

HARRIS COUNTY PUBLIC DEFENDER OFFICE PERSONNEL MANUAL



April 2011

I. GENERAL PROVISIONS

1.1 Purpose

It is the purpose of these policies and procedures to establish guides for administrative action, to assure that the employees of the Harris County Public Defender's Office ("HCPD"), will know what is expected of them, and to provide redress for administrative actions perceived to be unfair or arbitrary.

1.2 Mission Statement

A. The primary duty of all HCPD employees is to serve our clients. Service to clients means both showing concern about their plight as citizens accused of crimes, and acting upon that concern to the client's advantage. Service includes case preparation, vigorous advocacy, responding to client requests and calls, and anticipating client needs.

B. Another duty of all HCPD employees is to serve the courts. Service to the courts means showing respect to the judges and their staffs, and promptly responding to court orders and requests. Service includes timely court appearances, filing meritorious pleadings, and anticipating the needs of the judges.

C. Another duty of HCPD employees is to serve each other. Service to each other means helping other employees without being requested, and to do so with a sense of caring for them as human beings. Service includes asking others to assist you when you need help, asking others if they need help, and simply asking others how they are.

D. Another duty of HCPD employees is to serve the bar. This means helping other lawyers whose interests are consistent with helping the indigent, particularly when they are charged with crimes in Harris County, but not when doing so would injure the interests of any HCPD client. Service includes assisting with research and giving advice.

1.3 Organization

The Chief Public Defender ("CPD") is appointed by the Harris County Commissioners Court. All employees of HCPD work under the authority of the CPD. The CPD may delegate responsibilities to HCPD employees, except the authority to hire and terminate employees. The Administrative Officer is responsible for all office administration delegated by the CPD. The Division Chiefs are responsible for all case-related oversight delegated by the CPD.

II. DEVELOPMENT AND IMPLEMENTATION OF POLICIES

2.1 Revisions

Periodic revision of these policies and procedures will be made as conditions change, or as

necessitated by changes in government regulations or laws.

2.2 Memoranda

Office Memoranda from the CPD may serve as amendments or additions to these policies and procedures. The HCPD is covered by the Harris County Personnel Manual (“HCPM”).

III. EMPLOYEE STATUS

3.1 Personnel Regulations

All HCPD employees are covered by the HCPM and any subsequent amendments. Each new employee will sign a form to indicate they have read and understand those regulations.

3.2 Job Descriptions

See XI.

IV. APPLICATION FOR EMPLOYMENT

4.1 Recruitment

Recruitment, advertising, and hiring of employees will be in accordance with the HCPM. Falsification or concealment by an applicant of a material fact are grounds for dismissal without notice.

4.2 Evaluations of Prospective Employees

Applicants for positions will be subject to an evaluation which may consist of:

A. Application and Resume Review: Materials will be examined and evaluated to determine whether the applicant possesses the minimum qualifications for the position available.

B. Interview: An interview will be conducted with selected applicants prior to employment.

C. References: The CPD, or designee, may make inquiries of former employers or other references supplied by the applicant. Qualifications must be documented.

4.3 Offers of Employment

The CPD will establish salaries and effective dates of employment within budgeted guidelines.

V. EMPLOYMENT

5.1 Employment Status

Pursuant to County policy, all employees are maintained “at will.” Dismissal may be with or without notice, depending upon the circumstances.

5.2 Working Hours

A. The office is open between 8:30 a.m. and 5:00 p.m. on weekdays. All full-time staff are expected to work a 40 hour week. This means all employees must be engaged in work related activities during business hours. All staff must leave a voice or electronic message by 8:30 a.m. if they are going to be late or work from another location, if such was not previously listed on the electronic calendar.

B. It is a requirement that the Assistant Public Defenders (“APDs”), Social Workers, and Investigators, keep accurate time records consistent with the computer timekeeping program. In addition to timekeeping, all employees must sign an attendance sheet documenting days of work.

5.3 Flextime

Flextime is defined as time that an employee attends the office at hours different from the normal working day. Any flextime must be approved in advance by the CPD. Use of Flextime is available to all employees in the office on a limited basis, subject to the nature of the position in question, and is subject to the approval of the CPD.

5.4 Maintaining Acceptable Standards of Performance

HCPD’s effective operation demands a high level of skill, motivation, and commitment from its employees. Each employee, attorneys and support staff alike, are expected to maintain a high level of performance. See also HCPM §§2.01-2.04 (Ethics and Confidentiality).

5.5 Nepotism

HCPD will not employ relatives of HCPD employees or persons married to relatives of HCPD employees.

5.6 Code of Conduct

All employees must read and adhere to the Code of Conduct for HCPD Employees. *See* XV.

VI. EMPLOYEE PERFORMANCE REVIEW

6.1 Reviews

The CPD (through the Division Chiefs) is responsible for having written performance reviews conducted: (1) annually (approximately one month before the employee's anniversary date); (2) upon firing of the employee; or (3) when desired by the CPD, or when requested by the employee. Annual reviews will be based upon the job descriptions; goals set by the CPD, the Division Chief, and the employee; and the quality of work that each employee contributes within those definitions.

6.2 Goals

Goals are agreed upon by the CPD and each individual employee. Goals are not rules. Failure to achieve goals will not result in discipline, unless the failure is part of an overall poor performance. Attorneys should follow the performance measures listed in this manual. If an employee has a weakness in an area of performance, a goal should be set for improvement. Employees should also attempt goals that add new responsibility to their jobs. As employees develop a relationship with the HCPD, goals will become more specific and tailored to each individual employee. As issues arise, involving timeliness, demeanor, work quality, new goals will be set.

6.3 Employee Complaints

If an employee feels that a performance review is inaccurate or unfair, or has any other grievance, the employee may request review in accordance with the HCPM §§3.01-3.05. HCPD provides equal employment opportunity to all persons, regardless of their race, sex, national origin, religion, age, or disability.

6.4 Confidential Records

All employee performance reviews and other employment documents are confidential records of HCPD. No information contained in personnel records will be released without the employees' permission.

VII. SEPARATIONS

7.1 Resignation

An employee may resign by submitting a written resignation to the CPD, containing the reason and effective date. At least two weeks notice is required.

7.2 Procedures

Procedures regarding separation are covered in HCPM §§23.01-23.05.

VIII. TIME, VACATION, AND LEAVE

8.1 Holidays

All holidays recognized by the County will be paid holidays for all staff, subject to HCPM §13.04.

8.2 Weather and Closures

If the office closes in advance of, during, or following severe weather, or because of a building closure, employees will be paid if they work from home, otherwise they should use leave.

8.2 Notice

Employees should provide advance notice of their intention to take vacations, and for leave whenever possible. All employees are responsible for accurately reporting their time. *See* HCPM §7.03.

8.3 Leave, Overtime, and Vacations

These are covered by HCPM §§13.01-130355 and 13.05-13066, and 15.01-15.112.

IX. OFFICE PROCEDURES

9.1 Security

All employees are responsible for the security of the office. The last person to leave should make sure the office is secured.

9.2 Travel

Travel policies are covered in the Harris County Accounting Procedures Manual. Travel and costs related to training must be approved in advance by Commissioner's Court. Case-related travel that incurs no costs requires no preapproval. Case-related travel that will require reimbursement to the employee of over \$50.00 must first be approved by the CPD.

9.3 Equipment and Systems

The limitation upon use or misuse of County equipment and systems is detailed in HCPM §§6.01-6.03. Neither Internet access nor electronic mail should be used for any illegal purpose.

9.4 Communication

All employees are responsible for keeping other employees up to date about legal issues,

courthouse information, case information, and other items necessary to aid the operation of HCPD. The appropriate way to communicate is by e-mail, electronic calendar, memorandum, telephone, or office meeting. Never send any letter or message that would discredit any employee, client, or the office generally.

9.5 File Management

The Case Manager is responsible for the management of case files. All will be maintained electronically through the case management system. Any items received as paper, and that are inappropriate for scanning, should be placed in labeled files indicating the client's name and case number. They should be kept in a secure file cabinet when not in use.

9.6 Postage

The postal meter will remain locked with a key code during and after business hours. A postage log will record all transactions.

9.7 Purchasing

The office maintains no petty cash. All purchases must be made by the Administrative Officer.

