



TRLA PUBLIC DEFENDER

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POLICIES AND PROCEDURES MANUAL

Revised March 21, 2022

I. GENERAL PROVISIONS

a. Purpose

It is the purpose of this manual is to supplement the Texas RioGrande Legal Aid, Inc. Employee Handbook (“TRLAEH”) with policy and procedures specific to the Texas RioGrande Legal Aid, Inc. – Public Defender Division (“TRLAPD”).

b. Mission Statement

1. The primary duty of all TRLAPD employees is to represent our clients to the best of our ability. We defend them in the case for which we have been appointed. The scope of this representation may include attending to issues ancillary to the charge(s) against the client that will potentially either affect the proceedings and outcome of the case or be substantially affected by the proceedings and outcome of the case: housing issues; immigration; licensing; employment; education; family matters; and credit ~ naming a few.
2. TRLAPD employees should balance the fervor of their representation of the client with a showing of respect to the judges and their staffs, promptly responding to court orders and appropriate requests, punctually appearing for court settings, timely filing pleadings, and thoroughly preparing for court appearances.
3. When presenting an argument in court, argue with confidence and respectfully insist on getting one’s argument fully before the judge and on the record. Insist on a ruling. However, once the judge has ruled, do not argue behind the ruling.
4. The scope of responsibility for TRLAPD staff may include helping other staff both within and outside of the PD program. Try to help when asked, and offer to help when an opportunity arises.
5. The scope of responsibility for TRLAPD staff often includes helping other lawyers in TRLA. It may even include working with lawyers outside the organization, particularly when there is a client in common charged with crimes for which TRLAPD is providing defense. However, this responsibility is limited by the confines of avoiding a conflict of interest or overextending one’s self to the detriment of our service area clients or the program.

c. Organization

The Director of the TRLA Public Defender Division is appointed by the Executive Director of Texas RioGrande Legal Aid, Inc. All employees of TRLAPD work under the authority of the Division Director (“DD”). The DD may delegate responsibilities to TRLAPD employees, except the authority to hire and terminate employees. The Chief Public Defender and the Assistant Public Defender are responsible for all case-related oversight delegated by the DD.

II. DEVELOPMENT AND IMPLEMENTATION OF POLICIES

a. Revisions

Periodic revision of these policies and procedures will be made as conditions change, or as necessitated by changes in government regulations or laws. Office Memoranda from the DD may serve as amendments or additions to these policies and procedures.

b. Texas RioGrande Legal Aid Employee Handbook

This TRLAPD manual serves as a supplement to the general administrative policies and procedures set forth in the Texas RioGrande Legal Aid, Inc. Employee Handbook (“TRLAEH”).

III. CASE MANAGEMENT

d. Receiving Cases

6. Typically a TRLA employee (usually an Intake Paralegal) will conduct an initial interview with all persons recently charged with a crime in a covered jurisdiction to determine (a) whether the accused wishes to be represented by counsel, and (b) whether s/he is eligible for publicly-funded legal services by the PD office under guidelines established by TRLA and the jurisdiction. The Intake Paralegal should explain that the accused has a constitutional right to be represented by counsel and that if s/he is unable to afford to hire counsel, that s/he can be represented by the public defender or, in the case of a conflict of interest, by a court-appointed private attorney. For determining annual income eligibility, TRLA uses the standard of 125% of the federal poverty guideline as the threshold; the assigning court will make the final determination of eligibility.
7. Cases are assigned to this office by court appointment, or in some jurisdictions by self-assignment under a standing order of a court. The investigator or attorney receiving notice about a potential appointment should immediately conduct a conflicts check in the TRLA case management system, Legal Server. If an investigator identifies a potential conflict, but is not certain, the potential conflict should be brought to the attention of the Chief Defender or Deputy Chief for a final determination. 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. Otherwise, the case should be referred for assignment a Staff Public Defender, unless the Chief Defender for the program retains principal responsibility.
8. Intake information should be entered into the Legal Server even if the client does not qualify or is not eligible for Public Defender services due to a conflict of interest. In such instances, written notice should be made to the appropriate court, made to the attention of the court coordinator in the county of service and presiding judge, describing the reason why the applicant is not entitled to the public defender program’s services. Then, the case should be closed, giving the resolution reason as, conflict of interest, or otherwise ineligible. The presiding judge may decide to appoint an attorney anyway, after having heard from the

Defendant. There is a proceeding of such a hearing contemplated in the contracts with the counties, and usually in the County's Indigent Defense Plan.

