

**Federal Adaptation of *National Legal Aid and Defender Association (NLADA)*
*Performance Guidelines For Criminal Defense Representations*¹
Adopted by the Defender Services Performance Measurement Working Group (PMWG) and
Defender Services Advisory Group(DSAG), October 2015.
Updated by PMWG and DSAG, March 2023**

Note: These standards are intended as a guide to help ensure that people entitled to representation under the Criminal Justice Act are afforded quality representation. The standards should be used to assist appointed counsel in providing services that are consistent with the generally accepted practices of the legal profession. These standards are not all inclusive; effectiveness is not the minimum; zealous, quality representation is the goal.²

Guideline 1.1 Role of Defense Counsel

- (a) The paramount obligation of counsel is to provide zealous, conflict-free, high-quality representation to the client at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and to act in accordance with the rules of the court. Effectiveness is required. Zealous, conflict free, high-quality representation is the goal.

Related Statutes, Standards, and Federal Rules:

ABA Ten Principles of a Public Defense Delivery System, (ABA Principle), 1, 4, 5, and 6.

American Bar Association Criminal Justice Section Standards (ABA Standard), 4-1, Defense Function.

Missouri v. Frye, 566 U.S. 134 (2012)

Guideline 1.2 Education, Training and Experience of Defense Counsel

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law, the Criminal Justice Act (18 U.S.C. §§ 3006A, *et seq.*), the Rules of Evidence, use of technology, the U.S. Sentencing Guidelines, application of scientific knowledge to criminal defense, and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should be familiar with the practices of the specific judge before whom a case is pending.
- (b) Prior to handling a criminal matter, counsel should have, and the local CJA Plan should require, sufficient experience or training to provide quality representation.

¹ *NLADA's Performance Guidelines for Criminal Defense Representation* are copyrighted by the National Legal Aid and Defender Association (1995).

² Counsel should always consult the local rules of the district court as well as any jury instructions adopted by the circuit court of the jurisdiction.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3006A

Title 18, Crimes and Criminal Procedure

Federal Rules of Criminal Procedure

Federal Rules of Evidence

ABA Principles 6 and 9; ABA Standard 4-1.12, Training Programs

Strickland v. Washington, 466 U.S. 668 (1984)

Guideline 1.3 General Duties of Defense Counsel

- (a) Before accepting appointment by a court, counsel has an obligation to ensure they have available sufficient time, resources, knowledge, wellness, cultural sensitivity, and experience to offer high quality representation to a defendant in a particular matter. If it later appears that counsel is unable to provide effective representation in the case, counsel should move to withdraw.
- (b) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Where appropriate, counsel may be obliged to investigate potential conflicts of interest or seek an advisory opinion on any potential conflicts.
- (c) Counsel has the obligation to keep the client informed of the progress of the case.
- (d) Counsel should meet in person with the client when important decisions are to be made. Although videoconferencing technology has become more available, it is a supplement, not a substitute for in-person meetings between counsel and client. Building a trusting relationship and discussing important evidence and decisions must occur in person.

Related Statutes, Standards, and Federal Rules:

ABA Principles 4, 5, and 6

ABA Standard 4-1.2, Functions and Duties of Defense Counsel; 4-1.3, Continuing Duties of Defense Counsel; 4-1.4, Defense Counsel's Tempered Duty of Candor; 4-1.5, Preserving the Record; 4-1.6, Improper Bias Prohibited; 4-1.7, Conflicts of Interest; 4-1.8, Appropriate Workload; 4-1.9, Diligence, Promptness and Punctuality; 4-1.10, Relationship with Media; 4-3.7, Prompt and Thorough Actions to Protect the Client

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

- (a) The attorney has an obligation to attempt to secure the pretrial release of the client. *See generally*, 18 U.S.C. §§ 3141-3150.
- (b) If at all possible, the attorney should meet with the client before the pretrial services interview and should be present for the interview.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3142, 3143