9.8 Attire

Assistant Public Defenders, who may be required to appear in court, must come to work dressed for court, or have suitable clothes available. All other staff should dress appropriately for an office. The exceptions to this rule are tasks that require casual clothing (i.e. investigation, off-site discovery, etc.).

X. CASE MANAGEMENT

10.1 Receiving Cases

Cases are assigned to this office by the Harris County courts. Anyone receiving a call about a potential appointment to this office should compare the case number and the names of the defendants to our list of cases to determine if an apparent conflict exists. If a conflict exists, the court should be notified immediately so a private attorney can be appointed. If no conflict exists, and the case needs immediate action, any available attorney should take appropriate action. After emergency action is taken, or if it is unnecessary, the case should be referred to the appropriate Division Chief for assignment to an APD. The attorney who receives primary responsibility for the case must make sure the Case Manager has the necessary information to open the case.

10.2 Non-Appointed Cases

This office only accepts representation in cases in which the office is appointed by the Harris County courts. Any attorney who receives such a request can counsel that defendant about the appropriateness of answering questions by a government agent or court officer. This advice may be given regardless of whether this office will ultimately be assigned the case. Attorneys should not otherwise give case-specific advice to persons who solicit information.

10.3 Experts and Services

Whenever a case will require spending resources for outside services, the APD in charge of the case is responsible for submitting those estimated costs to the CPD for preapproval. No costs should be incurred without prior approval.

10.4 Caseload

Caseload per attorney is consistent with those recommended by the National Advisory Commission on Criminal Justice Standards and Goals. The maximum annual caseloads are 150 felonies per attorney, or 200 juvenile cases per attorney, or 25 appeals per attorney. Misdemeanor mental health cases are not to exceed 350 per attorney. Any changes to these caseloads must be made known to the PDO Board.

XI. PERSONNEL

11.1 Chief Public Defender

The CPD is a Harris County Department Head appointed by the Harris County Commissioners Court. The CPD is responsible for hiring and firing employees. Because the CPD is ultimately responsible for all actions of those employees, and all cases assigned to the office, all pleadings and briefs must state the name and title of the CPD, as well as the APD responsible for that case. The CPD reviews and approves the budget and all payment requests.

11.2 Division Chiefs

Division Chiefs are APDs with supervisory authority over APDs in their division.

11.3 Assistant Public Defenders

APDs are the attorneys responsible for representing individual clients appointed to the office. Their duties are more specifically described in §§XIV-XXII.

11.4 Administrative Officer

The Administrative Officer is a management position in this office. Primary duties of that position are to assist the CPD in the administration of the office; including, preparing the

budget, entering data into IFAS accounting program, monitoring internal controls and spending, and creating reports. The Administrative Officer has the authority to enforce all administrative rules in the office. That does not include authority over case-related decisions. When those areas overlap, the matter should be referred to the CPD.

11.5 Investigators and Social Workers

Investigators and Social Workers will assist attorneys in the preparation of their cases. Attorneys should be careful to seek that assistance in a manner that will best serve the entire office. Whenever possible, attorneys should coordinate their requests of an Investigator or Social Worker. Any disputes should be referred to the Division Chief or CPD.

11.6 Computer Systems Administrator

The Computer Systems Administrator (CSA) is responsible for all computer hardware and software in the office. Do not make any changes to equipment or software without first consulting the CSA.

11.7 Case Manager

The Case Manager is primarily responsible for the electronic case management system, including opening and closing cases, coordinating the entry of data, and creating reports.

11.8 Administrative Staff

Primary responsibility for answering the phone is vested in the Receptionist. The phone should be answered "Public Defender's Office." Administrative Assistants should answer the phone when the Receptionist is otherwise occupied. Administrative Assistants will also have duties related to case management, timekeeping, library maintenance, appellate brief preparation, word processing, and other tasks consistent with their job description. All attorneys are responsible for their own word processing. However, it is appropriate to ask for assistance when necessary.

11.9 Interns

Interns are generally law school students working for a salary or academic credit. They are always temporary workers who need guidance to do legal work. Attorneys should assign work to interns that assists the office and is educational for the intern.

XII. COMPENSATION

12.1 Salaries

All salaries are based on pay scales similar to those for other Harris County employees,

particularly the District Attorney's Office. Annual salary increases for are effective on the anniversary of employment. It is the policy of this office to hire excellent personnel and compensate them accordingly.

12.2 Benefits

All permanent employees are eligible for participation in available Harris County benefits. *See* HCPM §§8.01-12.06.

XIII. CLIENT RELATIONS

13.1 Attorney-Client Procedures

A. Clients are those persons appointed to our office by the Harris County courts. We do not open a file on a case unless we have been appointed or the matter is ancillary to a matter to which we were previously appointed. There are situations when we will contact the court and ask to be appointed to a client, but those are rare.

B. Procedures for lawyers are discussed in §§XIV-XXII.

13.2 Procedures for Non-Lawyers

A. Only attorneys may provide legal advice to clients. Regardless how persistent a client is, or a family member of a client is, always refer that person to the lawyer handling the case or a Division Chief. Always treat clients and their families with courtesy. If an employee is mistreated by a client or others, report it to the lawyer handling the case or a Division Chief. Do not attempt to resolve the matter alone.

B. The office accepts collect calls from our clients when the person they are attempting to reach is available to take the call. Clients may ask employees to forward or connect to a third-party through our phone system. This practice is not allowed, and may subject our office to blocks or further restrictions from the correctional facility.

13.3 Relations with the Government

Prosecutors and law enforcement officers are to be treated with courtesy. Differences of opinion, about a particular case or philosophy, should not cause any employee of the office to openly display hostility. Employees need not avoid social relationships with government representatives, except to the extent that it would potentially compromise the effective representation of a client. If any prosecutor or law enforcement officer misrepresents any fact, or breaks any promise without just cause, future communications with that person should be documented in writing.

13.4 Relations with the Public

A. If there are media inquiries about a particular case, they should be referred to the APD handling the case, the Division Chief, or CPD. Responses about a particular case should only be made if they will not harm the client or the case, and if they do not include confidential communications.

B. Media inquiries about any institutional practice of the office should be referred directly to the CPD. Inquiries about law generally may be answered by any attorney in the office, as long as it is answered with the caveat that it is not advice specific to any case.

13.5 Relations with the Court

Judges and their staff should be treated with the highest courtesy. Any request or inquiry from a judge or member of their staff should be addressed immediately. There is no excuse for an attorney to show disrespect to a judge, appear late for court, or appear in court unprepared. An attorney who commits such an act, should be prepared to apologize to the Court without reservation. No attorney should ever refrain from urging an argument or asking a question merely because a judge may think the position taken is inappropriate. However, an attorney should always consider whether the argument or question is meritorious, and whether its proposal may diminish the attorney's credibility.

13.6 Relations with Private Attorneys

The office owes a special duty to other attorneys appointed to represent indigent clients. Whenever possible, assist those lawyers by providing advice or offering reasonable use of our resources. Although our own cases come first, it is appropriate to assist those lawyers whenever we can, as well as other members of the bar. Sometimes the interests of our own clients take precedence over our obligation to other counsel. Be careful to anticipate situations where our obligation to our clients takes precedence over our institutional role, such as when there are conflicts of interest.

13.8 Client Property

It is advisable to avoid receiving client property at all times. When it is unavoidable, arrangements should be made to get the property back to the client or their designated trustee within 30 days.

XIV. General Duties of Attorneys

14.1 Role of a Public Defender¹

¹ The term "public defender" refers to any attorney employed by the Harris County Public Defender's Office, including the Chief Defender. The terms "attorney" and "counsel" are interchangeable with "public defender" in this document.

Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Attorneys also have an obligation to uphold the ethical standards of the State Bar of Texas and to act in accordance with the rules of the court.

14.2 Education, Training and Experience

To provide competent, quality representation, be familiar with the substantive criminal law and the law of criminal procedure and its application, including changes and developments in the law. Where appropriate, consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel. When representing clients with mental illness or mental retardation, become familiar with the symptoms of the client's mental illness and their potential impact on the client's participation in the case, level of culpability, and sentencing options.

14.3 Duties

A. Before agreeing to act as counsel or accepting appointment by a court, make sure that there are available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that the Office is unable to offer quality representation in the case, the Chief Public Defender should move to withdraw.