e. Non-Appointed Cases

TRLAPD only accepts representation in cases in which it is appointed by contracting courts. Any TRLAPD attorney who receives a request from someone other than a client may counsel that defendant about the appropriateness of answering questions put to him or her by a government agent or court officer. The TRLAPD attorney may advise the person generally about right to counsel. This advice may be given regardless of whether this office will ultimately be assigned the case. However, the TRLAPD attorney should also be clear that she or he does not represent the person and cannot do so unless appointed by the court. It also probably not a good idea to recommend particular private attorneys when approached for such advice. Attorneys should not otherwise give case-specific advice to persons who solicit information.

f. Experts and Services

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

g. Caseload

Caseload per attorney is based on those recommended by TIDC guidelines for indigent defense, with the understanding that the attorney is not to exceed these numbers. The maximum annual caseloads for TRLAPD are 128 felonies per attorney, 226 misdemeanors per attorney, 168 juvenile cases per attorney, or 31 appeals per year. Misdemeanor mental health cases are not to exceed 200 per attorney.

h. Case Definition

A "case" shall be considered as a single criminal prosecution initiated by a charging instrument in a court of competent jurisdiction within any county covered by TRLAPD service area and having a separate and distinct case or cause number. A "case" commences at the magistrate's hearing pursuant to Tex. Code Crim. Proc. Art. 15.17. Note that while entitlement to an attorney under the TRLAPD contract with the service area counties begins at arrest and the magistrate's hearing, TRLAPD will occasionally be taking a case at the time of arraignment. Often an applicant is charged by arrest with a variety of offenses, each having its own case number at the magistrate level. The offenses identified and given magistrate court case numbers as a result of the same arrest shall be included in one Legal Server case file. If an offense from the arrest is taken up by the prosecutor and filed in a court of record by indictment or information, it should be separated from the uncharged offenses and given a new case file identity in the Legal Server. If there is only one charge at the time of arrest and it is taken up by the prosecutor and filed in a court by indictment or information, it shall be considered as the same case. Charges springing from the same arrest but as yet uncharged shall remain in the original case file created at the time of intake. Finally, if an indictment or information contains more than one count (Article 21.24, CCP), this is one case and is reported as the case under the category for the most serious offense alleged.

i. Closing Cases

Cases should be closed by the responsible TRLAPD attorney as soon as possible after relevant proceedings have concluded, a resolution considered to qualify the case for closing has been reached, and all documents pertinent to the resolution of the case have been received. Resolutions that qualify a case for closing are:

1. Judgment as a result of trial or plea;
2. Order on a Motion to Adjudicate or Revoke;
3. Order Granting a Motion to Withdraw;
4. Dismissal;
5. Failure to prosecute a charge or rejection of same by the State.

IV. PERSONNEL

a. Director of the Public Defender Program

All employees of TRLAPD work under the authority of the Division Director. The DD may delegate responsibilities to TRLAPD employees, except the authority to hire and terminate employees. The Chief Public Defender, First Assistant, and the Assistant Public Defender are responsible for all case-related oversight delegated by the DD.

b. Chief Public Defender

The Chief Public Defender is charged with supervisory authority over the all APDs in his or her TRLAPD office.

The Chief Public Defender ("CPD):

- 1) Meets with county officials when so requested;
- 2) Assigns cases;
- 3) Presides over team meetings;
- 4) Acts as lead counsel in all cases assigned to her or him and also in any case where appropriate because of the complexity or gravity of the case as it has developed;
- 5) Drafts and submits reports as regularly required or otherwise requested;
- 6) Implements or approves implementation of changes in this policy of operations, subject to the overseeing authority of the DD or Executive Director;
- 7) Handles her or his caseload;
- 8) Makes decisions regarding reassignment and collaboration on open cases;
- 9) Performs any such other administrative or supervisory duties that arise and are not otherwise managed by the chief public defender's supervisor, or the Executive Director of TRLA.

c. Assistant Public Defenders

APDs are the attorneys responsible for representing individual clients appointed to the office. Their duties are more specifically described in §§VI-XV. APD's are also responsible for participating in team meetings, keeping

the Chief Defender informed as to caseload, and maintaining their own calendar. All APD's are required to close their own cases, unless their supervising CPD devises and implements an alternative procedure for closing cases that proves to be efficient.

d. Investigator

The investigator is primarily responsible for tasks consistent with the job description, including but not limited to: conflict checks with witnesses involved in cases, discovery review for issues with evidence, witness interviews, cases related photography, surveillance, and procurement of case related materials such as medical records, documents of ownership, etc. The investigator customarily conducts initial intakes, and participates in client interviews other than the intake.

e. Intake Paralegals

The intake Paralegals are responsible for reviewing the jail census reports and conducting interviews at the jail for affidavits of indigence, or conducting the interview for the AOI, in court, when necessary, and submitting the Affidavits to the appointing authority for the county in order to obtain an Order of Appointment. Once the office receives the Order of Appointment for a case, the Intake Paralegals will create the electronic case in Legal Server and then request the Discovery for the case, if the case has already been filed.

f. General Paralegals and Legal Assistants

The other Paralegals and Legal Assistants are responsible for drafting and e-filing standard motions, uploading documents and media to the legal server electronic case files, maintaining the calendars for cases and entering new court dates, communicating with the courts and other agencies when necessary, purchasing supplies, and making sure that equipment is maintained and taken care of by the TRLA IT department.

g. Clerks and Interns

Clerks are generally law school students working for academic credit, or for legal experience. They are always temporary workers who need guidance to do legal work. Attorneys should assign work to clerks that assist the office and is educational for the clerk.

