactions that counsel misses.

4. Not all practitioners agree that verbatim repetition of jury instructions should be considered positively; a Massachusetts CLE trainer advises counsel *not* to repeat what the court will say in instructions. J. W. Carney, Jr., *supra* note 2. It is permissible to read the law to the jury in final argument. See *Hubbard v. State*, 313 N.E.2d 346, 350 (Ind. 1974) ("Article I, Sec. 19 gives the jury the right to determine the law as well as the facts and it is well settled in Indiana that reading from decisions is proper.)"

5. Methodology exists to show that certain jury instructions may be frequently misunderstood. *See*, *Free v. Peters*, 806 F. Supp. 705 (N.D. Ill 1992) modified 12 F.3d 700 (7th Cir. 1993); while the reversal granted in *Free* by the District Court was later overturned, the studies relied on by counsel for the death-sentenced inmate there remain viable as a cautionary lesson about the use of standard jury instructions. "There is now a substantial amount of research on the comprehension of instructions, with frequently disconcerting results." Walter F. Abbott, Flora Hull and Elizabeth Linville, *Jury Research: A Review and Bibliography* (1993) Sec. 5.17(b), pg. 43.

6. *See, e.g.*, Sunwolf, "Persuasion," 15 *The Advocate* (publication of the KY Department of Public Advocacy) (#2 April 1993) pg. 24.

7. Going outside the legal field for advice on how to talk to a jury may help counsel avoid a too-lawyerlike presentation. Trial advocacy or appellate (oral) advocacy seminars may include advice from actors or others on how to speak persuasively.

In closing argument to the jury, counsel may argue all reasonable inferences from the evidence in the record, but should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. Counsel should not express a personal belief or opinion in his or her client's innocence or in the truth or falsity of any testimony or evidence. Counsel should not make arguments calculated to appeal to the prejudices of the jury and should refrain from argument which would divert the jury from its duty to decide the case on the evidence.[8]

In drafting closing argument, and in deciding to make last-minute changes to that draft, counsel should consider what the prosecutor may say in his or her rebuttal argument, subparagraph (c)(5), assuming rebuttal is a possibility. If the State brings up a new point or fact on rebuttal, defense may reply. See IC 35-37-2-2(4); Indiana Jury Rule 27.

Counsel's attention to the prosecution's closing argument must be intense - and bifurcated. Counsel must make quick decisions about whether to object to any portion of the prosecutor's argument that violates applicable law,[9] and also adjust his or her own pending argument to meet any unanticipated comments.

The list of considerations underlying the decision about objecting, subparagraphs (d)(1) through (2), is explicitly non-exhaustive. It could also include, for example, the potential effects of objecting on counsel's own upcoming argument.[10] Objections must be timely, specific, and counsel must request a curative instruction. *Zenthofer v. State*, 613 N.E.2d 31 (Ind. 1993).

This Guideline does not address counsel's actual delivery of closing argument, which will vary from attorney to attorney depending on individual style. As already noted, however, counsel should consider the importance of an effective delivery, and perhaps avail himself or herself of training in public speaking or on courtroom presentations.[11]

Handbooks may also be helpful, *see, e.g.*, Ron Hoff, *I Can See You Naked: A Fearless Guide to Making Great Presentations*, (1988).

8. *See*, ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.7); *Donnegan v. State*, 809 N.E.2d 966 (Ind.Ct.App. 2004) (counsel for neither side should argue evidence which was not introduced into record as such during trial).

9. For a list of possible objections to make during prosecutor=s closing, see IPDC Criminal Trial Law manual (2013 edition) pages 17-4 to 17-24 and IPDC Trial Objections Outline. If objection is precluded, counsel should make plans ahead of time for how to deal with objectionable statements by the prosecution -- motions *in limine* (*see*, Guideline 5.1(b)(12)) to bar foreseeable objectionable arguments, requests for mistrial following the prosecution's argument, etc.

10. Will the prosecutor perhaps make retaliatory objections, especially if counsel has planned to skirt the edge of some particular limit? Will the jury be more critical of counsel's argument? Etc.

11. Tips from one CLE presentation on closing argument delivery include: Forego the use of notes whenever possible. Use dramatic techniques of oratory -- *e.g.*, changes in volume and pacing. Use movement and gestures. Be sincere. J.W. Carney, *supra* note 2. In addition, consider charts highlighting important contradictions or other demonstrative exhibits, as well as acting out portions of testimony to demonstrate its meaning or impossibility.

Guideline 7.7 Jury Instructions

(a) Counsel should be familiar with the local rules and the individual judges's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions. In addition, counsel must be aware of appellate requirements for preservation of error in instructing the jury.

(b) 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 caselaw in support of the proposed instructions.

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

(d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, filing a copy of proposed instructions or reading proposed instructions into the record.

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

(f) Counsel should be familiar with the law concerning reinstructing the jury, responding to jury questions, and when jury is unable to reach a verdict. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 6.9.

Indiana Jury Rule 26, Final Instructions; Rule 28, Assisting Jurors at an Impasse.

Louisiana Public Defender Board Trial Court Performance Standards, § 749

Commentary

Coming from the pinnacle of the bench, jury instructions can profoundly affect the jury's deliberations. Which instructions are to be given should be a factor in preparation of the case; counsel's consideration of instructions must not wait until the time that they are actually to be given.[1] For example, in developing a theory of the case (Guidelines 4.3, *supra*, and 7.5(a), *supra*), counsel may want to consider whether jury instructions supporting a given theory are available in the jurisdiction.

Counsel's knowledge about jury instruction practice where the case is being tried, paragraph (a), should include any time limitations on offering proposed jury instructions. Generally, counsel will want to obtain the court's ruling on counsel's proposed instructions as early as possible so that any necessary

1. That case preparation is a continuum, not an unconnected series of events, is noted throughout these Guidelines. *E.g.*, Guideline 4.1, Commentary, *supra*.

changes in defense strategy can be planned.[2]

However, counsel may not want to offer instructions regarding affirmative defenses or similar matters before the defense case is actually presented, at least in jurisdictions where prior notification of such matters is not required.

Counsel should "request instructions which present the applicable law in a manner most favorable to the defense,"[3] and be prepared to offer legal support for any requested instruction whether standard or special, paragraph (b). Many standard instructions are to be given only when evidence in the case supports them; counsel must be prepared to argue (orally or in memorandum, as the court requires) why such instructions -- or any requested instruction -- should be given in the particular case.

Supporting authority serves two purposes. One, it may well persuade the court to give the instructions proposed. Two, it provides a full record for appeal should the defendant be convicted after the court refuses to give requested instructions, paragraph (d) (see Guideline 7.1(e), *supra*). Supporting authority should be offered when objecting to instructions proposed by the prosecution, paragraph (c), for similar reasons. See Criminal Rule 8 and Trial Rule 51(C) for the manner of objecting to instructions and making them a part of the record. *Scisney v. State*, 701 N.E.2d 847 (Ind. 1998) (objection that an instruction is incorrect must clearly state the problem so it can be corrected or counsel must tender a correct instruction). Appellate lawyers must provide a transcript of the court's oral reading of the instructions or error is waived. *See Reed v. State*,702 N.E.2d 685 (Ind. 1998). For objections made orally see Criminal Rule 8(C).

Counsel should be aware of any inadvertent or deliberate deviations by the court during the actual charge to the jury from the instructions settled upon in advance.[4] Counsel must consider whether deviations from the requested and/or standard instructions are harmful to the client's case, and what steps should be taken to alleviate the harm, paragraph (e).

Counsel's trial duties are not over when the jury begins deliberations. The court may decide to give supplemental instructions to the jury, either in response to an inquiry by the jury or after a long time passes with no verdict being returned.[5] For a discussion of issues arising after the jury has been instructed and before the verdict, paragraph (f), see Jury Deliberations chapter in the IPDC Criminal Trial Law Manual (2013 edition) Chapter 18. A response to any inquiry from the jury about a point of law or fact may mark the turning point in deliberations. There may be no standard instruction covering the area of inquiry. Counsel will certainly want to ensure that the response is legally and/or factually correct.[6]

This standard does not address trials where the judge is the factfinder. Counsel must be aware of the jurisdiction's rules with regard to whether/in what fashion the court "instructs itself" in those cases.