B. Maintain regular contact with the accused and keep the client informed of the progress of the case, where it is possible to do so. Promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls. If a client has abused the privilege (e.g. unnecessary and abusive calls), document the abuse in a letter to the client and provide specific rules about when to call. Whenever a client is particularly difficult, or potentially violent, bring along another person to visit them.

C. Unless case materials are too voluminous, or release would compromise a client's interests, they should be copied for the client upon request. A client who is illiterate, or who refuses written materials, should receive a careful explanation of those documents. Warn the client not to share documents with others who may later use it as a basis to claim the client confessed to them.

D. Make every reasonable effort to contact a client not later than the end of the first working day after the date appointed, in compliance with Code of Criminal Procedure 26.04(j). In making this contact, provide the client with an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with their attorney. Never promise a result without fully researching the issue and having all the necessary facts. If there are contingencies, make them known to the client.

E. Appear on time for all scheduled court hearings in a client's case.

F. Be alert to all potential and actual conflicts of interest that would impair one's ability to represent a client. Where appropriate, seek an advisory opinion on any potential conflicts.

G. If a conflict develops during the course of representation, notify the client and the court.

H. When the Public Defender's Office's caseload is so large that it is unable to satisfactorily meet these performance guidelines, the Chief Public Defender shall inform the court or courts before whom the cases are pending, and the Public Defender Board.

I. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), the Public Defender's Office shall continue to represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the office is relieved of its duties by the court or replaced by other counsel after a finding of good cause is entered on the record. The office may also appear in any ancillary matters that are necessary to a successful resolution of the client's criminal case.

14.4 General Obligations Regarding Pretrial Release

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

XV. Initial Procedures

15.1 Initial Interview

A. Arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within two business days after notice of assignment to the client's case. If necessary, arrange for a designee to conduct the initial interview. If the initial interview is completed by a designee, interview the client personally at the earliest reasonable opportunity. Any notes should go into the internal case management file and should not be disclosed to third parties absent a court order.

B. Preparation:

After being assigned to a case and prior to conducting the initial interview, where possible, do the following:

1. Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known; and
2. Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by pretrial services agencies concerning pretrial release, and law enforcement reports that might be

available.

3. When representing client with mental illness, it is also important to review the “special needs sheets” for the courts, as well as, obtain reports from Harris County Mental Health and Mental Retardation Authority’s (MHMRA) staff on the client’s mental health status at the time of booking into the jail, as well as current status.

In addition, when the client is incarcerated:

4. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

5. Be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the district and county, and whether Pretrial Services is available to act as a custodian for the client’s release;

6. Be familiar with any procedures available for reviewing the trial judge's setting of bail; and

7. Be familiar with Code of Criminal Procedure 17.032, which sets forth the procedure by which certain mentally ill defendants may be released on personal bond.

C. The Interview

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release if the client is incarcerated, and also to provide the client with information concerning the case. Ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds, can be overcome. If appropriate, file a motion to have a foreign language or sign language interpreter retained by the office, or appointed by the court, and present at the initial interview.

2. In addition, obtain from the client all release forms necessary to obtain client’s medical, psychological, educational, military, prison and other records as may be pertinent.

3. Videoconferencing is sometimes available for meeting with clients from a remote location, rather than traveling to the jail. Videoconferencing is not recommended for an initial interview. Videoconferencing is never recommended for contact with mentally ill clients. Only use videoconferencing to relay basic information like dates of court or future meetings, not to discuss disposition of a case.

4. While obtaining the specified information in the initial interview is important to

preparation of the defense of a client's case, when working with a mentally ill client, to be aware of symptoms of the client's illness that may make it difficult to obtain some of the information. Make a few visits to the client or obtain it from multiple sources, depending on the client's state of mind and ability to provide counsel with information.

5. 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, citizenship and immigration status, employment record and history;
- b. The client's physical and mental health, educational, employment, social security/disability, and armed services records;
- c. The client's immediate medical 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; also determine whether the client has any pending charges and also whether he or she is on probation or parole and 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 to contact to verify the information provided by the client (obtain the permission of the client before contacting these individuals);
- g. Any necessary information waivers or releases that will assist the client's defense, including preparation for sentencing; the written releases obtained should include a Health Insurance Portability and Accountability Act (HIPAA) compliant release in case medical records are required; and
- h. Any other information that will assist the client's defense, including preparation for sentencing.

6. 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 types 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 any statements concerning the offense;

c. An explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

d. The charges and the potential penalties;

e. A general procedural overview of the progression of the case, where possible;

f. Realistic answers, where possible, to the client's most urgent questions;

g. What arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers;

h. How and when counsel can be reached; and

i. When counsel intends to see the client next.

D. Supplemental Information

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

1. The facts surrounding the charges against the client;

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; and

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

15.2 Initial Appearance before the Magistrate and Pretrial Release Proceedings

A. Preserve the client's rights at the initial appearance on the charges before the magistrate by seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the

court dismiss the charge or charges.

B. Request a timely examining trial when the client is entitled to one unless there is a sound tactical reason not to do so.

C. Be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

D. Adequately inform the defendant of his/her conditions of release after such conditions have been set.

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

F. 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, make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, advise the client and others acting in his or her behalf how to properly post such assets.

G. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation with the client. In the event that it would be in the best interest of the client to testify regarding bond, instruct the client not to answer any questions that do not pertain strictly to the issue of bond.

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

15.3 Examining Trial

A. Prior to conducting an examining trial, make reasonable efforts to secure information in the prosecution's or law enforcement authorities' possession. Where necessary, pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.

B. Where the client is entitled to an examining trial, take steps to see that the examining trial is conducted timely unless there are strategic reasons for not doing so.

C. In preparing for the examining trial, become familiar with:

1. The elements of each of the offenses alleged;

2. The law of the jurisdiction for establishing probable cause;
3. Factual information that is available concerning probable cause;
4. The subpoena process for obtaining compulsory attendance of witnesses at an examining trial and the necessary steps to be taken in order to obtain a proper recording of the proceedings;
5. The potential impact on the admissibility of any witness's testimony if he or she is later unavailable at trial;
6. The tactics of calling the defendant as the witness; and
7. The tactics of proceeding without discovery materials.

D. Meet with the client prior to the examining trial. Evaluate and advise the client regarding the consequences of waiving an examining trial and the tactics of full or partial cross-examination.

15.4 Grand Jury

A. Where a client is the subject of a grand jury investigation, consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying, or by providing exculpatory or mitigating evidence in written form.

B. Upon return of an indictment, determine if proper notice of the proceedings was provided and obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

15.5 Competency to Stand Trial

A. The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea. Counsel is often in the best position to discern whether the client may not be competent to stand trial.

B. Be familiar with Code of Criminal Procedure Article 46B, which governs proceedings surrounding incompetence to stand trial.

C. During the initial interview with the client, note signs that a mentally ill or mentally retarded client may not be competent to stand trial. Signs include, but are not limited to: inability to communicate with counsel; delusions; psychosis; intellectual inability to comprehend the proceedings; and inability to remember or articulate the circumstances of arrest.

D. Request mental health records from MHMRA, the client's mental health provider and history of psychiatric treatment in the jail, if any.

E. If a client may be incompetent to stand trial, retain an expert or file a motion to have the client examined for competency. The motion to have a client examined for competency may be supported by affidavits setting out the facts on which the suggestion of incompetence is made.

F. If a client may be incompetent to stand trial, and it appears that transporting the client to and from court for routine proceedings where the client's presence is not needed may cause disruption or undue stress for the client, consider requesting that the client not be transported to court unless or until his presence is necessary.

G. If the court finds that there is some evidence that would support a finding of incompetence, the judge is required to stay all other proceedings in the case and order a competency evaluation. Facilitate setting up the competency evaluation as soon as possible. The sooner the evaluation is completed, the sooner the client can receive the mental health treatment that the client may need.

H. Investigate competency restoration treatment options including outpatient or local competency restoration.

I. If client is in custody, communicate with the Sheriff's office regarding when client will be transported to the hospital or treatment program.

J. To the extent it is possible to communicate with client, keep the client informed of when he will be going to the hospital.