V. CLIENT RELATIONS

a. Attorney-Client Procedures

- A. Clients are those persons appointed to our office by the contracting courts. Normally, appointment is automatic if after intake has been conducted, the applicant qualifies for services and there is no insurmountable conflict of interest regarding representation. However, the various courts may have distinct preferences and routines pertaining to court appointment. TRLAPD management will try to accommodate the courts. We do not open a file on a case unless we have been appointed. A matter ancillary to a matter to which we were previously

appointed may be opened as something other than a PD case. This will be managed case by case, usually in collaboration with another TRLA team.

Generally, Appearance of Counsel by a TRLAPD attorney is made orally in open court at the first occasion after intake in which the applicant/client is required to appear. But, if a judge wants a written Appearance of Counsel filed, get them one. Procedures for lawyers are discussed in §VI-XV.

b. 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. 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 the CPD. Do not attempt to resolve the matter alone.
- B. The office does not accept collect calls. Incarcerated 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.

c. Relations with the Public

- A. If there are media inquiries about a particular case, they should be referred to the CPD overseeing the case or the DD. 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 or DD. 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.
- C. Generally, the CPD and DD should consult with the TRLA public relations person before making any comment regarding a case or the program.

d. 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 (maybe being subjected to a traffic stop will get you there, but a dysfunctional alarm clock will not), 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. If you are going to be late, call the court. Call opposing counsel. Call your supervisor. If you are going to have a scheduling conflict, get a substitute or begin proper efforts for a reset. Be aware of the court's local rules, written and unwritten.

e. Client Property

It is advisable to avoid receiving client property at all times. When it is unavoidable, establish a chain of custody with the client's knowledge and permission. When possible, arrangements should be made to get the property back to the client or their designated trustee within 30 days.

VI. General Duties of Attorneys

a. Role of a Public Defender

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

b. 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 intellectual disability, become familiar with the symptoms of such a condition and their potential impact on the client's participation in the case, level of culpability, and sentencing options. When representing non-citizens, research and advise the client as to the certain and uncertain immigration consequences that may result from a conviction.

c. Duties

A. Maintain regular contact with the client and keep her or him 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.

B. Distribution or presentation of written materials to clients.

1. Any written materials presented or distributed to a client that are in a language other than one in which the client is comfortably fluent should be either copied in the client's preferred language or competently translated. If translated, a certification of translation should be signed by the translator and acknowledged by the client. If it is necessary to review a volume of written materials for which copying and literal translation is very impractical, secure acknowledgment from the client that she or he has reviewed the materials with the attorney and someone capable of competent translation; that the client believes questions have been answered and the content of the materials as they relate to the client's case have been fully reviewed and discussed.
2. A client who is blind, illiterate, or who refuses written materials, should receive a careful explanation of those documents.

- 3. Warn the client not to share distributed written materials with others.
 - C. 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 our work the first contact will usually be with an investigator. However, a TRLAPD attorney should meet with a client within 24 hours of having received notice of the appointment. 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.
 - D.** Appear on time for all scheduled court hearings in a client’s case.
 - E.** 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.
 - F.** If a conflict develops during the course of representation, notify the client, consult with the client, and if the conflict appears to be unresolvable without doing so, notify the court.
 - G.** When the Public Defender’s Office’s caseload exceeds the contractual standards, or is otherwise so large that it is unable to satisfactorily meet these performance guidelines, the Chief Public Defender shall inform the DD and the TRLA Executive Director.
 - H.** 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, an appellate attorney is appointed or hired, 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.
- d. 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.

VI. Initial Procedures

a. Initial Interview

Arrange for an initial interview with the accused as soon as practicable after arrest, or after being assigned to the client’s case. In most jurisdictions the investigator should conduct an initial interview at the jail within 24 hours of arrest, and ideally before the Art. 15.17 magistration. If information regarding bail and personal recognizance is obtained prior to magistration, it should be presented to the magistrate to assist in setting reasonable conditions and bail for release pending trial. Absent exceptional circumstances, if the client is in custody and the case is assigned by a court, the initial interview should take place within two business days after notice of assignment to the client’s case. If the initial interview is completed by an investigator, 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.

A. *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 reports from local MHMRs 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.