---

2. See Criminal Rule 8 (instructions; limitations, objections). Counsel should have a proposed list ready at least by the time of trial, (Guideline 7.1(b)(13), *supra*.

3. [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 39, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822.

4. Here, as in other portions of the trial, observations by the client and/or additional defense team members can be valuable. Catching one-phrase differences in the charge can be very difficult for one person, especially a person who has heard many similar charges and is expecting the usual charge to be given. Especially if no written charge is provided to the jury, omission of even a single word could be vital error (for example, suppose the judge inadvertently omits the "not" in the phrase, "if you have a reasonable doubt that the prosecution has proven its case, you must find the defendant not guilty.")

5. Indiana Jury Rule 28 permits reading of additional instructions after deliberations commence. *Thomas v. State*, 774 N.E.2d 33, 36 (Ind. 2002).

6. *See*, *e.g.*, *Gantt v. State*, 825 N.E.2d 874 (Ind.Ct.App. 2005) (trial court acted appropriately under Jury Rule 28 in providing an additional jury instruction to address a disagreement among jury members; however, instruction given was an erroneous statement of law and invaded province of jury to determine credibility and accept or reject evidence as it sees fit).

Guideline 8.1 Obligations of Counsel in Sentencing

(a) 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 presentence investigation report.
(6) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1; *ABA Standards for Criminal Justice: Sentencing* (3d Ed. 1994).

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.1 *et seq*.

Louisiana Public Defender Board Trial Court Performance Standards, § 751.

Commentary

Aside from the welcome resolution of a case by outright dismissal or acquittal, no single point in a criminal case is more consequential than sentencing. Representation of a client at sentencing is not a separate aspect of the criminal case, but should be a final step in a case-long plan. Nor is plea bargaining, subparagraph (a)(1),[1] the only early stage at which sentence must be considered.[2]

Client -- or attorney -- reluctance to consider sentencing strategy early in the case must be overcome. Such reluctance may be based on an emotional or superstitious fear that thinking about sentencing is an acceptance of or invitation to conviction. It may be based on a perceived need to concentrate scarce time and resources on the most immediately demanding aspects of the case. Whatever

1. The obvious need to consider sentencing consequences during plea negotiations is discussed in Guideline 6.2 and Commentary, *supra*. For example, sentences on guilty pleas are directly appealable and belatedly appealable. See *Browning v. State,* 576 N.E.2d 1315 (Ind. Ct. App. 1991); *Tumulty v. State*, 666 N.E.2d 394 (Ind. 1996).

2. Tasks described as a necessary part of *sentencing* advocacy begin with the interview of the client at the time of arrest and may occur at trial itself ("Presentation of mitigating evidence through cross-exam [or in the] case-in-chief"). The Sentencing Project, "A Sentencing Advocate's List of Tasks." *See*, *also*, ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1(a).

the reason, reluctance to plan for the contingency of conviction and therefore sentencing must be overcome.[3] Sentencing must be considered early in the case if it is to be handled properly (Guideline 8.3, *infra*).

Evidentiary rules are generally much more relaxed at sentencing than at trial. This does not mean, however, that any information can be presented to and considered by the sentencer. Rules regarding permissible sentencing evidence, as well as constitutional due process, limit what a sentencer may properly learn and consider.[4]

Defense counsel should carefully examine all information offered by the government (or otherwise brought to the attention of the sentencer). Inaccurate information, or information that cannot lawfully be brought to the court's attention (such as pending charges where such charges are barred by rule or plea bargain) should be challenged, paragraph (a)(2).

Counsel's advocacy is needed in the sentencing process because the adversary system does not cease operation at the time of conviction. In fact, a new, de facto adversary may in some cases appear -- the probation officer or other functionary whose job it is to prepare and present a presentence report or other source(s) of information to the court for sentencing.[5]

Without defense input, only information unfavorable to the client may appear in the presentence report, and the client's sentence may be accordingly harsh. Therefore, defense counsel must develop mitigating and favorable information and present it to the court, subparagraph (a)(3), either directly (IC 35-38-1-11 permits a convicted person to file a written memorandum) or through the presentence report. (The person preparing the official presentence report may agree to include defense information.[6]) Counsel should consider preparing his/her own sentencing memorandum to put the client's offense and criminal history in perspective.

The way in which defense information is conveyed to the sentencer will vary, depending on circumstances. Defense counsel may choose to present a separate sentencing memorandum (Guideline 8.6, *infra*). Or, counsel may choose to offer certain information directly, in an evidentiary hearing in connection with the imposition of sentence (Guideline 8.7 (b) through (d), *infra*).

The way counsel chooses to present defense information may be affected by counsel's overall sentencing plan, subparagraph (a)(4). If counsel has developed a detailed program for the client which involves the participation of drug rehabilitation agencies or other entities, counsel will probably want to prepare a defense memorandum setting out the plan. If counsel and the client realize that imprisonment is

---

3. Public defenders and assigned counsel may face special difficulties in raising sentencing issues early with clients, because of client fear that publicly funded lawyers work for "the system," not the client (see Guideline 6.1 Commentary, note 9, *supra*). All attorneys whose clients are resistant to early sentencing planning should artfully seek to persuade the client that such planning is vital, not defeatist.

4. U.S. Const. Amend. XIV; *See e.g.*, *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (due process right not to be sentenced on basis of information withheld from defendant); *Gardner v. State, 270* Ind. 627, 388 N.E.2d 513, 520 (1979) (defendant entitled to be sentenced only on basis of accurate information, sentence based on materially untrue assumptions violates due process); *United States v. Miele,* 989 F.2d 659,663-65 (3d Cir. 1993) (defendant has due process rights not to be sentenced on basis of unreliable information); and *United States v. Bakker*, 925 F.2d 728, 740-741 (1991).

   Under Indiana Evid.R. 101(d)(2), the rules of evidence do not apply in sentencing proceedings, except for the law of privileges. However, a court need not admit evidence not relevant to sentencing decision. *See, Rabadi v. State,* 541 N.E.2d 271, 277 (Ind. 1989); *Powell v. State,* 644 N.E.2d 82, 83 (Ind. 1994) (a court need not admit all hearsay evidence).

5. Counsel's obligations with regard to the official presentence report are set out in Guideline 8.4, *infra*. Counsel must prepare the client for being interviewed by the preparer of the presentence report, Guideline 8.3(a)(6), *infra*.

6. Guideline 8.4, *infra*. In fact, defense information may be welcome; caseload pressure may limit the ability of even the best-intentioned report-preparer to learn good things about the client.

likely,[7] and that most defense information will be coming from apparently defense-biased sources, counsel may decide to directly present defense information by way of sympathetic family members on the day of sentencing. (Counsel should consider each sentencing proceeding individually, and not rely on a standardized delivery of a routine plea for mercy even where there appears but little room for sentence adjustment. While the plan must take into account any binding legal limitations on the sentencer's power, counsel can look for ways to modify "the usual" routine prison sentence.[8])

Plans can be developed for any type of case. Sentencing specialists can assist counsel in developing plans in the most difficult cases.[9]

The use of official presentence reports has grown in the last 20 years, and has grown beyond simply consideration by a judge at the time of sentencing. The reports often follow defendants into prison and through probation and/or parole, impacting on defendants' eligibility for certain programs, consideration for release, etc.[10]

If a convicted person is sentenced to a term of imprisonment, his or her presentence report will be sent to the Department of Correction. See IC 35-38-1-14. The Adult Offender Classification Policy Manual provides in pertinent part: "All persons involved in offender classification decisions may apply the following considerations:

I. Information contained in the pre-sentence material.
Q. The sentencing court recommendations."

See Indiana Department of Correction Adult Offender Classification Policy Manual, Section 2.V. Inaccurate or improper information that is not stricken from the reports while defendants are still represented by counsel may adversely affect those defendants for years, with little chance of challenge. Defense counsels' duty to challenge all inaccurate and improper information, subparagraph (a)(5), is not peripheral, but central, to their clients' best interests. Counsel should ensure that the presentence report is "cleansed" of all inaccurate and improper information, and the report is not missing any information which is beneficial to the defendant. *Woodcox v. State*, 591 N.E.2d 1019 (Ind. 1992), *overruled on other grounds*, 717 N.E.2d 32 (Ind. 1999) (fact that PSR does not contain all elements mandated by legislature does not, alone, invalidate PSR; incumbent upon defendant to demonstrate how he is prejudiced by omissions from a PSR).