Fed. R. Crim. Pro. 32.1, 46

ABA Standard 4-3.2, seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Judicial Conference of the United States (JCUS) policy recognizes that people subject to 18 U.S.C. 3142 *et seq* should have the advice of counsel prior to being interviewed by the pretrial services officer. (JCUS, March 1988)

Guide to Judiciary Policy, Vol. 7, App'x 2A, Model Plan for Implementation and Administration of the Criminal Justice Act, V.c. (Model CJA Plan, rev. 2016)

Commentary

The pretrial services interview is a critical stage in the proceedings. In many instances, it is the client's first encounter with the federal criminal justice system. The pretrial services advice of rights mirrors *Miranda* but also warns that requesting counsel may delay the person's release. Because many clients will be concerned that they should go forward with the pretrial interview as soon as possible, it is important for counsel to be present and advise the client as soon as possible about potential negative consequences from inaccurate information. False statements during the pretrial services interview may have significant negative consequences. *E.g.*, *United States v. Griffith*, 365 F.3d 124 (11th Cir. 2004) (statements to pretrial services officer admissible to impeach trial testimony); *United States v. De La Torre*, 599 F.3d 1198 (10th Cir. 2010) (same); *United States v. Doe*, 661 F.3d 550 (11th Cir. 2011) (pretrial service officer's request for biographical information during interview fell within "routine booking exception" to *Miranda*; false answers supported assessment of upward adjustment for "obstruction of justice"); *United States v. Caparotta*, 676 F.3d 213 (1st Cir. 2012) (admission to drug use in pretrial services interview used in presentence investigation report to increase base offense level as "regular user of and addicted to illegal drugs" at the time of the offense; no violation of Sixth Amendment). Every effort should be made to secure the appointment of counsel as soon as possible to allow a meaningful opportunity for consultation prior to the interview.

Guideline 2.2 Initial Interview

(a) Preparation – Prior to conducting the initial interview the attorney should, if possible:

- (1) be familiar with the elements of the offense and the potential punishment;
- (2) obtain copies of any relevant documents, including copies of any charging documents, recommendations and reports concerning pretrial release, and law enforcement reports;
- (3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
- (4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;
- (5) be familiar with any procedures available for reviewing the bail determination;
- (6) be familiar with risk assessment instruments used by Probation;

(b) The Interview:

- (1) Counsel should interview the client to acquire information concerning pretrial release and also to provide the client with information concerning the case. Whenever possible, the interview should take place in person. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.
- (2) Information that should be acquired includes, but is not limited to:
 - (A) the client's ties to the community, including the length of time they have lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history,
 - (B) the client's physical and mental health, and educational records;
 - (C) the client's history of service in the armed forces, including periods of active duty status, deployments, and separation from service;
 - (D) the client's immediate medical and institutional needs, including special security concerns;

- (E) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses, and prior record of court appearances or failure to appear in court, counsel should determine whether the client has any pending charges, whether they are on probation or parole, and past or present performance under supervision;
 - (F) the ability of the client to meet any financial conditions of release;
 - (G) the names of individuals or other sources that counsel can contact to verify the information provided by the client. Counsel should obtain the permission of the client before contacting these individuals;
 - (H) a preliminary assessment of whether the client has any impediments potentially limiting ability to understand what is happening and to make decisions in their best interest. Impediments include language, literacy, intellectual disability, mental illness and emotional disorders, as well as external factors such as needs of dependents and domination by others. Throughout the representation, counsel should be attentive to clues that such limitations exist but are not obvious due to acquired coping mechanisms;
 - (I) obtain client's signature on appropriate release forms for the defense team.
- (3) Information to be provided the client includes, but is not limited to:
- (A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - (B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation why the client should not make statements concerning the offense;
 - (C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case 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.