B. *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. In some jurisdictions, videoconferencing or teleconferencing is available for meeting with the client from a remote location, rather than traveling to the jail. Videoconferencing or teleconferencing is not preferred for the initial interview. Videoconferencing or teleconferencing is never recommended for contact with mentally ill clients or clients who have a developmental disability.

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.

C. 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.

b. 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.

c. 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.

d. 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. **A decision to have a client testify before a grand jury should be staffed with the DD, regardless of whether the client is the target defendant or subpoenaed as a witness.**

- 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.

e. 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 intellectually disabled 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 MHDD, 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 is clearly incompetent to participate in or even understand court proceedings, and it appears that transporting the client to and from court for routine proceedings where the client's presence is not needed and may cause disruption of the court proceedings 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.

f. 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, and the circumstances in which a defendant may refuse to do so.

VII. Case Preparation

a. 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--including double jeopardy and statutes of limitations.
 - e. The punishment range for the charge.
 - 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. 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.
 8. 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.
 - e. Mitigate any punishment that may be assessed.
 9. Where appropriate, secure medical record release forms and obtain client's medical records.
- 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.
- b. 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. Potential favorable information;

5. The names and addresses of all prosecution witnesses, their prior statements, and criminal records;
6. Any other information that may be used to impeach the testimony of prosecution witnesses;
7. All oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;
8. The prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
9. Statements made by co-defendants;
10. Statements made by other potential witnesses;
11. All official reports by all law enforcement and other agencies involved in the case, including the results of any scientific tests;
12. All records of evidence collected and retained by law enforcement;
13. All video/audio recordings or photographs relevant to the case, as well as all recordings of transmissions by law enforcement officers;
14. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;
15. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof; and
16. 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.

c. 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.

d. Arraignment

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

VIII. Motion Practice

a. 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.

b. 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 appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.
- C. 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.

- D. In every case, examine whether it is appropriate to file a motion to suppress evidence or statements.
- E. In every case that proceeds to trial, file timely and appropriate motions in limine to exclude any improper evidence or prosecutorial practices.
- F. Obtain a clear ruling on any pretrial motion on the record or in writing.

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

IX. Plea Negotiations

a. 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 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.

b. 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. The potential for recidivist sentencing , including habitual offender statutes and sentencing enhancements, and all other applicable statutes or case law;
3. If a plea involving community supervision or deferred adjudication is under consideration, the permissible conditions of supervision with which the client must comply in order to avoid revocation or adjudication;
4. 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;
5. 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;
6. Any registration requirements including sex offender registration and job-specific notification requirements;
7. The availability of appropriate diversion and rehabilitation program;
8. The possible and likely place and manner of confinement;
9. The effect of good-time and earned-time credits on the sentence of the client, the period that must be served according to statute before the clients becomes eligible for parole, and the general range of sentences for a similar offenses committed by defendants with similar backgrounds;
10. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence.
11. 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;

12. 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;
13. The availability of appropriate diversion and rehabilitation programs;
14. Any possible and likely sentence enhancements or parole consequences;
15. The effect on possible appellate rights.
16. That plea bargains are not binding on the court.

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;
 - 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 Rights Act (Chapter 56 Code of Criminal Procedure) 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.

c. 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.

d. 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.

X. Trial

a. 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. Relevant documents provided by the prosecution.
 4. Reports, test results, and other materials subject to disclosure;
 5. Voir dire topics, plans, or questions; Outline of opening statement;
 6. Cross-examination plans for all possible prosecution witnesses;
 7. Direct examination plans for all prospective defense witnesses;
 8. Copies of defense subpoenas and returns;
 9. Prior statements of all prosecution witnesses;
 10. Prior statements of all defense witnesses;
 11. Reports from defense experts;
 12. A list of all defense exhibits, and the witnesses through whom they will be introduced;
 13. Originals and copies of all documentary exhibits;
 14. Proposed jury instructions with supporting case citations;
 15. Copies of all relevant statutes and cases; and
 16. 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 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. Throughout preparation and trial, consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

b. Jury Selection

A. Preparation

1. Be familiar with the procedures by which both petit and grand jury venires are selected in the particular jurisdiction. One 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 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. 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. Counsel should take all steps necessary to protect the voir dire record for appeal, including, when appropriate, filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.
2. 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.
3. 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.
4. 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.
5. 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.
6. In a group voir dire, avoid asking questions that may elicit responses which are likely to prejudice other prospective jurors.
7. 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.
7. Where appropriate, obtain and review laboratory credentials and protocols and by the prosecution.

c. Opening Statement

- A. Prior to delivering an opening statement, counsel should ask for a sequestration of witnesses, unless a strategic reason exists for not doing so. **Invoke the Rule.**
- B. Be familiar with the law, the practice of TRLA, 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. Consider deferring the opening statement until the beginning of the defense case on occasion. 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.

d. 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 for possible use in cross-examining experts;
 - 9. When 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 charge. 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.

e. 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.
- 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 or other evidence, 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
 - 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.
- f. 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.

g. 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. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.
- J. Counsel should move to discuss any jury notes or responses to jury notes regarding substantive matters in open court and on the record, and to include the actual notes and responses in the record for appellate purposes.