Presentence reports have enormous consequences when the content of such reports is the basis for determining where on a mandatory sentencing grid a particular defendant falls.[11] Consequently, defense

7. For instance, if the client has a long prior record of violent crimes and increasingly long prison sentences, or a prison term is mandated by law.

8. The Department of Correction (DOC), not the judge, determines the facility in which the convicted person will be imprisoned. *Barnes v. State,* 435 N.E.2d 235 (Ind. 1982); IC 35-38-3-5. The court=s record of judgment may include a recommendation as to the degree of security, and the DOC must notify trial court and prosecutor if the degree of security assigned differs from the court=s recommendation. IC 35-38-3-5(a)(5). See The Indiana Department of Correction Adult Offender Classification Policy Manual, Section 3, XVII. E. (The Supervisor of Offender Placement shall submit in writing to the trial court and prosecuting attorney the reasons for the security classification, if different from the court=s recommendation).

9. *See e.g.*, Philip Witt and Thom Allena, "Developing Sentencing Plans for Child Molesters," 15 *The Advocate* (publication of the KY Department of Public Advocacy) (#1 February 1993) pg. 15. *See also*, Marc Mauer, "Sentencing Alternatives for Drug Users and Sellers," The Sentencing Project, January 3, 1989, pg. 381, *et seq.*

10. Earlier sentencing report properly included in presentence investigation report. *Forrester v. State,* 440 N.E.2d 475 (Ind. 1982). *See, e.g.*, Hap Houlihan, "Your Client Needs You at Presentence Interviews!" 13 *The Advocate* (publication of the KY Department of Public Advocacy) (#3 April 1991) pg. 63, 64.

11. *E.g.*, the Federal Sentencing Guidelines.

counsel has reason to pay particularly close attention to presentence reports in such cases.[12] It is because of the great importance of presentence reports in modern criminal practice that counsel's duties as to those reports are mentioned in the instant Guideline, subparagraph (a)(5) as well as being detailed in a separate one (Guideline 8.4, *infra*). Counsel unaware of the sentencing specialists, subparagraph (a)(6), may contact appropriate organizations for information.[13]

12. ABA Criminal Justice Section, "Survey on the Impact of U.S. Sentencing Guidelines on the Federal Criminal Justice System" (Executive Summary), August 27, 1992. This survey found that significantly more defense attorney time was required to deal with presentence reports in cases involving the guidelines.

13. For example, the Indiana Public Defender Council serves as a sentencing information resource (telephone number 317-232-2490); as does the National Association of Sentencing Advocates and The Sentencing Project (Washington, D.C.).

Guideline 8.2 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, judgment without a finding, and diversionary programs;
(3) expungement and sealing of records;
(4) probation or suspension of sentence and permissible conditions of probation;
(5) restitution;
(6) fines;
(7) court costs and reimbursement of public defender fees;
(8) imprisonment including any mandatory minimum requirements;
(9) confinement in mental institution;
(10) forfeiture;
(11) local practice of the court and probation department.

(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;
(3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
(4) place of confinement and level of security and classification;
(5) self-surrender to place of custody;
(6) eligibility for correctional and educational programs;
(7) available drug rehabilitation programs, psychiatric treatment, and health care;
(8) deportation and other immigration consequences;
(9) use of the conviction for sentence enhancement in future proceedings;
(10) loss of civil rights;
(11) impact of a fine or restitution and any resulting civil liability;
(12) restrictions on or loss of driver's license;
(13) loss of Fifth Amendment right to remain silent and exposure to contempt and/or perjury;
(14) prohibition of possessing a firearm;
(15) 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 procedural operation of any sentencing guideline system;
(3) the effect of a judicial recommendation against deportation;
(4) the practices of the officials who prepare the presentence report and the defendant's rights in that process;
(5) the access to the presentence report by counsel and the defendant;
(6) the prosecution's practice in preparing a memorandum on punishment;
(7) the use of a sentencing memorandum by the defense;
(8) the opportunity to challenge information presented to the court for sentencing

purposes;

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

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

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.1.

Louisiana Public Defender Board Trial Court Performance Standards, § 753.

Commentary

The list of sentencing provisions and options that counsel should know, subparagraphs (a)(1) through (11), is not exhaustive. (See Indiana Sentencing Options, and the Table of Penalties below). Lawmakers, judges and corrections officials are endlessly creative when it comes to imposing new limitations, penalties and quasi-penalties on persons convicted of crime. They are similarly creative in devising ways to block defense efforts to affect sentences and sentencing results. A single, high-profile sentencing procedure or later disclosure of a sentence result deemed too lenient can lead to a maze of new limits at sentencing. A political trend toward "tougher" treatment of a particular type of criminal can have a similar impact (*e.g.*, IC 35-38-1-7.5 - findings regarding sexually violent predators). Defense attorneys should be familiar, then, with not just the provisions and options listed here but with the entire sentencing and correctional system in their jurisdiction.[1] Counsel must keep current on rules, statutes and court opinions that affect sentencing procedurally or substantively. (See the IPDC's 2009 Sentencing Law Manual, and Indiana Criminal Law Case Bank, Section >E=).

By knowing the sentence consequences potentially applicable to a client's case, subparagraphs (b)(1) through (15), counsel can try to avoid nasty surprises for the client.[2] For example, to calculate earned credit time for educational requirements completed after July 1, 1999, subtract from the earliest possible release date. See IC 35-50-6-3.3. However, for educational requirements completed before June 30, 1999, the earned educational credit time is subtracted from the period of imprisonment imposed by the sentencing court. See *Miller v. Walker*, 655 N.E.2d 47 (Ind. 1995). For guidance on the calculation and earning of good-time credits under subparagraph (b)(3), see sentencing credit statutes IC 35-50-6-3.3, IC 35-50-6-4, and *State v. Eckhardt*, 687 N.E.2d 374 (Ind.Ct.App. 1997).

Under subparagraph (b)(4), counsel should become familiar with the Department of Correction's administrative procedures regarding place of confinement, level of security, and classification. Refer to the Indiana Department of Correction Adult Offender Classification Policy manual. (Contact the Indiana Public Defender Council for a copy).

A sentencing plan asking for probation may be reconsidered if conditions automatically imposed as a part of probation are so strict that the client believes he or she cannot meet them and will eventually be incarcerated. Or, counsel's foreknowledge and accurate advice to the client about probation conditions,

1. The bureaucracies of probation/parole and corrections departments can be just as difficult to navigate as those pretrial release paths described in the Commentary to Guideline 2.2, *supra*.

2. The need to know "real" sentencing consequences when negotiating a plea is discussed in the Commentary to Guideline 6.2, *supra*. Also, counsel=s knowledge of appellate law can avoid nasty surprises. For example, sentences on guilty pleas are directly appealable and belatedly appealable. *Browning v. State,* 576 N.E.2d 1315 (Ind.Ct.App. 1991). Also, there are no belated appeals from probation revocation or jail time credit denials. *Neville* v. *State*, 694 N.E.2d 296 (Ind.Ct.App. 1998).

costs,[3] etc. may prepare the client to accept and abide by such conditions.