(c) Supplemental Information:

Counsel should consider using 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 that affects the client's rights;
- (3) any possible witnesses who should be located;
- (4) any evidence that should be preserved;
- (5) evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Related Statutes, Standards, and Federal Rules:

ABA Principle 4

ABA Standards 4-2.2, Confidential Defense Communication with Detained Persons; 4-3.1, Establishing and Maintaining an Effective Client Relationship; 4-3.3, Interviewing the Client; 4-3.9, Duty to Keep Client Informed and Advised About the Representation

Guideline 2.3 Pretrial Release Proceedings

- (a) Counsel should be familiar with the law pertaining to pretrial release including Fed. R. Crim. P. Rule 46, and the Bail Reform Act codified in 18 U.S.C. §§ 3142 and 3143.
- (b) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, if appropriate, to make a proposal concerning conditions of release.
- (c) If the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available or consider seeking review in the district court and, if necessary, appealing the detention order.
- (d) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should ensure the client understands the available options and the procedures for posting such assets. If appropriate, counsel should advise the client and others acting in his or her behalf how to post such assets.

- (e) If the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical, psychiatric, or security needs of the client and request the court direct the appropriate officials to take steps to meet such special needs, and counsel should contact the place of confinement directly to alert them to the client's special needs.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3142, 3143

Fed. R. Crim. Pro. 46

ABA Standard 4-3.2, Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Stack v. Boyle, 342 U.S. 1 (1951)

United States v. Salerno, 481 U.S. 739 (1987)

Guideline 3.1 Initial Appearance

The attorney should be present for pretrial matters and protect the client's rights during an initial appearance by:

- (a) preserving the client's right to enter an appropriate plea;
- (b) preserving the client's right to challenge the charge(s) through preliminary hearing or other grounds for dismissal;
- (c) requesting the client's release from custody, or in the alternative, a timely bail hearing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3142

Fed. R. Crim. Pro. 5(c); 32.1(a)

ABA Standard 4-2.3, Right to Counsel at First and Subsequent Judicial Appearances

See, Rothgery v. Gillespie County, 554 U.S. 191 (2008) (Sixth Amendment right to counsel attaches at first appearance)

Guideline 3.2 Preliminary Hearing

- (a) When the client is entitled to a preliminary hearing, the attorney should ensure the hearing is conducted within the requisite time limits, unless there are sound reasons for waiving the time limits or hearing.
- (b) In preparing for the preliminary hearing, the attorney should become familiar with:
 - (1) the elements of each of the offenses alleged;
 - (2) the law of the jurisdiction for establishing probable cause; and
 - (3) factual information bearing on probable cause.
- (c) If the client is held to answer and required to enter a plea, counsel should enter a plea of not guilty on the client's behalf, unless the nature of the charges warrant recommending the client decline to enter a plea.
- (d) Counsel should consider the consequences of exercising the right to a detention hearing coincident with a preliminary hearing or ancillary to arraignment.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 5.1, 17, 26.2, 32.1

ABA Standard 4-2.3, Right to Counsel at First and Subsequent Judicial Appearances

Gerstein v. Pugh, 420 U.S. 103 (1975)

Guideline 3.3 Bail and Detention Hearing

- (a) Counsel should be familiar with the provisions of the Bail Reform Act of 1984, as amended, 18 U.S.C. §§ 3141 – 3150, Federal Rules of Criminal Procedure Rule 46, and current case law. (*See* Appendix A)
- (b) In preparing for the detention hearing, counsel should consult with the client in person and develop a pretrial release plan unique to the client's financial circumstances, housing needs, support network, health conditions, and employment status.
- (c) After consultation with the client, counsel should contact potential witnesses, notify them of the detention hearing, and secure their attendance if possible.
- (d) Where the client has been charged with an offense that gives rise to a rebuttable presumption that no condition or combination of conditions will reasonably assure the

appearance of the client and the safety of any other person and the community, counsel must be prepared to rebut the presumptions of dangerous and flight risk.

- (e) Counsel should consider requesting deferment of the detention hearing if there is no practical benefit to conducting the hearing during the initial stages of the litigation. Counsel should promptly request a detention hearing in the event changed circumstances warrant a hearing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3141 et. seq.