XI. Sentencing

a. 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.

b. 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.

c. 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.

d. 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.

e. The Prosecution's Sentencing Position

Attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed.

f. The Defense Sentencing Memorandum

Counsel should prepare and present to the court a defense sentencing memorandum when there is a strategic reason for doing so, or where the client is vulnerable due to some developmental disability, mental or physical

health issue, or other vulnerabilities exploitable by the prosecution. See the TIDC Performance Guidelines, Section 8.6 for details on the memorandum.

g. 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.

XII. Post-Trial

a. 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.

b. 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 or an appellate attorney has been appointed. Representation may include a 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.

c. 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.

d. 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 and its effect on other post trial remedies, the defendant desires that such a motion be filed,
 5. The effect filing a motion for new trial may have on the availability of other post-trial remedies.
- 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.

XIII. Appeal

a. Controlling Appellate Memorandum

All policies and procedures related to appeals herein are controlled by "Updated Procedure for Appeals," a memorandum dated October 7, 2014, distributed by Abner Burnett:

b. 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 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.
- c. Direct Appeal
- A. Counsel representing a client on direct appeal should be familiar with the procedures applicable to an appeal, including the rules specifying the time period for filing an appeal and the requirements for submission of the clerk's and reporter's records.
- B. Counsel should, upon being contacted by the court or client concerning representation for an appeal, immediately consult with the trial court to ascertain relevant information concerning the perfection of the appeal and relevant filing deadlines, in order to confirm that counsel's acceptance of the case permits the maximum opportunity for proper representation.
- C. When a client indicates a desire to appeal the judgment or sentence of the court, counsel should inform the client of any opportunity that may exist to be released on bail pending the disposition of the appeal and, if the client desires to pursue release pending appeal, file a motion requesting same including affidavits supporting such motion, and seek a hearing before the trial court.
- D. Counsel should immediately contact trial counsel to obtain background information on the client, information on the nature of the issues presented, and to determine whether filing a motion for new trial, if available, is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion.
- E. Retained counsel should, upon acceptance of appellate representation, immediately inform the court and the prosecution of the representation by filing the appropriate designation of counsel with the court, and all counsel, both retained and appointed, must submit the proper designations of the clerk's and reporter's records as mandated by the Rules of Appellate Procedure.

- F. Counsel must review the clerk's and reporter's records to determine whether they 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 necessary to protect the reliability of the record.
- G. Counsel should fully review the appellate record for all reviewable errors, prepare a well researched and drafted appellate brief, file the brief 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, when appropriate.
- H. Counsel should consider preparing and filing a reply brief or a motion for rehearing if, under the circumstances, such is needed or required, particularly in order to make the court of appeals aware of legal or factual matters that may have been overlooked or mischaracterized or that may have newly developed.

d. 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.

XIV. Code of Conduct for TRLA Public Defender Employees

a. 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.

b. 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.

c. 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 an 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 TRLA 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.

d. 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.

e. 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.

f. 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.

g. 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 TRLA 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.

2021 Atascosa County Improvement Grant Application Narrative
Rural Regional Public Defender Sustainability Grant
Multi-year

a. Application Form

Counties Represented: **Atascosa, Frio, Karnes, Wilson**

Fiscal Year: **2021**

State Payee Identification Number: **17460014685**

Division To Administer Grant: **Tracy Barrera**

Program Title: **Rural Regional Public Defender Sustainability Grant**

Requested Grant Amount: **\$1,447,373.00**

Authorized Official: **Robert L Hurley**

Financial Officer: **Tracy Barrera**

Program Director: **Lynn Ellison**

Mailing Address: **1 Courthouse Circle; Suite 105; Jourdanton, TX 78026**

b. Introduction (Executive Summary)

Atascosa, Wilson, Karnes and Frio Counties are four of the five counties in the 81st and 218th Judicial Districts in South Texas. Using funding from TIDC through the Rural Regional Public Defender Grant Program and county matching funds, they would like to contract with a non-profit corporation such as Texas RioGrande Legal Aid (TRLA) to obtain the benefits of a regional public defender. The program will provide representation to all indigent persons accused of crimes in the four counties, other than where conflicts exist, including non-capital felonies, misdemeanors, juveniles and appeals, from arrest through final disposition.

c. Problem Statement

The four counties in the 81st and 218th Judicial Districts -- Atascosa (pop. 50,256), Wilson (51,077), Karnes (15,304), and Frio (19,735) -- have characteristics of many South Texas counties. They have majority Hispanic populations and generally high poverty rates. 27.5% of the Frio County population is below the federal poverty guidelines and Karnes County's poverty population is also over 20%. Furthermore, tax rates are generally high, and with a limited tax base these counties must struggle to meet the financial burdens of providing adequate counsel for indigent defendants. The financial picture for these counties is even more bleak for the near future, given cratering oil and natural gas prices and the coronavirus having a disastrous impact on property tax values.