Creatively thinking about conditions of probation may provide counsel -- and the court -- opportunities to tailor sentences to the circumstances of the case. Counsel must beware of conditions which are arguably improper,[4] and be prepared to challenge such conditions when they are injurious to the client (or defend such conditions when they are favorable to the client).

Counsel should not wait until final preparation for sentencing to become familiar with the list of sentence consequences in subparagraphs (b)(1) through (b)(15). Determining possible consequences may be time-consuming and difficult.[5]

In some instances, counsel may need to seek outside expertise to understand particular, specialized collateral consequences of sentencing. At the very least, counsel may wish to seek information from agencies or colleagues who have already collected information on forfeiture, deportation, etc.[6]

Many of the practices noted in subparagraphs (c) (1) through (10) will have local or informal components as well as formal, written ones. With respect to subparagraph (c)(9), under Indiana law before sentencing a person for a felony, the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. IC 35-38-1-3. Counsel must know any formal local court rules regarding such hearings. Under Evid.R. 101(d)(2), the rules of evidence do not apply in sentencing proceedings, except for the law of privileges. However, a court need not admit evidence not relevant to the sentencing decision. *See*, *Rabadi v. State*, 541 N.E.2d 271, 277 (Ind. 1989); *and*, *Powell v. State*, 644 N.E.2d 82, 83 (Ind. 1994) (a court need not admit all hearsay evidence). Also, the defendant has a constitutional right to counsel under the Sixth Amendment of the Constitution of the United States. The Exclusionary Rule may be applicable to sentencing proceedings. But, claims that evidence has been unlawfully obtained are waived by pleading guilty. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1603 (1973).

Be aware of due process issues regarding the participation of victims and witnesses, subparagraph (c)(10). Due process requires that sentences be based upon accurate and reliable information. *Townsend v. Burke*, (1948), 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690. *e.g.*, *Fugate v. State*,516 N.E.2d 75 (Ind.Ct.App. 1987) (denial of right to be sentenced on basis of materially true assumptions in violation of due process, where court expressly relied upon presentence report which included statements of damage to victims due to crime of which defendant was acquitted).

Evidentiary hearings concerning sentencing present the same pitfalls as other hearings -- unprepared witnesses may offer damaging rather than helpful testimony, unforeseen prosecution rebuttal witnesses may contravene vital defense information, etc. This does not mean that counsel should avoid an evidentiary sentencing hearing when one suggests itself, but that counsel should prepare as fully for

---

3. Probation user fee mandatory for felonies. See IC 35-38-2-1(b). See also, IC 35-38-2-2.1 (alcohol and drug countermeasures fee). States may impose probation supervision fees or other costs, so long as defendants are not imprisoned for non-willful failure to pay, *see*, "New Fees in Effect," VII *Public Defense Backup Center Report* (Publication of the Defender Institute of the New York State Defenders Association) (#10 Nov/Dec 1992) pg. 3, citing Executive Law sec. 259-c, L 1992, c 55, Sec. 383 and *Beardon v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

4. Conditions must be specific. *Dulin v. State,* 169 Ind.App. 211, 346 N.E.2d 746 (1976). See also, IC 35-38-2-2.3(b). For example, probation conditions should not discriminate against clients without funds (*e.g.*, providing that a client may escape incarceration only if the client pays a certain amount of money; *see* note 3, *supra*) and should not inure to the personal benefit of the judge (*e.g.*, ordering client participation in a program in which the judge has a non-judicial interest, Michigan Ethics Opinion JI-64, 72 Michigan Bar Journal (#3, March 1993), pg. 282); *see also Mueller/Evans v. State*, 837 N.E.2d 198 (Ind.Ct.App. 2005) (requiring payment of a fee as an absolute condition of participating in a pretrial diversion program discriminates against indigent persons in violation of Fourteenth Amendment).

5. ". . . [but] it is not always clear what rights are lost." "Convicted Felons Face Penalties Beyond Sentencing," 15 *The Cornerstone* (publication of NLADA), (#1 Spring 1993) pg. 6, citing a report of the Office of Pardon Attorney.

6. *See, e.g.,* "Collateral Costs: The Hidden Impact of Adult Convictions and Juvenile Adjudications," *Public Defender Commission News,* August 2010, p.1. (available at http://www.in.gov/judiciary/pdc/files/pdc-pubs-vol3-no2-aug-2010.pdf)

hearings at this end of the case as for pretrial hearings, Guideline 5.2(b), *supra*.

Table Of Penalties				
Advisory and Standard Sentencing Additions or Subtractions				
Class	Advisory	Add	Subtract	Fines
Murder	55 years	10 years	10 years	$10,000
1	30 years	20 years	10 years	$10,000
2	17.5 years	12.5 years	7.5 years	$10,000
3	9 years	7 years	6years	$10,000
4	6 years	6 years	4 year	$10,000
5	3 years	3 years	2 year	$10,000
6	1 years	1 1/2 years	1/2 year	$10,000
A mis.	1 year max.			$5,000
B mis.	180 days max.			$1,000
C mis.	60 days max.			$500

Felony Sentencing Enhancements		
Enhancement Description	Minimum	Maximum
Habitual criminal	2 years for Level 5 & 6 felonies; 6 years for murder through Level 4 felonies	6 years for Level 5 & 6 felonies; 20 years for murder through Level 4 felonies
Use of firearm	5 years	20 years if felony resulted in SBI or death, kidnapping, or criminal confinement as a Level 2 or 3 felony
Repeat sexual offender	1x advisory	1x advisory; 10 years max.

Indiana's Sentencing Options

Definitions
Executed sentence - An executed sentence in a criminal case is understood to require the incarceration of a defendant, with the possibility of his receiving one day of credit time for each day of imprisonment. *Page v. State*, 706 N.E.2d 230, 236 (Ind.Ct.App. 1999) (Brook, J., dissenting).

Suspended Sentence - means in effect that defendant is not required at the time sentence is imposed to serve the sentence. *Page v. State,*706 N.E.2d 230, 236 (Ind.Ct.App. 1999) (Brook, J., dissenting).

Split Sentence - sentence by which the defendant serves some time and the balance of the sentence is suspended. *Page v. State,* 706 N.E.2d 230, 237 (Ind.Ct.App. 1999) Brook, J., dissenting).

Options
Concurrent or consecutive sentence - IC 35-50-1-2
Modification of sentence/shock probation - IC 35-38-1-17
Intermittent service of sentence (includes weekend sentence & split sentence) - IC 35-38-2-2.3
Death Penalty; life imprisonment without parole - IC 35-50-2-9
Conviction for Level 6 felony entered as Class A Misdemeanor - IC 35-50-2-7(b)
Conversion of a Level 6 felony to a Class A Misdemeanor – IC 35-38-1-1.5

Community Corrections
Direct placement in community corrections program - IC 35-38-2.6

Community Transition Program Services
Definition - IC 11-8-1-5.5 and IC 11-12-10
Assignment to - IC 11-10-11.5
IC 35-38-1-24 (if most serious offense is Level 5 or 6 felony)
IC 35-38-1-25 (if most serious offense is Level 1, 2, 3, or 4 felony)

Drugs/Alcohol
Conditional discharge for possession of marijuana as first offense - IC 35-48-4-12
Sentence where intoxication is element of offense - IC 12-23-5
Drug abuse and alcohol treatment - IC 12-23
Pretrial diversion - IC 33-14-1-17
Problem Solving court – IC 33-23-16

Fees/fines
Alternative fine for felony or misdemeanor - IC 35-50-5-2
Payment of fines/installment payments - IC 35-38-1-18
Fees for offenses generally - IC 33-19-5-1

Forensic Diversion Program – IC 11-12-3.7

Habitual Offender
Habitual offenders - IC 35-50-2-8
Habitual traffic offender-license suspension - IC 9-30-10-5 Repeat sexual offender - IC 35-50-2-14