K. Provide contact information to the hospital and stay in touch with them regarding the client's status.

L. When the client is returned from the hospital after competency restoration treatment, ensure that the client's case is placed back on the docket as quickly as possible to prevent the client's condition from worsening upon return to the jail, but before the case can be resolved.

M. Be familiar with all statutory options and mandates concerning return of a client to court either restored to competency, or unrestored.

15.6 Prosecution Requests for Non-Testimonial Evidence

Be familiar with and understand 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.

XVI. Case Preparation

16.1 Investigation

A. Conduct an independent case review and investigation as promptly as possible. Regardless of the client's wish to admit guilt, ensure that the charges and disposition are factually and legally correct and the client is aware of potential defenses to the charges. Explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction.

B. Sources of review and investigative information may include the following:

1. Arrest warrant, accusation, complaint, information and/or indictment documents, along with any supporting documents used to establish probable cause, should be obtained. The relevant statutes and precedents should be examined to identify:
 - a. The elements of the offense(s) with which the client is charged;
 - b. The defenses that may be available, as well as the proper manner and time limits for asserting any available defenses;
 - c. Any lesser included offenses that may be available; and
 - d. Any defects in the charging documents, constitutional or statutory.
2. An in-depth interview of the client.
3. Interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the client. Do so in the presence of an investigator or other third person.
4. Utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities.
5. If possible, a public defender should request and review any tapes or transcripts from previous hearings in the case. A public defender also should review the client's prior court file(s).
6. Where appropriate, seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

7. Where appropriate, make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing and counsel should examine any such physical evidence.

8. When possible, attempt to view the scene of the alleged offense as soon as possible under circumstances as similar as possible to those existing at the time of the alleged incident. Consider taking photographs and creating diagrams or charts of the scene of the offense.

9. Consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. A public defender should secure the assistance of experts where it is necessary or appropriate to:

- a. The preparation of the defense;
- b. An adequate understanding of the prosecution's case;
- c. Rebut the prosecution's case; and
- d. Investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

C. During case preparation and throughout trial, identify potential legal issues and the corresponding objections. Consider the tactics of when and how to raise those objections. Consider how best to respond to objections that could be raised by the prosecution.

16.2 Formal and Informal Discovery

A. Pursue as soon as practicable discovery procedures provided by the rules and to pursue such informal discovery methods as may be available.

B. Consider seeking discovery of the following items:

- 1. All information to which the defendant is entitled under Art. 39.14 of the Texas Code of Criminal Procedure;
- 2. Potential exculpatory information;
- 3. Potential mitigating information;
- 4. The names and addresses of all prosecution witnesses, their prior statements, and criminal records, if any;

5. Any other information that may be used to impeach the testimony of prosecution witnesses;
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. Statements made by co-defendants;
9. Statements made by other potential witnesses;
10. All official reports by all law enforcement and other agencies involved in the case, including the results of any scientific tests;
11. All records of evidence collected and retained by law enforcement;
12. All video/audio recordings or photographs relevant to the case, as well as all recordings of transmissions by law enforcement officers;
13. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;
14. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof; and
15. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.

C. Seek prompt compliance and/or sanctions for failure to comply.

D. Timely comply with all of the requirements governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Be aware of the possible sanctions for failure to comply with those requirements.

16.3 Theory of the Case

During investigation and trial preparation, develop and continually reassess a theory of the case and develop strategies for advancing the appropriate defenses, including those related to mental health, on behalf of the client.

16.4 Arraignment

Preserve the client's rights at arraignment by entering a plea of not guilty in all but the most extraordinary circumstances.

XVII. Motion Practice

17.1 The Decision to File Pretrial Motions

A. Consider filing an appropriate motion whenever a good-faith reason exists to believe that the defendant is entitled to relief and that the court has discretion to grant.

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

1. A motion to review confinement or conditions of release;
2. The competency of the client;
3. The constitutionality of the implicated statute or statutes;
4. Potential defects in the charging process;
5. The sufficiency of the charging document;
6. Severance of charges or defendants;
7. The discovery obligations of the prosecution;
8. The suppression of evidence gathered as the result of violations of the Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution, or the Texas Constitution, including;
 - a. The fruits of illegal searches or seizures;
 - b. Involuntary statements or confessions;
 - c. Statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination; and
 - d. Unreliable identification evidence;
9. The suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

10. Change of venue;
11. Access to resources or experts that may be denied to an accused because of his or her indigence;
12. The defendant's right to a speedy trial;
13. The defendant's right to a continuance in order to adequately prepare his or her case;
14. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion; and
15. Matters of trial or courtroom procedure.

C. Withdraw a motion, or decide not to file a motion, only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. 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 that could enhance the likelihood that relief ought to be granted; and
3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions.

D. Request a full evidentiary hearing on any pre-trial motion to the extent necessary to preserve the issue adequately for appellate review.

E. Consider the advisability of disqualifying or substituting the presiding judge. The decision to disqualify a judge shall only be made when it is a reasoned strategy decision and in the best interest of the client. The final decision rests with counsel.

F. Requests or agreements to continue a trial date shall not be made without consultation with the client.

G. Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

17.2 Filing and Arguing Pretrial Motions

A. Motions should be filed in a timely manner in accordance with statute and local rule, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, 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, 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;
3. Full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and potential consequences and costs of having the client testify;
4. The assistance of an expert witness where appropriate and necessary;
5. Familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial; and
6. Preparation and submission of a memorandum of law when appropriate.

C. In every case, examine whether it is appropriate to file a motion to suppress evidence or statements.

D. In every case that proceeds to trial, file timely and appropriate motions in limine to exclude any improper evidence or prosecutorial practices.

E. Obtain a clear ruling on any pretrial motion on the record or in writing.

17.3 Subsequent Filing of Pretrial Motions

A. Raise any issue that was not raised pretrial, if the facts supporting the motion were not reasonably available at that time. Further, be prepared, when appropriate, to renew a pretrial motion if new supporting information is disclosed in later proceedings.

B. Where appropriate, file an interlocutory appeal from the denial of a pretrial motion.

C. Consider reserving the right to appeal denial of a pretrial motion when negotiating the entry of a guilty plea.

XVIII. Plea Negotiations

18.1 The Plea Negotiation Process

- A. Under no circumstances 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.
- B. After appropriate investigation and case review, 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 fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
- C. Obtain the consent of the client before entering into any plea negotiation.
- D. Keep the client fully informed of any continued plea discussions and negotiations and promptly convey to the client any offers made by the prosecution for a negotiated settlement. Do not accept any plea agreement without the client's express authorization.
- E. Explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if a client's decisions are not in his or her best interest, attempt to persuade the client to change his or her position.
- F. The existence of ongoing tentative plea negotiations with the prosecution should not prevent taking steps necessary to preserve a defense.
- G. Do not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

18.2 The Contents of the Negotiations

- A. In conducting plea negotiations, attempt to become familiar with any practices and policies which may impact the content and likely results of negotiated plea bargains.
- B. In order to develop an overall negotiation plan, be fully aware of, and make sure the client is fully aware of:
 - 1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;
 - 2. If a plea involving supervision is under consideration, the conditions of supervision

with which the client must comply in order to avoid revocation or adjudication;

3. If a plea involving deferred adjudication is under consideration, special considerations regarding such a plea, including sentencing alternatives in the event a motion to adjudicate is granted, and the unavailability of a pardon;

4. If a plea of no contest is under consideration, differences between a no contest plea and a guilty plea including the potential collateral uses of such a plea in subsequent judicial proceedings;

5. Other consequences of conviction including, but not limited to, deportation and other possible immigration consequences; forfeiture of and/or future ineligibility for professional licensure; ineligibility for various government programs including student loans, public housing, food stamps, and social security/disability; prohibition from carrying a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of the right to vote; loss of the right to hold public office; and potential federal prosecutions;

6. Any registration requirements including sex offender registration and job-specific notification requirements;

7. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

8. The availability of appropriate diversion and rehabilitation programs;

9. Any possible and likely sentence enhancements or parole consequences;

10. The possible and likely place and manner of confinement;

11. The effects of good-time or earned-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds; and

12. The effect on appellate rights.

C. In developing a negotiation strategy, 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;
 - e. Admitting identity and waiving challenges to proof or validity of prior conviction record;
 - f. Foregoing appellate remedies; and
 - g. Asset forfeiture.
2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
- a. That the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - b. That the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
 - c. To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
 - d. That the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - e. 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;
 - f. 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;
 - g. 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; and
 - h. 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.