In some of the counties there are few local lawyers willing to accept appointments. Because of limited resources, fees paid to private attorneys for indigent defense are well below fair market rates. Many private court-appointed attorneys must travel from San Antonio, and there are no funds for mileage. As a result, court dockets and case resolutions are frequently delayed by court-appointed attorneys who have scheduling conflicts or who prioritize their fee-paying clients. There are complaints from defendants that their lawyer has not visited them in jail and/or otherwise failed to maintain communications. The failure to move cases expeditiously and efficiently causes jail populations and costs to be unnecessarily high, a problem aggravating the risk during the current pandemic crisis. In addition, misdemeanor appointment rates in two of the counties are well below the state average.

More importantly, there is a serious need to improve the quality of defense services for the indigents accused of crimes. The ad hoc assignment of counsel at sub-market fees all too often results in a less than acceptable level of professional service - the effective assistance of counsel. Many, if not most, lawyers who accept 20% or less of their market rates to represent an indigent defendant fail to interview their clients promptly after appointment, fail to investigate the defenses available, fail to review discovery materials offered by the prosecutor, fail to file any motions,

fail to bring in expert witnesses when necessary, fail to address major issues such as serious mental illness, and fail to request a trial where that ultimate constitutional protection is indicated.

d. Objectives

By contracting with a non-profit for a turnkey defender program, the participating counties will achieve the following objectives:

1. Provide the services of a regional public defender to four counties by contracting with a qualified indigent defense services provider [< 90 days after Notice of Grant Award (N/A)] and through inter-local agreement with the participating counties to detail the services and contributions required from each participating county [< 90 days after N/A].
2. Provide trial and appellate defense counsel and support services to the indigent in all participating counties and in all courts [< 90 days after start-up].
3. Use the Commission's Weighted Caseload Study Guidelines to set caseload limits for the program, which will serve as a basis for staffing [from inception].
4. Act as a resource to assigned private counsel representing indigent defendants where the public defender has a conflict of interest [from inception].
5. Provide quality representation to indigent defendants who are represented by the program and improve the performance of indigent defense systems throughout the region that will be served [from inception].
6. Measure program outcomes and assess program performance in order to provide information to local county and court officials about their indigent defense systems [from inception].
7. Improve the efficiency of the criminal court systems in the participating counties by engaging in the representation of indigent defendants promptly, reducing unnecessary days of confinement in the county jails, and moving cases expeditiously and professionally to final disposition [from inception].

e. Activities

The 81st/218th District Regional Public Defender will work with the Commission's staff to establish an implementation plan for this expansion effort.

Startup

Once the key specifics of the Statement of Grant Award are determined (contingent upon the Commission's award), an Oversight Board for the 81st/218th District Regional Public Defender will be constituted to oversee the program.

The Oversight Board will include local stakeholders from the counties that are anticipated to join the program, referred to as Expansion Counties for the purpose of this proposal. The Board will include county judges, trial judges with criminal jurisdiction, and representatives of the private bar.

Within 30 days of receipt of the Notice of Grant Award, the Oversight Board will meet and issue a request for proposals from non-profit corporations willing to provide indigent defense services.

Within 60 days of receipt of the Notice of Grant Award, the Oversight Board will make a recommendation of a non-profit corporation to serve as the Public Defender to the commissioners' courts.

To participate in the program, counties will enter into an inter-local agreements with Atascosa County as the administrative county.

Participating counties will submit amended indigent defense plans to the Commission to reflect the creation of the Regional Public Defender.

Within 90 days of receipt of the Notice of Grant Award, Atascosa County will contract with the non-profit corporation recommended by the Oversight Board and designated by the commissioners' courts of the participating counties for the operation and management of the Regional Public Defender program.

Promptly after the execution of the contract, the non-profit corporation will designate the Chief Public Defender and begin hiring Assistant Public Defenders and support staff.

Any additional implementation plans for the startup and operation of the program will be incremental and will be approved by the Commission's staff.

Positions will be filled using personnel policies and procedures that are consistent with the Commission's grant requirements and the internal policies of the non-profit corporation.

New offices to serve the counties will be opened according to the incremental implementation plan. The offices will be fully operational with equipment, connectivity, supplies, and case management software that is necessary to provide representation to clients and fulfill reporting and evaluation requirements.