Home Detention
Home detention - IC 35-38-2.5

Petition for placement in home detention in lieu of incarceration - IC 35-38-1-21

Ignition interlock device as part of court ordered probationary driving privileges
IC 9-30-5-16 and
IC 9-30-10-9

Juvenile Waived to Adult Court
Imposition of sentence upon conviction under IC 31-30-4 concerning sentencing alternatives for certain offenders under criminal court jurisdiction – IC 35-50-2-17

License suspension
Controlled Substances license suspension - IC 35-48-4-15
Thirty (30) day license suspension for traffic offenses - IC 9-30-3-16
Habitual traffic offender-license suspension -IC 9-30-10-5 and 9-30-10-9

Restitution
Restitution orders without probation - IC 35-50-5-3
Restitution order as civil judgment lien - IC 35-50-5-3(b)

Suspension of sentence and placement on probation
IC 35-50-2-2.2 (felonies)
IC 35-50-3-1 (misdemeanors)
IC 35-38-2-1 (probation in general)

Guideline 8.3 Preparation for Sentencing

(a) 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, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
(4) ensure the client has adequate time to examine the presentence report;
(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) prepare the client to be interviewed by the official preparing the presentence report;
(7) 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 restitution proceedings;
(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;
(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.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.4; Guideline 7.1.

Louisiana Public Defender Board Trial Court Performance Standards, § 755.

Commentary

The opening clause of this Guideline indicates that counsel should "consider the need to" perform the various tasks listed after it. Only when circumstances of the case prevent certain of those tasks, however, can they be considered optional. It is difficult to imagine a case in which counsel need not tell the client about the applicable sentencing requirements, options, alternatives and potential consequences, subparagraph (a)(1). Even where the client has absconded on bond following conviction, counsel should generally have discussed these matters, at least prefatorily, earlier in the case.[1] But if no official presentence

1. The need to consider sentencing issues early in the case is discussed in the Commentary to Guideline 8.1, *supra.*

report is prepared in the jurisdiction, subparagraphs 4 and 6 would not apply.

Plea negotiation is an obvious time to consult with the client about sentencing factors.[2] But sentencing considerations that should be discussed with the client may arise as early as proceedings on pretrial release,[3] and sentencing must not be ignored when a theory of the case is formulated, in consultation with the client (Guidelines 4.3 and 7.5(a), *supra*).

Having a client on bond who refuses to remain in contact with counsel could obviously impact on the other sentencing preparations listed in subparagraphs (a)(2) through (9). The intent of this Guideline, however, is that the tasks listed should be done.

The need to keep in touch with the client about preparation for sentencing, subparagraph (a)(2), is not only an example of counsel's continuing duty to keep the client informed of the progress of the case (Guideline 1.3(c), *supra*), but is a prerequisite for most of the tasks listed thereafter, subparagraphs (a)(3) through (8), involving client participation in sentence preparation.

Some information relevant to sentencing will most likely have been collected from the client long before final sentencing preparations begin. Certainly, information that impacts on pretrial release proceedings -- *e.g.*, ties to the community, family relationships, employment record, past criminal record, etc. (Guideline 2.2 (b)(2), *supra*) -- is also important for sentencing. And investigation of the case in preparation for trial will undoubtedly include information about the client that must be considered by counsel for its sentencing implications.[4]

Ensuring that there will be adequate time for the client to review the official presentence report before it goes to the court, subparagraph (a)(4), can be difficult. (For example, overburdened probation officers or other report preparers may delay completion of reports until the date of sentencing). Nonetheless, counsel should insure, for example by seeking a continuance, that there is time for the client to review the accuracy of the report.[5] The purpose of such review is to identify inaccurate or improper information which can then be challenged before sentence is imposed (Guideline 8.1(a)(5), *supra*).

The client needs to know not only the existence of any right to speak before sentence is imposed[6] but of potential consequences of any admissions made at sentencing in the event of a retrial or other proceeding, subparagraph (a)(5). Overall defense sentencing strategy should be considered as counsel confers with the client about the client's potential statement to the sentencer. If the client disagrees with

---

2. That sentencing consequences must be considered in plea negotiations is addressed in Guideline 6.2 (a) (1) through (6) and (b)(2)(E)through (G), *supra*. The Commentary to Guideline 6.2 notes in detail the difficulty in ascertaining some potential sentencing consequences.

3. The Commentary to Guideline 2.1, *supra*, includes discussion of supervised pretrial release, which might generate positive sentencing information.

4. For example, the existence of prior convictions is important information in deciding whether the client should testify (Guideline 7.5(b), *supra*), and is also important sentencing information. See IC 35-38-1-7.1(a)(2).

5. Before imposing the sentence, the court shall provide the defendant or his counsel a copy of the presentence report. See, IC 35-38-1-12(a)(2). Better practice for court to routinely make sure reports are made available more than one day before sentencing hearing. *Goudy v. State,* 689 N.E.2d 686 (Ind. 1997) (incumbent upon defendant challenging denial of continuance of sentencing hearing to show how he was prejudiced by short time period within which to review presentence report). Proposed Guidelines in Michigan call for counsel to "review the accuracy of the presentence report and the sentencing information report with the client." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 42, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822.

6. "The defendant may also make a statement personally in his own behalf and, before pronouncing sentence, the court shall ask him whether he wishes to make such a statement." IC 35-38-1-5. Although the statute applies only to defendants who did not plead guilty, if a defendant specifically requests the opportunity to give a statement, the request should be granted. *Biddinger v. State*, 868 N.E.2d 407 (Ind. 2007). *See* [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 5, Proposed Standard 45.

counsel's proposed sentencing plan, counsel should tell the client of his or her right to speak personally for a particular sentence, subparagraph (a)(8).[7]

No right to counsel at presentence interview. *Lang v. State*, 461 N.E.2d 1110, 1115 (Ind. 1984). When preparing the client to be interviewed by the official who is to prepare the official presentence report, subparagraph (a)(6), counsel should advise the client of any constitutional or statutory protections available to the client,[8] and the consequences of invoking -- or eschewing -- those protections,[9] subparagraph (a)(7). Counsel should consider being present for the interview.[10]

7. For example, if the client is determined to ask the court for probation despite a statutorily mandated sentence of incarceration, the client may do so while counsel advocates the best sentence available by law. While exercising right of allocution, defendant only has right to express his views of facts and circumstances surrounding his case and to articulate reasons why judgment should not be imposed at that time. *Ross v. State,* 676 N.E.2d 339 (Ind. 1996).

8. A statement made by the defendant during a presentence interview should be excluded on Fifth Amendment grounds where it is shown to be involuntary, as induced by violence, threats, promises, or other improper influence. *Burch v. State,* 450 N.E.2d 528, 530 (Ind. 1983). *See Hines v. State*, 856 N.E.2d 1275 (Ind.Ct.App. 2006) (no force or coercion was using during court-ordered psychosexual evaluation as part of pre-sentence investigation, other than persistent questioning by interviewing psychologist; Darden, J., dissenting, was “deeply troubled by the fact that the trial court had ordered Hines to undergo a psychosexual evaluation and then expressly used the information gained from it when imposing a sentence"). The Fifth Amendment protection against self-incrimination may not apply, *see* Hap Houlihan, "Your Client Needs You at Presentence Interviews!" 13 *The Advocate* (publication of the Kentucky Department of Public Advocacy) (#3 April 1991) pg. 63, citing *United States v. Herrera-Figueroa*, 918 F. 2d 1430 (CA 9, 1990).

9. *See*, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards*, *supra* note 5, Proposed Standard 40.

10. *Id*.; *see also*, Hap Houlihan, "Presentence Interviews: An Update," 13 *The Advocate* (publication of the KY Department of Public Advocacy), (#4 June 1991) pg. 46, citing *United States v Davis*, 919 F2d 1181 (CA 6 1990).