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

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

E. In conducting plea negotiations, be familiar with:

1. The various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a plea involving deferred adjudication, or a plea of not guilty by reason of insanity;
2. The advantages and disadvantages of each available plea according to the circumstances of the case, including whether or not the client is mentally, physically, and financially capable of fulfilling requirements of the plea negotiated;
3. Whether the plea agreement is binding on the court and prison and parole authorities;
4. Possibilities of pre-trial diversion; and
5. Any recent changes in the applicable statutes or court rules and the effective dates of these changes.
6. In conducting plea negotiations, attempt to become familiar with the practices and policies of the particular judge and prosecuting authority.

18.3 The Decision to Enter a Plea of Guilty

A. Make it clear to the client that the client must make the ultimate decision whether to plead

guilty. Investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses (if known), relevant concessions and benefits subject to negotiation, and possible consequences of a conviction after trial. Do not base a recommendation of a plea of guilty solely on the client's acknowledgment of guilt or solely on a favorable disposition offer.

B. Inform the client of any tentative negotiated agreement reached with the prosecution, and explain the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement. Never allow a prosecutor, law enforcement officer, or other representative of the government, to discuss any contested issue in client's case in their presence.

C. The decision to enter a plea of guilty rests solely with the client, and do not attempt to unduly influence that decision. Where a rejection of a plea offer is in the best interest of the client, advise the client of the benefits and risks of that course of action. Similarly, where a plea offer is in the best interest of the client, advise the client of the benefits and consequences of that course of action.

D. A negotiated plea should be committed to writing whenever possible.

E. Whenever possible, obtain a written plea offer from the prosecution. If the prosecutor does not provide a written plea offer, document in writing all the terms of the plea agreement offered to and accepted by the client.

F. Where the client verbally rejects a fully explained and detailed plea offer, if appropriate, ask the client to sign a written rejection of plea offer statement.

18.4 Entry of the Plea before the Court

A. Prior to the entry of the plea:

1. Make certain that the client understands the rights he or she will waive by entering the plea and that the decision to waive those rights is knowing, voluntary and intelligent;
2. Make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions and collateral consequences the client will be exposed to by entering a plea, including whether the plea agreement is binding on the court and whether the court, having accepted the guilty plea, can impose a sentence greater than that agreed upon;
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; and

4. Make certain that if the plea is a non-negotiated plea, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.

B. Become familiar with the consequences of a plea or a finding of guilty in state court upon any current or future federal prosecution.

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

D. After entry of the plea, be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, 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, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing. Subsequent to the acceptance of the plea, make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

XIX. Trial

19.1 General Trial Preparation

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

B. The decision to seek to proceed with or without a jury during both the guilt and punishment phases of the trial rests solely with the client after consultation with counsel. Discuss the relevant strategic considerations of this decision with the client, including the availability of different sentencing options depending on whether sentence is assessed by a judge or jury and the need to obtain the prosecution's consent to proceed without a jury on guilt. Maintain a record of the advice provided to the client, as well as the client's decision concerning trial. Advise the court of the client's decision in a timely manner.

C. Complete investigation, discovery, and research in advance of trial, such that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

1. Subpoenaing and interviewing all potentially helpful witnesses;
2. Subpoenaing all potentially helpful physical or documentary evidence;
3. Obtaining funds and arranging for defense experts to consult and/or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence,

opinion testimony, etc.);

4. Obtaining and reading transcripts of prior proceedings in the case or related proceedings;

5. Obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information which may assist the fact finder in understanding the defense; and

6. Obtaining and reviewing the court file of any co-defendant(s) and contacting co-defendant(s)' counsel to obtain information about the co-defendant(s)' case.

D. Where appropriate, a public defender 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. Reports, test results, and other materials subject to disclosure;

4. Return of copies of defense subpoenas;

5. Voir dire topics, plans, or questions;

6. Outline of opening statement;

7. Cross-examination plans for all possible prosecution witnesses;

8. Direct examination plans for all prospective defense witnesses;

9. Copies of defense subpoenas;

10. Prior statements of all prosecution witnesses;

11. Prior statements of all defense witnesses;

12. Reports from defense experts;

13. A list of all defense exhibits, and the witnesses through whom they will be introduced;

14. Originals and copies of all documentary exhibits;

15. Proposed jury instructions with supporting case citations;

16. Copies of all relevant statutes and cases; and

17. Outline of closing argument.

E. Where a party will seek to introduce an audio or video tape or a DVD of a police interview or any other event, consider whether a transcript of the recording should be prepared, and how the relevant portions of the recording will be reflected in the appellate record.

F. Be familiar with the rules of evidence, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise in the trial.

G. Decide if it is beneficial to secure an advance ruling on issues likely to arise at trial and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

H. Throughout the trial process, establish a proper record for appellate review. Be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should ensure that a sufficient record is made. Request that all trial proceedings be recorded.

I. Advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. Ensure that the client is not seen by the jury in any form of physical restraint.

J. Plan with the client the most convenient system for conferring throughout the trial. Where necessary, seek a court order to have the client available for conferences.

K. If, during the trial, it appears that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.

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

19.2 Jury Selection

A. Preparation

1. Be familiar with the procedures by which both petit and grand jury venires are selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venires.

2. 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, seek to obtain a prospective juror list and the standard jury questionnaire where feasible, and seek access to and retain the juror questionnaires that have been completed by potential jurors. Consider requesting use of a separate questionnaire that is tailored to the client's case. Determine the court's method for tracking juror seating and selection.
4. Where appropriate, develop and file written voir dire questions in advance of trial. Tailor voir dire questions to the specific case. Among the purposes for voir dire questions are the following:
 - a. To elicit information about the attitudes of individual jurors, which will inform counsel and defendant about peremptory strikes and challenges for cause;
 - b. To determine jurors' attitudes toward legal principles that are critical to the defense, including, where appropriate, the client's decision not to testify;
 - 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; and
 - e. To establish a relationship with the jury, when the voir dire is conducted by an attorney.
5. 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. Be familiar with the law concerning challenges for cause and peremptory strikes. Be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
7. Where appropriate, consider whether to seek expert assistance in the jury selection process.
8. Consider seeking assistance from others in the office to record venire panel responses and to observe venire panel reactions. Communicate with the client regarding the client's venire panel preferences.

B. Examining the Prospective Jurors

1. Be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, and insanity defenses.
2. Consider seeking permission to personally voir dire the panel. If the court conducts voir dire, consider submitting proposed questions to be incorporated into the court's voir dire.
3. Take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.
4. If the voir dire questions may elicit sensitive answers, consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the voir dire as to those sensitive questions.
5. In a group voir dire, avoid asking questions that may elicit responses which are likely to prejudice other prospective jurors.
6. Be familiar with case law regarding the client's right to be present during individual voir dire. Fully discuss the risks and benefits of asserting this right with the client.

C. Challenges

1. 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, consider exercising peremptory challenges to eliminate such jurors.
3. In exercising challenges for cause or peremptory strikes, consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Make every effort to consult with the client in exercising challenges.
5. Be alert to prosecutorial misuse of peremptory challenges and seek appropriate remedial measures.
6. Object to and preserve all issues relating to the unconstitutional exclusion of jurors

by the prosecution.

19.3 Opening Statement

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

B. Be familiar with the law, the practice of Harris County, and the individual trial judge's rules, regarding the permissible content of an opening statement.

C. Consider the strategic advantages and disadvantages of disclosure of particular information during opening statement. In rare cases, consider deferring the opening statement until the beginning of the defense case. Opening statement should introduce the case theory and theme using storytelling techniques. Opening statement also may incorporate these objectives:

1. To provide an overview of the defense case;
2. To identify the weaknesses of the prosecution's case;
3. To identify and 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 establish counsel's credibility with the jury;
8. To prepare the jury for the client's testimony or failure to testify; and
9. To state the ultimate inferences which counsel wishes the jury to draw.

D. Consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his or her opening statement.

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

1. The significance of the prosecutor's error;

2. The possibility that an objection might enhance the significance of the information in the jury's mind; and
3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

19.4 Confronting the Prosecution's Case

- A. Research and be fully familiar with all of the elements of each charged offense and attempt to anticipate weaknesses in the prosecution's case.
- B. Attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.
- C. Consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- D. In preparing for cross-examination, be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, be prepared to question witnesses as to the existence of prior statements that they may have made or adopted, and consider doing so outside the presence of the jury.
- E. In preparing for cross-examination:
 1. Consider the need to integrate cross-examination, the theory of the defense, and closing argument;
 2. Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking unnecessary questions or questions which may hurt the defense case;
 3. File a motion requesting the names and addresses of witnesses the prosecutor might call in its case-in-chief or in rebuttal;
 4. Consider a cross-examination plan for each of the anticipated witnesses;
 5. Be alert to inconsistencies or variations in a witness's testimony;
 6. Be alert to possible variations between different witnesses' testimony;
 7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

8. Where appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;
9. Where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
10. Have prepared a transcript of all audio or video tape-recorded statements made by witnesses;
11. Be alert to issues relating to witness credibility, including bias and motive for testifying; and
12. Have prepared, all documents intended for use during cross-examination, including certified copies of records such as prior convictions of witnesses and prior sworn testimony of witnesses.

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

G. Prior to trial, ascertain whether the prosecutor has provided copies of all prior statements of the witnesses it intends to call at trial. If disclosure is not timely made, prepare and argue motions for:

1. Adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;
2. Exclusion of the witness's testimony and all evidence affected by that testimony;
3. A mistrial; and
4. Dismissal of the case.

H. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, move for an instructed verdict of acquittal on each count charged. 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.

19.5 Presenting the Defense Case

A. Develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, 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. Discuss with the client all of the considerations relevant to the client's decision to testify. Be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

C. The decision to testify rests solely with the client, and do not attempt to unduly influence that decision. Where testifying is in the best interest of the client, advise the client of the benefits and risks of that course of action.

D. Be aware of the elements and tactical considerations 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.

E. In preparing for presentation of a defense case, where appropriate, do the following:

1. Consider all potential evidence which could corroborate the defense case, and the import of any evidence that 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 use of physical or demonstrative evidence and the witnesses necessary to admit it;
7. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
8. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
9. Review all documentary evidence that must be presented;
10. Review all tangible evidence that must be presented; and

11. Be fully familiar with statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

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

G. Prepare all witnesses for direct and possible cross-examination. Advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. Where appropriate, advise witnesses of suitable courtroom dress and demeanor.

H. Systematically analyze all potential defense evidence for evidentiary problems. Research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

I. Conduct redirect examination as appropriate.

J. If an objection is sustained, make appropriate efforts to re-phrase the question or make an offer of proof.

K. Guard against improper cross-examination by the prosecutor.

L. At the close of the defense case, renew the motion for an instructed verdict of acquittal on each charged count.

M. Keep a record of all exhibits identified or admitted.

19.6 Closing Argument

A. Before argument, obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the court's rulings.

B. Be familiar with the substantive limits on both prosecution and defense summation.

C. 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.

D. In developing closing argument, review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, consider:

1. Highlighting weaknesses in the prosecution's case;
2. Describing favorable inferences to be drawn from the evidence;

3. Incorporating into the argument:

- a. The theory and the theme of the case;
- b. Helpful testimony from direct and cross-examination;
- c. Verbatim instructions drawn from the jury charge;
- d. Responses to anticipated prosecution arguments; and
- e. Visual aids and exhibits; and

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

E. Consider incorporating in argument summation the promises of proof the prosecutor made to the jury during his or her opening.

F. Whenever the prosecutor exceeds the scope of permissible argument, 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. Whether the case will result in a favorable verdict for the client;
- 2. The need to preserve the objection for appellate review; and
- 3. The possibility that an objection might enhance the significance of the information in the jury's mind.

19.7 Jury Instructions

A. File proposed or requested jury instructions before closing argument.

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

C. Submit proposed jury instructions in writing.

D. Where appropriate, submit modifications to 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, provide case law in support of the proposed instructions.

E. Object to and argue against improper instructions proposed by the prosecution.

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

G. During delivery of the charge, 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.

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

I. Reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.

J. Ensure that any jury notes or responses to jury notes regarding substantive matters are discussed in open court and on the record, and that the actual notes and responses are made part of the record for appellate purposes.

XX. Sentencing

20.1 Obligations at Sentencing

A. 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;

B. To ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

C. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;

D. To develop a plan that 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;

E. To ensure all information presented to the court that may harm the client and that is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;

F. To consider the need for and availability of sentencing experts, and to seek the assistance

of such experts whenever possible and warranted; and

G. To identify and preserve legal and constitutional issues for appeal.

20.2 Sentencing Options, Consequences and Procedures

A. Be familiar with the sentencing provisions and options applicable to the case, including:

1. Habitual offender statutes, sentencing enhancements, mandatory sentence requirements, and all other applicable sentencing statutes or case law;
2. Mandatory minimum and statutory maximum sentences;
3. Deferred adjudication, judgment without a finding, and diversionary programs;
4. Expungement and sealing of records;
5. Probation or suspension of sentence and permissible conditions of probation;
6. The potential for recidivist sentencing;
7. Restitution;
8. Mandatory registration programs: sex offender, DNA, etc.;
9. Fines;
10. Court costs;
11. Confinement in mental institution and the effects of a “not guilty by reason of insanity” (NGRI) plea; and
12. Civil forfeiture implications of a guilty plea.

B. Be familiar with direct and collateral consequences of the sentence and judgment, including:

1. Credit for pre-trial detention;
2. Parole eligibility and applicable parole release ranges if applicable;
3. Effect of good-time credits and mandatory release on the client's release date and how those 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 programs and furloughs;
7. Available drug rehabilitation programs, psychiatric treatment, health care and other treatment programs;
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. Possible revocation of probation or parole;
13. Whether the sentence will run concurrently or consecutively to any past, current, or future, sentence;
14. Suspension of a motor vehicle operator's permit;
15. Prohibition from carrying a firearm;
16. Other consequences of conviction, including but not limited to, forfeiture of and future ineligibility for professional licensure; ineligibility for various government programs including student loans, public housing, food stamps, and social security/disability; suspension of a motor vehicle operator's license; civil monetary penalties; loss of the right to vote; and loss of the right to hold public office; and
17. Potential federal consequences.

C. Be familiar with the sentencing procedures, including:

1. The effect that plea negotiations may have upon the sentencing discretion of the court;
2. The procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;
3. The practices of those who prepare the presentence report, and the defendant's rights in that process;

4. Access to the presentence report by counsel and the defendant;
5. The defense sentencing presentation and sentencing memorandum;
6. The opportunity to challenge information presented to the court for sentencing purposes;
7. The availability of an evidentiary hearing to challenge information, and the applicable rules and burdens of proof at such a hearing; and
8. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

20.3 Preparation for Sentencing

- A. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
- B. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
- C. Obtain from the client and other sources 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;
- D. Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences upon an appeal, subsequent retrial, or trial on other offenses;
- E. 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;
- F. Prepare the client to be interviewed by the official preparing the presentence report and ensure the client has adequate time to examine the pre-sentence report, if one is utilized by the court;
- G. Inform the client of the sentence or range of sentences the court will consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, inform the client of his or her right to speak personally for a particular sentence or sentences; and
- H. Collect documents and affidavits to support the defense position and, where relevant,

prepare witnesses to testify at the sentencing hearing; where necessary, request the opportunity to present tangible and testimonial evidence and use subpoenas to ensure the availability of relevant documents and witnesses.

20.4 The Official Presentence Report

- A. Be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition:
- B. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;
- C. Provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense, and supporting evidence;
- D. Attend any interview of the client;
- E. Review the completed report;
- F. Take appropriate steps to ensure that erroneous or misleading information is deleted from the report;
- G. Take appropriate steps to preserve and protect the client's interests if:
 - 1. The court refuses to hold a hearing on a disputed allegation adverse to the defendant;
 - 2. The prosecution fails to prove an allegation; or
 - 3. The court finds an allegation not proved.
- H. 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.