Ongoing Program Operation

1. The 81st/218th District Regional Public Defender will operate with a policy and procedure manual that reflects the Commission's Weighted Caseload Study Guidelines on caseload limits and override/under-ride procedures.
2. The program will develop a referral process from courts and will assist courts with submission of amendments to indigent defense plans if necessary.
3. The Chief Public Defender will establish procedures for interviewing persons arrested for crimes within 24 hours of arrest to determine eligibility for assignment of counsel and whether a conflict of interest exists for the defender office. During the existence of the current pandemic crisis, the Chief shall assure that interviews at the jail or via teleconference are conducted as safely to the client and program staff as reasonably possible.
4. The Chief Public Defender will cause all relevant eligibility and conflict information to be promptly made available to the appointing authority in each county for the assignment of counsel.
5. Once adequate staff is in place and the referral process is operational, the program will begin serving defendants in Expansion Counties. The target for beginning operations is the 4th Quarter of calendar 2020, if grant award decisions are made by the Commission at its June, 2020 meeting. If the award decision is later than that schedule, the start-up target will be delayed accordingly.
6. A staff investigator will be assigned to a local satellite office in each county to provide investigative services to attorneys in the public defender program.
7. The Chief Public Defender will assign attorneys and support staff to clients' cases in a manner that assures the availability of counsel at every critical stage of the criminal justice process.

8. The Chief Public Defender will provide quarterly written status updates to the Oversight Board detailing the number of cases assigned to the office, status of staffing in the office, and other relevant information.

f. Evaluation

The Evaluation of the program will be conducted by the Oversight Board and the non-profit corporation managing the program. The following outputs from the case management system will be vital to the evaluation of this program:

1. Program Caseload: Track the number of active cases assigned to the public defender program.
2. New Cases Added: Track the number of new cases added to the public defender caseload for each month.
3. Cases Disposed: Provide monthly reports detailing the number of disposed cases by case category and county.
4. Average Caseload by Attorney
5. Percentage of total indigent defense cases that are assigned to the program
6. Cost Measures per Case.
7. Time spent on each case by investigators

The following outcomes will be considered for program evaluation:

1. Days from appointment to first contact with defendant
2. Length of time between arrest and resolution of the case
3. Case disposition: final judgment compared to initial prosecution offer.
4. Cases where the defendant is acquitted or case dismissed.
5. Surveys of stakeholders.
6. Impact on jail population and counties' costs of confinement.

The program will cooperate with the Commission to determine other measure that will be necessary to demonstrate the program's impact. If the outputs and outcomes provided in this proposal need to be adjusted, the program will work with the Commission and will report quarterly or as required by the Statement of Grant Award.

g. Future Funding

Sustainability funding is essential to allow these rural counties the ability to improve indigent defense and to meet constitutional norms. The counties have the financial capability to meet the fund matching requirements of the Rural Regional Public Defender Sustainability Grant Program, but would not be able to make the described improvements in their indigent defense systems without a substantial infusion of state funding.

h. Budget Narrative and Budget Form

81st/218th District Regional Public Defender Budget FY2021

Personnel	FTE's	Salary	Fringe	Subtotal	
Division Director	0.20	\$ 125,000	\$ 47,500	\$ 34,500	
Chief Public Defender	1.00	\$ 90,000	\$ 34,200	\$ 124,200	
First Assistant	1.00	\$ 80,000	\$ 30,400	\$ 110,400	
Felony Staff Defenders	4.47	\$ 75,000	\$ 28,500	\$ 462,512	
Misd Staff Attorneys	6.17	\$ 50,000	\$ 19,000	\$ 425,846	
Attorneys	12.84				\$ 1,157,457
Investigators	4.28	\$ 40,000	\$ 7,200		\$ 202,022
Investigator	4.28				
Secretaries	3.21	\$ 35,000	\$ 6,300		\$ 132,577
Secretary	3.21				
Total FTE Staff	20.33				\$ 1,492,057
Non-personnel					
Space/Utilities				\$ 44,222	
Telephone/Data				\$ 25,321	
Travel				\$ 75,424	
Library/Legal Research				\$ 9,101	
Supplies				\$ 12,635	
Litigation Expenses				\$ 12,825	
Admin/IT				\$ 19,543	
Contract Svc. (Janitorial Service)				\$ 10,477	
Training				\$ 14,980	
Equipment (1-time startup costs)				\$ 92,631	
Non-Personnel					\$ 317,159
Total Cost					\$ 1,809,216

One-Time Startup Costs

Laptop	17	\$ 850	\$ 14,552
Desktop	3	\$ 600	\$ 1,926
Monitor	17	\$ 120	\$ 2,054
Docking	17	\$ 250	\$ 4,280
Keyboard	17	\$ 75	\$ 1,284
Mouse	17	\$ 50	\$ 856
Desk	24	\$ 800	\$ 19,464
Desk Chairs	24	\$ 175	\$ 4,258
Side chairs	49	\$ 100	\$ 4,866