Guideline 8.4 The Official Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

(1) determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting 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 interests where the defense challenges information in the presentence report as being erroneous or misleading and:

(A) the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

(B) the prosecution fails to prove an allegation;

(C) the court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to correctional and/or parole officials.

(6) Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Performance Guidelines, Guideline 7.2; Guideline 7.3.

NLADA, *Death Penalty Standards*, Standard 11.8.4

Commentary

As noted in Commentary to Guideline 8.1, *supra*, the use of presentence reports is now widespread.[1]

Knowing how these reports come in to being, paragraph (a), can help counsel get advantageous information into the report, subparagraph (a)(2)[2] and may help counsel in assessing the accuracy of the

1. A defendant convicted of a felony may not be sentenced before a presentence report is prepared by a probation officer and considered by the sentencing court. IC 35-38-1-8(a). However, a court may sentence a person convicted of a Level 6 felony without considering a presentence report, unless the defendant is committed to the DOC or a community corrections program. See IC 35-38-1-8(c). In 1992, a report compiling information from 1990 indicated that a presentence report was requested by the judges in felony cases in 84% of the jurisdictions surveyed. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, "Prosecutors in State Courts, 1990," NCJ-134500, March 1992.

2. [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 41, 72 Michigan Bar Journal #8 (August 1993), pg. 818, 822.

report.[3] Knowledge of how the report will be prepared may also help counsel decide whether or not to request an official presentence report where it is optional, subparagraph (a)(1). That decision rests on what information counsel believes will be included in the requested report, what the impact of an official report compared to a defense-prepared report is likely to be, etc.

Counsel should review any completed report, paragraph (a)(3), as well as having the client do so (Guideline 8.3(a)(4), *supra*).[4] If report is delivered late, move for a continuance.5 Defendant must show he would be harmed by denial of a continuance. *Eubank v. State*, 456 N.E.2d 1012 (Ind. 1983) (defendant should point to findings in PSR that he wishes to controvert and what evidence he wants to present if given additional time.). If counsel (or the client) is not permitted to review the report,[6] counsel should take action (objecting on the record, making motions) to have the report made available. For without knowing what is in the report, counsel cannot possibly meet the mandate of subparagraph (a)(4), to take steps to ensure that harmful, inaccurate information is deleted. The initial burden of production rests with the defendant in disputing the information contained in the presentence report. Whether the defendant is required to produce evidence or merely deny the information depends upon whether the information consists of supported or naked allegations. *Gardner v. State*, 270 Ind. 627, 388 N.E.2d 513, 517-18 (1979), (citing, Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 Geo.L.J. 1515, 1529 (1978)).

In contemplating how the information in the presentence report could be harmful to the client, defense counsel must consider not only the report's use at the sentencing proceeding, but its use thereafter by probation, prison and/or parole officials.[7]

If harmful, inaccurate information is contained in the presentence report and counsel's initial efforts to have it corrected[8] are unsuccessful, counsel must decide what further steps to take, subparagraph (a)(5) *et seq*. It is not enough that the sentencing judge agrees to disregard disputed information where the report

3. Statements in presentence report prepared by county probation department are presumptively true unless challenged by defendant. *Shuttleworth v. State,* 469 N.E.2d 1210 (Ind.Ct.App. 1984); *Dillard v. State*, 827 N.E.2d 570 (Ind.Ct.App. 2005). Confidence in the integrity of a particular agent who has prepared a report will not substitute, however, for independent defense investigation into the report's accuracy. *See* ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1, Commentary, which notes that counsel should seek to determine the accuracy of report information and the soundness of report conclusions, adding, "To do so, counsel will ordinarily need to make some independent investigation." *See also Shane v. State*, 769 N.E.2d 1195 (Ind.Ct.App. 2002) (affirming that trial counsel has obligation to review accuracy and reliability of presentence report).

4. The court shall furnish the factual contents of the presentence investigation or a copy of the presentence report sufficiently in advance of sentencing so that the defendant will be afforded a fair opportunity to controvert the material included." See IC 35-38-1-12(b). [MI] State Bar Committee on Assigned Counsel Standards, Proposed Minimum Standards *supra* note 2, Proposed Standard 42. The mandatory nature of the instant Guideline is noted in the Introduction, *supra*, at note 3.

5. *See Gilbert v. State*, 982 N.E.2d 1087 (Ind.Ct.App. 2013) (defendant's sentencing procedure violated his right to due process when the trial court scheduled his sentencing hearing with one day notice and the PSI report was not given to the defendant or counsel until the day of the sentencing hearing).

6. The ABA *Standards* speak of counsel reviewing the report if it (or a summary) is made available, ABA *Standards*, The Defense Function (3d ed.) Standard 4-8.1(b). *Carter v. State*, 468 N.E.2d 212 (Ind. 1984) (failure to preserve error for appeal where defendant did not complain of not receiving presentence report when trial court referred to the report at sentencing hearing).

7. *See, e.g.,* Hap Houlihan, "Your Client Needs You at Presentence Interviews!" 13 *The Advocate* (publication of the Kentucky Department of Public Advocacy) (#3 April 1991) pg. 63, 64; *see also Shepard v. United States*, 544 U.S. 13 (2005) (because rules of evidence do not apply to sentencing proceedings that are conducted by a judge sitting without a jury, judge may use a presentence report to discern a defendant's criminal history although a presentence report is hearsay).

8. "The most desirable method of correcting errors in the presentence report is through informal contact with the presentence investigator, since that will prevent misinformation from being presented to the sentencing judge." [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards, supra* note 2, Proposed Standard 43, Comment.

may be used against the client by probation officers, prison officials, parole officials or others following sentencing.[9]

Therefore, counsel must make very sure that improper information has been deleted from all copies of the report, subparagraph (a)(6). Counsel should be aware of the following cases: *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005) (using a defendant's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the right against self-incrimination); *Thomas v. State*,553 N.E.2d 825, 828 (Ind. 1990) (defendant objected to the presentence investigation filed by a probation officer and filed a proposed amended report; held, defendant had the right to challenge probation report and to state to court his version of the situation, but not entitled to replace probation officer=s report with his own language); *Carmona v. State*, 827 N.E.2d 588 (Ind.Ct.App. 2005) (where a defendant vigorously contests his criminal history and that history is highly relevant to his sentence, State has burden to produce some affirmative evidence, *e.g.*, docket sheets, certified copies of convictions, etc., to support a criminal history alleged in a PSI and urged as a basis for sentence enhancement); *Hiner v. State*,470 N.E.2d 363 (Ind.Ct.App. 1984) (statutes governing presentence reports did not provide for deletion of any items before report was sent to DOC).

9. If a convicted person is sentenced to a term of imprisonment, the court sends a copy of the presentence report to the DOC. See IC 35-38-1-14(1). *Id*. and note 6, *supra*.

Guideline 8.5 The Prosecution's Sentencing Position

(a) Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.
(b) If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
(c) If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.1(d).

Louisiana Public Defender Board Trial Court Performance Standards, § 757.

Commentary

As noted earlier,[1] the adversary system does not cease to function once a defendant has been convicted. Prosecutors almost always appear at sentencing, and usually have a recommendation as to what sentence should be imposed.[2] Knowing in advance what the prosecution's position will be, paragraph (a), makes it easier for counsel to counter that position with one more favorable to the client.

Where erroneous or misleading information is being submitted by the prosecution in writing, paragraph (b), counsel should consider whether such report may be used against the client in the future (as an official presentence report may be used, Guideline 8.4, Commentary, *supra*). Distribution of the report to probation, parole and corrections officials should be contested where the report contains improper information or where counsel is unable to determine what the report contains, paragraph (c). The State is permitted to prepare and submit a written presentence memorandum. *Laird v. State*, 483 N.E.2d 68, 71 (Ind.1985). Defense counsel should be entitled to see the memorandum under IC 35-38-1-12(b).