20.5 The Prosecution's Sentencing Position

- A. Attempt to determine 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, request to see the memorandum and verify that the information presented is accurate. If the memorandum contains erroneous or misleading information, take appropriate steps to correct the information.

C. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

20.6 The Defense Sentencing Memorandum

Prepare and present a defense sentencing memorandum when there is a strategic reason for doing so. Among the topics to include in the memorandum are:

A. Challenges to incorrect or incomplete information in the official presentence report or any prosecution sentencing memorandum;

B. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report or any prosecution sentencing memorandum;

C. Information contrary to that before the court which is supported by affidavits, letters, and public records;

D. Information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record, education, and family and financial status;

E. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

F. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and

G. Presentation of a sentencing proposal.

20.7 The Sentencing Process

A. 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. 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, consider requesting an evidentiary hearing. Where a sentencing hearing will be held, be prepared to present evidence, including testimony of witnesses.

D. Where information favorable to the defendant will be disputed or challenged, 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, 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 or exclusion of the defendant.

F. Where appropriate, prepare the client to personally address the court.

20.8 Self-Surrender

Where a custodial sentence has been imposed, consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

XXI. Post-Trial

21.1 Expungement or Sealing of Record

After sentencing, inform the client of any procedures available for requesting that the record of conviction be expunged or sealed and, if such procedures may be available in the client's case, when and under what conditions the client may pursue expunction or sealing of the record.

21.2 Duties in Post-Trial Proceedings

A. A defendant's right to counsel does not terminate upon conviction, imposition of sentence, or order of deferred adjudication.

B. Regardless of whether appointed or retained, and irrespective of the terms of any contract or legal services agreement, representation of the client must continue until counsel has been formally granted permission to withdraw. Continue to represent the defendant until appeals are exhausted, including in motion for new trial proceedings.

C. If the defendant wishes to pursue post-trial remedies, do the following prior to seeking to withdraw as counsel for post-trial proceedings:

1. Attempt to arrange for the defendant's post-trial representation in advance of the verdict in order to ensure the defendant's continuous access to counsel;
2. Notify the trial court in advance if the defendant will submit an affidavit of indigency and may require immediate appointment of post-trial counsel on the day of sentencing or entry of an order of deferred adjudication community supervision; and

3. If arrangements have not been made for new counsel by the day of sentencing or entry of an order for deferred adjudication, assist the defendant in filing a written notice of appeal and in requesting prompt appointment of post-trial counsel and providing any financial or other information necessary to establish the defendant's right to appointed counsel.

21.3 Education, Training and Experience in Post-Trial Proceedings

In order to provide competent and quality representation in post-trial proceedings, be familiar with the Texas Rules of Appellate Procedure, article 11.07 of the Texas Code of Criminal Procedure and any local rules of the courts of appeal or the Texas Court of Criminal Appeals. Attend at least fifteen (15) hours of continuing legal education every year in criminal law, criminal appellate law, or another area of law that is relevant to Texas criminal appellate practice. Make every effort to become familiar with recent opinions in criminal cases that are issued by the Texas Court of Criminal Appeals, the courts of appeal, and the federal appellate courts, including the United States Supreme Court.

21.4 Motion for a New Trial

A. Be familiar with the procedures applicable to a motion requesting a new trial including:

1. The time period for filing such a motion;
2. The effect it has upon the time to file a notice of appeal;
3. The grounds that can be raised;
4. The evidentiary rules applicable to hearings on motions for new trial, including the requirement that factual allegations in the motion, or affidavits in support of such factual allegations, must be sworn to;
5. The requirement that a motion for new trial be timely "presented" to the trial court in conformance with Rule of Appellate Procedure 21.6 in order to obtain a specific hearing date and preserve for appeal a claim that a request for a hearing was erroneously denied;
6. The time period for receiving a ruling on a motion for new trial, after which the motion is overruled by operation of law; and
7. The requirement that a trial court make written findings if a motion for new trial is granted.

B. When a judgment of guilty has been entered against the defendant after trial, consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding

whether to file such a motion, consider:

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 new trial motion;
3. The effect the filing of a motion for new trial will have on the time period for perfecting an appeal; and
4. Whether, after explaining to the defendant his rights to submit a motion for new trial, the defendant desires that such a motion be filed.

C. The decision to file a motion for new trial should be made after considering the applicable law in light of the circumstances of each case. Among the issues to consider addressing in a motion for new trial are:

1. Denial of defendant's right to counsel or right to be present during trial;
2. Fundamentally defective jury charge;
3. Jury misconduct;
4. Intentional suppression of witness testimony or other evidence tending to show the defendant's innocence, preventing its production at trial;
5. Denial of a continuance based upon a critical missing witness;
6. Sufficiency of the evidence;
7. Ineffective assistance of counsel; and
8. Any claim that would require a new trial in the interest of justice.

D. In the event that a motion for new trial is granted, be prepared to draft and timely file a reply brief in opposition to any appeal of that decision filed by the prosecution.

XXII. Appeal

22.1 Protecting the Right to Appeal

A. Following trial, 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. Advice to the defendant should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court.

B. In circumstances where the defendant wants to file an appeal and trial counsel will not be handling the appeal, formally withdraw from the client's case, but only after taking all steps necessary to preserve the right to appeal. These steps include:

1. Assisting the defendant in filing written notice of appeal in accordance with the rules of the court;
2. Ordering transcripts of the trial proceedings; and
3. If the defendant is indigent for purposes of appeal, assisting the defendant in requesting prompt appointment of appellate counsel and providing any financial or other information necessary to establish the defendant's right to appointed counsel.

C. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), continue to represent the defendant until appeals are exhausted, or relieved of duties by the court or replaced by other counsel after a finding of good cause is entered on the record. If relieved of duties by the court, assist the defendant in taking all steps necessary to preserve the right to appeal.

D. Where the defendant takes an appeal, cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

22.2 Initial Duties in Direct Appeal Proceedings

A. Upon being notified of appointment to represent a criminal defendant in the direct appeal of that person's conviction and sentence, or other appealable order, as soon as possible, through inspection of the papers from the trial court's file:

1. Confirm that a written notice of appeal has been filed with the clerk of the trial court. If such notice has not been filed, and the time for filing such notice has not expired, counsel must file the notice of appeal immediately (*See Texas Rules of Appellate Procedure 25 and 26*);
2. Confirm that the Certification of the Defendant's Right to Appeal has been properly completed, signed by the defendant, and filed with the clerk of the trial court (*See Texas Rule of Appellate Procedure 25*);
3. Gather all of the information necessary to complete the docketing statement to be filed with the court of appeals (*See Texas Rule of Appellate Procedure 32*);

4. Determine whether the defendant is entitled to be released to bail on appeal (*See* Texas Code of Criminal Procedure, art. 44.04). If the defendant is entitled to bail, and the trial court has not set an appeal bond amount, ask the trial court to set bail in the lowest amount that the trial court will consider.

B. Upon being notified that he has been appointed to represent a criminal defendant in the direct appeal of that person's conviction and sentence, or other appealable order, within three (3) business days of such appointment, personally meet with the client, if the client is in custody in Harris County or otherwise resides in Harris County. If meeting the client in person, provide the client with an initial client letter, which contains information explaining criminal appeals in general, eligibility for bail and the time periods that apply to each phase of the appellate process. If the Texas Department of Criminal Justice-Institutional Division or another jail or prison authority has already taken possession of the client, then ascertain the client's whereabouts, mail him the initial client letter, and make arrangements to either visit the client in person or interview him by telephone.

C. Following initial appointment to a direct appeal, at the earliest practical time:

1. Contact trial counsel to obtain background information on the client, the nature of the issues presented in the trial court, and to determine whether filing a motion for new trial, if available, is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion;

2. File a docketing statement with the court of appeals (*See* Texas Rule of Appellate Procedure 32);

3. Request in writing that the clerk of the court prepare a clerk's record (Texas Rule of Appellate Procedure 34.5(b)), and that the court reporter prepare the reporter's record (Texas Rule of Appellate Procedure 34.6).

22.3 Bail Pending Appeal

A. Where a client indicates a desire to appeal the judgment or sentence of the court, 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, cooperate with appellate counsel in providing information to pursue the request for bail.