Polycom VoIP phones	25	\$	180	\$	6,300
Network cable drop for voice	25	\$	200	\$	6,800
Network cable drop for data	25	\$	200	\$	6,800
Sonicwall for voice	1	\$	900	\$	2,700
Sonicwall for data	1	\$	900	\$	2,700
Telephone system				\$	25,300
Printers (all-in-one)	4	\$	250	\$	1,000
Printer (Xerox network)	1	\$	3,600	\$	3,600
Filing cabinets	17	\$	220	\$	3,767
Conf table	1	\$	1,200	\$	1,200
Conf chairs	20	\$	100	\$	2,033
Waiting Room chairs	24	\$	90	\$	2,190
				\$	92,631

Budget Narrative

Division Director. An experienced non-profit corporation will have a position for a senior lawyer who oversees all of its public defender offices. The salary is allocated among all counties participating in the regional public defender program on a per capita ratio to lawyers supervised.

Chief Public Defender. This will be an experienced felony trial lawyer who will handle a caseload of 80-90% of a normal level of felony cases. Because the non-profit will already have administrative staff that is responsible for management and administrative functions, such as accounting, human resources, IT, recruitment and training, it will not be necessary for the Chief to spend much time on those functions.

First Assistant. Again, an experienced felony trial lawyer who will handle a full caseload.

Felony Staff Defenders. Depending on the level of experience of the lawyers hired in these positions, there will be 4 or 5 additional felony-qualified lawyers. For budget purposes and based on the anticipated caseload, there are 6.67 FTE positions for experienced lawyers, with 0.51 FTE felony-qualified lawyers working on appeals.

Misdemeanor Staff Defenders. These are positions for recent law graduates or less experienced lawyers who will be assigned Class A and B misdemeanors, as well as juveniles. Extensive training will occur through mentoring as second chair in felony trials under the supervision of more experienced attorneys.

Investigators. There are 4.48 FTE positions for investigators. Ideally, one will be hired from each participating county, and s/he will be responsible for promptly interviewing recently arrested inmates at the jail, determine eligibility and whether conflicts exist, and convey that information to the appointing authority in each county. They will carry out investigations at the request of the lawyers and will be located in satellite offices in each county.

Secretaries. An office manager and two secretaries will be hired to support the lawyers and investigators, prepare reports, and draft documents under the supervision of the lawyers.

Non-personnel expenses. Space/Utilities, Telephone/Data, Travel, Library/Legal Research, Supplies, Litigation Expenses (which includes fees of expert witnesses) and Contract Services are all

calculated from FY2019 expenses incurred for each line item in the Public Defender Division at TRLA, divided by the average of 17 lawyers on the PD staff that year, and multiplied by the number of FTE attorneys in this grant application (12.84). The Administration/IT item is derived from the percentage this grant bears to the total TRLA budget multiplied times the administration and information technology expenses at TRLA in FY2019. Training includes a \$1,000 stipend for each lawyer per year provided under TRLA policies and \$500 for each investigator, in addition to free continuing legal education programs sponsored by TRLA or other public interest organizations or the State Bar of Texas.

Equipment. Because the lawyers and investigators will be working in multiple office locations covering four counties, it is provident to use laptop computers with docking stations and external monitors, keyboards and mouse rather than the conventional desktop computers. Desktop computers will be available in each of four offices, mostly assigned to the secretaries but also available for more intense production activities. The main office will have a Xerox network printer for high-volume color printing, and each satellite will have an all-in-one printer, copier, fax and scanner. Each staff member will have a desk, desk chair, and 2 side chairs, and there will be an additional desk setup at each satellite office for traveling lawyers to use while meeting with clients, witnesses and family members. The telephone system includes Polycom Voice-over-IP phones and the necessary cable connections for voice and data through high-speed internet connections. Rounding out the equipment list are locking file cabinets for securing confidential client files and a conference table and chairs for 20 in the main office, plus 24 waiting room chairs.

The chosen non-profit corporation will have a web-based case management software for the use of the public defender lawyers and support staff. In addition to supporting the litigation effort, the CMS program will be used to create reports for the Commission and provide evaluation and analytical tools for the program, Commission and Oversight Board. It is not anticipated that there would be start-up costs for the software, and monthly charges for the CMS are included in the Admin/IT expense item.

Personnel Costs		\$1,492,057.00
FTE's	20.33	
Salary	\$1,122,296.00	
Fringe Benefits	\$369,761.00	
Travel and Training		\$90,404.00
Equipment		\$92,631.00
Supplies		\$12,635.00
Contract Services		\$10,477.00
Indirect		\$111,012.00
Total		\$1,809,216.00
Required County Match		\$361,843.00
Total less County Match		\$1,447,373.00