1. Guideline 8.1, Commentary, *supra*

2. A 1992 report compiling information from 1990 showed that in the jurisdictions surveyed, the prosecution was represented at sentencing 99.5% of the time, and 88% recommended a sentence. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, "Prosecutors in State Courts, 1990," NCJ-134500, March 1992, pg. 7.

Guideline 8.6 The Defense Sentencing Memorandum

(a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

(1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;

(2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;

(3) information contrary to that before the court which is supported by affidavits, letters, and public records;

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

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

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

(7) presentation of a sentencing proposal.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.4.

Commentary

IC 35-38-1-11 authorizes the convicted person to file a written memorandum setting forth any information he considers pertinent to the question of sentence, including written statements by others in support of facts alleged in memorandum. Presenting a written memorandum in support of the defense sentencing plan is advisable whenever it is likely that the memorandum will either have a favorable effect on the decision reached by the court as to sentencing or will assist the client in future proceedings (such as motions for resentencing or appeal). In conducting an offender evaluation, The Indiana Department of Correction (DOC) may utilize information supplied by external sources. See the DOC's Adult Offender Classification Policy Manual, Section 3, XI.B.2. "presentence memorandums filed by the offender," and B.5. "Other information forwarded by the sentencing court or other agency." A written memorandum may be particularly beneficial if the defense plan is complicated, is unusual or new (even if new only to the particular judge), or relies heavily on specialized information (*e.g.*, sociological, medical, psychological[1]).

Supplement the record with significant mitigating factors. The trial court is not required to find mitigating factors or to explain why it has chosen not to do so, unless significant mitigating factors are

1. For example, counsel may seek to convince a court that a client convicted of sexually abusing a child can be treated in a community setting so that the abuse will not recur. A tremendous amount of information may be needed to convince the court that the particular client is amenable to treatment and that successful treatment programs are available. *See, e.g.*, Richard T. Purvis, "Sex Offender Treatment: An Overview," 14 *The Advocate* (publication of the KY Department of Public Advocacy) (#5 October 1992), pg 44.

clearly present in the record. *See Blanche v. State*, 690 N.E.2d 709 (Ind. 1998) (trial court did not abuse its discretion by failing to weigh mitigating circumstance of defendant's "troubled youth" as defendant made no argument regarding effects of his background). Also, the court must make a finding of a mitigating circumstance if the court reduces the presumptive sentence or uses the mitigating circumstances to offset the aggravating circumstances which serve to enhance the sentence. *Widener v. State*, 659 N.E.2d 529, 534 (Ind. 1995).

Examples of incorrect or incomplete information, subparagraph (a)(1), include: 1) assumptions which are materially untrue, *Townsend v. Burke* ,334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed.1690 (1948); 2) unverified statements, *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971); 3) statements made by defendant where it is shown to be involuntary, as induced by violence, threats, promises, or other improper influence, *Burch v. State*, 450 N.E.2d 528, 530 (Ind. 1983); 4) an acquittal as an aggravating circumstance, unless crime was proven by a preponderance of the evidence, *U.S. v. Watts*, 117 S.Ct. 633, 638 (1992); 5) opinions of victim's loved ones, *Edgecomb v. State*, 673 N.E.2d 1185 (Ind. 1996); 6) factors which comprise material element of crime cannot also constitute aggravator to enhance that crime, *White v. State*, 647 N.E.2d 684 (Ind.Ct.App. 1995), *trans. den.;* 7) enhancing sentence to compensate for erroneous verdict, *Gambill v. State*, 436 N.E.2d 301 (Ind. 1982); 8) previous convictions of defendant which were obtained in violation of 6th Amendment right to counsel, *United States v. Tucker*,404 U.S. 443, 92 S.Ct. 589 (1972) and, 9) enhancing sentence to send message to others and make an example out of defendant, *Gregory-Bey v. State*, 669 N.E.2d 154, 159 (Ind. 1996); 10) considering evidence outside record, *Hulfachor v. State*, 813 N.E.2d 1204 (Ind.Ct.App. 2004).

Where counsel has relied on the assistance of a sentencing specialist,2 that expert may prepare the memorandum for counsel to present.

2. Guideline 8.1(a)(6), *supra*. For information on human service programs (such as drug treatment, mental health, etc) in central Indiana, See The Rainbow Book - available on the Internet at http://lawlibrary.in.gov/cgi-bin/koha/opac-detail.pl?biblionumber=318297.

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
(b) Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
(c) 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.
(d) 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.
(e) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation of the defendant.
(f) Where appropriate, counsel should prepare the client to personally address the court.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 7.7; Guideline 7.8; Guideline 7.13.

Louisiana Public Defender Board Trial Court Performance Standards, § 759.

Commentary

This Guideline assumes counsel's presence at sentencing.[1] Sentencing is vital to the client[2] as well as to the community at large.[3] Counsel must not treat, and must not allow the court to treat, a sentencing

1. A Michigan attorney who failed to appear at his client's sentencing (and had failed to appear at an earlier set sentencing date) was reprimanded by the Attorney Discipline Board for that and other deficiencies in representation, 72 Michigan Bar Journal #3 (March 1993), pg. 348, 349.

2. Guideline 8.1, Commentary, *supra*.

3. The criminal justice system is supposed to serve a protective public function, and has for a long time been assumed to have a behavior-changing role:

"...The criminal law game is a behavior stimulation game. Judges and lawyers are playing that game, by rules developed through hunch and superstition. It is time, then, that the game be adjusted to the real rules. No one can doubt that judges and lawyers need help from other behavior specialists... The sentencing hearing must be developed to become a meaningful dispositional device in which evidence about behavior changes is received and in which rehabilitation programs for individual offenders are worked out by all participants, and embodied in a well-reasoned written opinion of the court."

hearing as a routine matter.

The steps needed to advocate for the defense position at sentencing, paragraph (a), will vary with the case. Counsel should present any favorable information not already provided, and seek to ensure that the court is aware of previously furnished information.[4] Counsel's advocacy for the client may include not only the presentation of favorable information but opposition to harmful inaccurate or improper information.[5]

Determining how to obtain and proceed with an evidentiary hearing in connection with sentencing, paragraph (b), should have been done in early preparation (Guideline 8.2(c)(9), *supra*). And early inquiry into the contents of the presentence report (Guideline 8.4(a)(3) and (4), *supra*) and any information to be presented by the prosecution (Guideline 8.5(b), *supra*) should give counsel time to request an evidentiary hearing on contested material, paragraph (c).

Presenting evidence at an evidentiary hearing in order to protect the client's sentencing interests, paragraph (d), requires the same preparation and skill as evidentiary hearings held in connection with pretrial motions, etc. (Guideline 5.2(b), *supra*).

In devising a sentencing plan or position (Guideline 8.1(a)(4), *supra*) and presenting that plan to the court, counsel must be aware of limitations on the court's authority, paragraph (e). If the client's interests require a particular order or recommendation from the court, counsel should creatively seek and present arguments that such an order or recommendation is within the court's authority.[6] The assistance of a sentencing specialist may be helpful in determining what the client needs, and what is available.

Personal allocution by the client at sentencing, paragraph (f), should not occur spontaneously. Counsel should have advised the client about allocution, including the potential consequences of making any admissions, well before the date of sentencing (Guideline 8.3(a)(5), *supra*). Similar advice will have been given concerning the client's interview with the preparer of the presentence report (Guideline 8.3(a)(6), *supra*).

Gerhard O.W. Mueller, *Sentencing: Process and Purpose*.

4. *See*, [MI] State Bar Committee on Assigned Counsel Standards, *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, Proposed Standard 44, 72 Michigan Bar Journal (#8 August 1993) pg. 818, 822.

5. Counsel should have tried to block improper information before it reached the court at sentencing, *e.g.*, Guidelines 8.4(a)(4) and 8.5(b), *supra*, but must be prepared to oppose such information if it is presented at sentencing.

6. "Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused." ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.1(b).

Guideline 9.1 Motion for a New Trial

(a) 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.