22.4 Direct Appeal

A. Ensure that the clerk's and reporter's records are true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial or appellate courts in order to obtain corrections or hearings to ensure the reliability of

the record.

B. Fully review the appellate record for all reviewable errors, prepare a well researched and drafted appellate brief, ensure that the brief is filed in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure and any local rules, and notify the court of counsel's desire to present oral argument in the case, if appropriate.

C. Be prepared to draft and timely file a reply brief in opposition to any brief filed by the prosecution.

D. Be prepared to draft and timely file a motion for rehearing should the conviction be affirmed. A public defender should be prepared to timely defend against the prosecution's motion for rehearing should the court reverse the conviction on original submission.

22.5 Petition for Discretionary Review

A. In the event that the intermediate appellate court's decision is unfavorable to the defendant, advise the defendant in writing of the defendant's right to file a petition for discretionary review and the action that must be taken to properly file such a petition. In advising the defendant of the right to file a petition for discretionary review, explain that:

1. Review by the Court of Criminal Appeals is discretionary and not a matter of right, and that the Court of Criminal Appeals may refuse to review the defendant's case without providing any reason for doing so;

2. If the defendant is indigent, defendant does not have the right to court-appointed counsel for purposes of filing a petition for discretionary review but that, upon request, the appropriate authority may appoint counsel at its discretion for purposes of filing a petition for discretionary review; and

3. However, if the defendant is indigent and if the petition for discretionary review is granted, defendant does have the right to court-appointed counsel for further proceedings on the merits before the Court of Criminal Appeals.

B. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), continue to represent the defendant until appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel after a finding of good cause is entered on the record. If relieved of duties by the court, assist the defendant in taking all steps necessary to preserve the right to file a petition for discretionary review.

C. When the court of appeals issues an opinion in a case, within five (5) days of the opinion being issued, send a copy of the opinion and judgment, as well as notification of the client's right to file to file a *pro se* petition for discretionary review under Texas Rule of Appellate Procedure 68. Such notification to the client shall include an explanation of what a petition

for discretionary review is, and shall include a copy of Texas Rules of Appellate Procedure 66-70. The opinion and accompanying notification letter shall be sent to the client by certified mail, return receipt requested. A letter certifying compliance with the above procedures shall be sent to the court of appeals, along with a copy of the return receipt. *See* Texas Rule of Appellate Procedure 48.4.

D. If the conviction is reversed at the court of appeals, a public defender should immediately take all necessary steps to secure bail for the client pending the filing of a petition for discretionary review by the State. *See* Texas Code of Criminal Procedure, article 44.04(h).

22.6 Right to File a Petition for Certiorari to the United States Supreme Court

In the event that the Court of Criminal Appeals either summarily denies a petition for discretionary review or denies relief after reviewing the defendant's case on the merits, advise the defendant in writing by certified mail of the defendant's right to file a petition for certiorari before the United States Supreme Court and the action that must be taken to properly file such a petition. In advising the defendant of the right to file a petition for certiorari, explain that:

A. Review by the United States Supreme Court is discretionary and not a matter of right, and that the United State Supreme Court may refuse to review the defendant's case without providing any reason for doing so;

B. If the defendant is indigent, defendant does not have the right to court-appointed counsel for purposes of filing a petition for certiorari;

C. If the petition is without merit, seek leave to withdraw from the case from the court from which review is sought, after explaining to the client the procedures and deadlines of seeking such review; and

D. If the defendant is indigent and if the petition for certiorari is granted, defendant may request the appointment of counsel for further proceedings on the merits before the United States Supreme Court.

XXIII. Code of Conduct for Harris County Public Defender Employees

23.1 Uphold the Integrity and Independence of the Office

An independent and honorable defender system is indispensable to justice in our society. Observe high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving clients and the principle of equal justice under law. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by applicable codes of professional

responsibility, by court order, or by the Chief Public Defender.

23.2 Avoid Impropriety and the Appearance of Impropriety in All Activities

Do not engage in any activities that would put into question the propriety carrying out the duties of the office. Do not use public office for private gain.

23.3 Adhere to Appropriate Standards in Performing the Duties of the Office

A. Respect and comply with the law and these canons. Report to the appropriate supervising authority any attempt to violate these canons.

B. Be faithful to professional standards and maintain competence in the legal profession.

C. Be patient, dignified, respectful, and courteous to all persons in official capacity, and require similar conduct of personnel subject to one's direction and control. Diligently discharge the responsibilities of the office in a nondiscriminatory fashion.

D. Do not solicit or accept a payment of money or anything of value from a client, except an appropriate memento or token that is neither money nor of commercial value. Never disclose any confidential communications from a client, or any other confidential information received in the course of official duties, except as authorized by law. A former defender employee should observe the same restrictions on disclosure of confidential information that apply to a current defender employee.

E. Do not engage in nepotism that is prohibited by law or Harris County policy.

F. Conflicts of Interest.

1. In providing legal representation to clients, observe applicable rules of professional conduct governing the disclosure and avoidance of conflicts of interest.

2. In the performance of administrative duties, avoid conflicts of interest. A conflict of interest arises when a defender employee knows that he or she (or the spouse, minor child residing in the defender employee's household, or other close relative) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the ability to properly perform administrative duties.

3. When a defender employee knows that a conflict of interest may be presented in the performance of duties, promptly inform the Chief Public Defender. If the conflict involves a conflict between or among clients, consider withdrawal from one or more representations, or other appropriate remedial actions, as necessary to comply with applicable rules of professional conduct.

23.4 Activities to Improve the Law, the Legal System, and Administration of Justice

A. It is permissible to speak, write, lecture, teach, and participate in other activities concerning defender services, the legal system, and the administration of justice.

B. An employee may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. An employee may assist such an organization in raising funds and may participate in the management and investment of such funds. An employee may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal profession, and the administration of justice. An employee may solicit funds for law-related activities, subject to the following limitations:

1. Do not use or permit the use of the prestige of the office in the solicitation of funds.
2. Do not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign.
3. Do not solicit or accept funds from lawyers, clients, or other persons likely to have official business with the public defender office, except as an incident to a general fund-raising activity.

C. It is permissible to promote the development of professional organizations and foster the interchange of information and experience with others in the profession. An employee may make himself or herself available to the public at large for speaking engagements and public appearances designed to enhance the public's knowledge of the operation of defender services and the criminal justice system.

23.5 Regulate Extra-Official Activities to Minimize the Risk of Conflict With Official Duties

A. An employee may write, lecture, teach, and speak on subjects unrelated to the profession, and may engage in the arts, sports, and other social and recreational activities, if such avocational activities do not interfere with the performance of official duties, or adversely reflect on the public defender's role as an advocate. An employee may solicit funds for avocational activities, subject to the limitations set forth above.

B. An employee may participate in civic and charitable activities that do not interfere with the performance of official duties, or adversely reflect on the public defender's role as an advocate. A defender employee may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal, or civic organization, and may solicit funds for any such organization subject to the limitations set forth above.

C. Financial Activities.

1. Refrain from financial and business dealings that tend to interfere with the performance of official duties.

2. Do not solicit or accept a gift from anyone seeking official action from or doing business with the public defender office, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties.

D. Practice of Law. Do not engage in the private practice of law. Notwithstanding this prohibition, an employee may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the employee's primary responsibility to the defender office.

23.6 Report Compensation Received for Extra-Official Activities

An employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation or reimbursement is not prohibited or restricted by this code, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement is limited to the actual cost of travel, food, and lodging reasonably incurred by an employee and, where appropriate to the occasion, by the employee's spouse or relative. Any payment in excess of such an amount is compensation and should be reported.

23.7 Refrain From Inappropriate Political Activity

A. An employee should not be a candidate for or hold partisan elective office and should not solicit partisan political contributions. An employee should not engage in any political activity while on duty or in the employee's workplace and may not utilize any Harris County resources in any such activity. Political activity includes, but is not limited to, displaying campaign literature, badges, stickers, signs or other items of political advertising on behalf of any party, political committee, or candidate for political office and soliciting signatures for political candidacy or membership in a political party.

B. An employee may engage in political activity not otherwise prohibited, provided that such activity does not interfere with the proper performance of official duties. An employee who participates in political activity should not use his or her position or title in connection with such activity.