(b) When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion to correct error 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;

(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 motion to correct error.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-7.9.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Standards, Guideline 8.1.

NLADA, *Death Penalty Standards*, Standard 11.9.1.

Louisiana Public Defender Board Trial Court Performance Standards, § 761.

Commentary

As with all aspects of criminal defense representation, counsel will not be able to act for or advise a client properly without knowledge about the matter at hand. For example, under Trial Rule 50(C), a court may grant a new trial in lieu of judgment on the evidence.[1] To determine whether immediate relief should be sought in the trial court for a client who has been convicted, counsel must first know the procedures for seeking such relief and the potential consequences of filing -- or not filing -- the relevant motion(s), paragraph (a). In criminal cases, a motion to correct error is required " ... when a party seeks to address newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment, which, with reasonable diligence, could not have been discovered and produced at trial." See Criminal Rule 16(A). A motion to correct error pursuant to Trial Rule 59 may be used to correct an erroneous sentence. *See Browning v. State*, 576 N.E.2d 1315 (Ind.Ct.App. 1991). When a motion to correct error is used, it must be filed within thirty days following the date of sentencing. See Criminal

1. Trial Rule 50 (C) provides: "When a judgment on the evidence is sought before or after the jury is discharged, the court may grant a new trial as to part or all of the issues in lieu of a judgment on the evidence when entry of a judgment is impracticable or unfair to any of the parties or otherwise is improper, whether requested or not."

Rule 16(B). The court may not extend the time for taking action on a motion to correct error. See Trial Rule 6(B) See also, Criminal Rule 11(3).

A trial court has wide discretion to correct errors and to grant new trials. *State v. Johnson,* 714 N.E.2d 1209, 1211 (Ind.Ct.App. 1999) (trial court has inherent power to grant new trials *sua sponte* and rule on its own motion to correct errors).

All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief. See Criminal Rule 16(A). If no motion to correct error is filed, the praecipe must be filed within thirty (30) days of the sentencing. No extension of time is available. The record of proceedings must be filed within ninety (90) days from the date the praecipe is filed. See Criminal Rule 19.

Once counsel knows when and how a motion for new trial can be made, and what effects filing such motion may have on the client's appellate rights, counsel should consider whether the motion should be filed, paragraph (b). Counsel is not obligated to file a motion for new trial in every case, but must analyze every case to decide whether such a motion would be proper.[2]

2. "Defense counsel's responsibility includes presenting appropriate post-trial motions to protect the defendant's rights." ABA *Standards,* The Defense Function (3d ed.), Standard 4-7.9.

Guideline 9.2 Right to Appeal

(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's right to appeal, such as ordering transcripts of the trial proceedings.

(b) Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty.

(c) Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Related Standards

ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.2; Criminal Appeals Standard 21-2.2(b).

ABA *Standards*, Providing Defense Services (3d ed.), Standard 5-6.2.

ABA/IJA *Juvenile Justice Standards*, Counsel for Private Parties, Standard 10.1.

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 8.2; Guideline 8.3; Guideline 8.7.

NLADA, *Standards & Evaluation Design for Appellate Defender Offices*, (1980), Standard I.E.

Louisiana Public Defender Board Trial Court Performance Standards, § 763.

Commentary

Trial counsel's job does not end at the moment sentence on a convicted client is announced. Until an appellate or post-conviction lawyer steps into the case, counsel has an obligation to assure that the client is informed of his or her appellate rights in the particular jurisdiction and of the procedures necessary to preserve such rights. Without trial counsel's advice and assistance in this regard, the client may well forfeit appellate rights involuntarily.

Under paragraph (b), a sentence that violates the express terms of a plea agreement is facially erroneous and may be attacked by a motion to correct erroneous sentence. *Reffett v. State*, 571 N.E.2d 1227 (Ind. 1991). See also, IC 35-38-1-15. However, the use of a petition for post-conviction relief is preferred. *Thompson v. State*, 270 Ind. 677, 389 N.E.2d 274 (1979).

Counsel is not relieved of the duty to advise the client merely because the judge has included a recitation of appellate rights in his or her statements at the time of sentence. Defendants listening for words like "prison" or "probation," or contemplating phrases like "10 years" or "life imprisonment" may not hear or comprehend explanations of appellate procedure.

While some clients may be capable of handling initial steps to preserve the right to appeal *in propria persona*, others will not. And even literate, intelligent clients may be handicapped by prison bureaucracy and unable to complete the filing of even a simple form.[1] Trial counsel must plug the cracks through which the client's rights may otherwise fall.

Once trial counsel has begun to represent a client, counsel is not relieved of professional responsibility for that client until replaced by other counsel, or dismissed by the client and, where necessary, excused by the court.[2] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion of all matters undertaken for a client. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter. See, Comment, Rule 1.3, *Indiana Rules of Professional Conduct*. Once appellate counsel has entered the case, trial counsel's primary responsibility ends.[3] However, trial counsel still has the duty to provide requested information, etc. to new counsel during the course of the appeal (or post-conviction proceedings).[4] IC 33-21-1-9 subjects a lawyer to contempt for refusal to deliver papers. Also, *Indiana Rules of Professional Conduct*, Rule 1.16(d) provides in pertinent part: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, . . . surrendering papers and property to which the client is entitled . . . ."

If appellate counsel is pursuing a claim that trial counsel was ineffective, the resulting conflict of interest should not prevent trial counsel from providing information or documents to which the client is entitled.

1. For example, prison procedures may include a period of "quarantine" for newly incarcerated persons, or movement between institutions may be common for the first few weeks (or months) of custody in the corrections department; these situations may prevent the client from obtaining or retaining necessary paperwork for filing a notice of appeal, or may deny the client access to the means of filing the appropriate appellate forms. Similarly, the client's mental/emotional state or conditions within the prison system may hinder any efforts by the client to obtain appellate counsel, whether retained or provided by the state.
2. ABA *Standards*, The Defense Function (3d ed.), Standard 4-8.2, Commentary.
3. This Guideline does not address the question of whether trial counsel should continue as appellate counsel, *see* NSC *Guidelines*, Recommendation 4.3.
4. Appellate lawyers have a duty to contact trial counsel, NLADA, *Standards and Evaluation Design for Appellate Defender Offices*, 1980, Standard I.J., creating a reciprocal duty on the part of trial counsel to provide needed information and, where appropriate, assistance.

Guideline 9.3 Bail Pending Appeal

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

(b) 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.

Related Standards

Mass. Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 8.5.

Commentary

IC 35-33-9-1 and Appellate Rule 39(E) provide for bail pending appeal. A person may not be admitted if he has been convicted of a Class A felony (for a crime committed before July 1, 2014) or a Level 1 or Level 2 felony (for a crime committed after June 30, 2014). If the stay is denied by the trial court, the appellate tribunal may reconsider the application. See, Ind.App.R. 39(C). The procedures and standards to be used by the appellate court in reviewing an application for bail pending appeal are set forth in *Tyson v. State*, 593 N.E.2d 175 (Ind. 1992).

If trial counsel also serves as appellate counsel, counsel will need to consider the availability of bond pending appeal and other appellate matters.[1] But where other counsel will be handling the appeal, trial counsel's responsibilities to the client who chooses to appeal a conviction do not end until successor counsel is retained or appointed, as shown by Guideline 9.2(a), *supra* (requiring counsel to preserve the client's right to appeal). If there is a possibility that the client could be at liberty, the client should be so advised, paragraph (a).

Counsel's responsibility to cooperate with appellate counsel when assistance in obtaining information is needed in seeking appellate bond, paragraph (b), is correlative to counsel's duty to cooperate with appellate counsel concerning the substance of the appeal (Guideline 9.2(c), *supra*).

1. NLADA, *Standards for Appellate Defender Offices* (1980), Standard I.D.2: "The appellate defender shall have a clearly-articulated policy regarding. . . .appellate bond which shall include the filing of appropriate motions seeking release pending appeal when the granting of such motion is reasonably possible."