Fed. R. Crim. Pro. 46

Fed. R. App. P. 9(b)

ABA Standard 4-3.2, Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Stack v. Boyle, 342 U.S. 1 (1951)

Carbo v. United States, 82 S. Ct. 662 (1962)

United States v. Salerno, 481 U.S. 739 (1987)

Guideline 3.4 Prosecution Requests for Non-Testimonial Evidence

Counsel should be familiar with the law governing the prosecution's power to require the client to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a client may refuse to do so, requiring an objection by counsel, the extent to which counsel may participate in the proceedings, the record of the proceedings required to be maintained, and counsel's ability to access any record made of the proceedings.

Related Statutes, Standards, and Federal Rules:

Fifth Amendment

Fed. R. Crim. Pro. 16

ABA Standard 4-4.5, Compliance with Discovery Procedures; 4-4.7, Handling Physical Evidence with Incriminating Implications

Gilbert v. California, 388 U.S. 263 (1967)

United States v. Mara, 410 U.S. 19 (1973)

Guideline 4.1 Investigation

- (a) Counsel has a duty to conduct an independent investigation into the facts and circumstances of the allegations. The investigation should be conducted as promptly as possible and may include investigation at pre-indictment and pre-trial stages of the case, as well as in support of sentencing mitigation.

- (b) Sources of investigative information may include the following:
 - (1) Charging documents – Copies of all charging documents should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:
 - (A) the elements of the offense(s) with which the client is charged;
 - (B) the defenses, ordinary and affirmative, that may be available; and
 - (C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

 - (2) The client – An in-depth interview of the client should be conducted as soon as possible and appropriate. The interview with the client should be used to:
 - (A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct affecting the client's rights;
 - (B) explore the existence of other potential sources of information relating to the offense;
 - (C) collect information relevant to sentencing, such as school, medical, mental health, employment, military, Social Security, prior criminal and immigration records.

 - (3) Potential witnesses who may provide information relevant to the offense, the client's history, or mitigation – Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If counsel conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness. Alternatively, counsel should have an investigator conduct such interviews.

- (4) The police and prosecution – Counsel should make efforts, including through the use of investigators and paralegals, to secure information in the possession of the prosecution or law enforcement authorities, including police reports. If necessary, counsel should pursue such efforts through formal and informal discovery. If appropriate, counsel should ask the court to enter an order preserving evidence that is not readily turned over or that is at risk of destruction (*i.e.*, in-car police video of a traffic stop).
- (5) Physical evidence – If appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or to sentencing. All evidence should be physically examined by the investigator and/or attorney. If appropriate, counsel should ask the court to enter an order preserving evidence that is not readily turned over or that is at risk of destruction (*i.e.*, traffic camera, bank, or private party video recording, in-car police video of a traffic stop).
- (6) The scene – Counsel should consider seeking access to the scene as soon as possible, accompanied by appropriate personnel to assist in documenting conditions. Counsel should consider seeking access to the scene under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions), if different from the initial view of the scene.
- (7) Investigators, Experts, and other Service Providers – Counsel should secure the assistance of:
 - (A) investigators, experts, or other service providers for the preparation of the defense and sentencing mitigation;
 - (B) investigators, experts, or other service providers necessary to attain an adequate understanding of the prosecution’s case;
 - (C) investigators, experts, or other service providers to rebut the prosecution’s case, including forensic specialists as needed.
- (8) The press – Media, social media, and third-party sources – Counsel should initiate efforts to:
 - (A) gather all written, audio and video available on case,
 - (B) review material and subpoena any additional media available from public or private sources,

(C) interview any witnesses learned through media who may have a bearing on the case.

(D) compare all audio and written statements with the official reports for discrepancies.

Related Statutes, Standards, and Federal Rules:

5 U.S.C. § 552, Freedom of Information Act

5 U.S.C. § 301 & 28 C.F.R. § 16.21 (*Touhy* regulations)

Fed. R. Crim. Pro. 17

ABA Standards 4-3.7, Prompt and Thorough Actions to Protect the Client; 4-4.1, Duty to Investigate and Engage Investigators; 4-4.2, Illegal and Unethical Investigation Prohibited

Strickland v. Washington, 466 U.S. 668 (1984)

Guideline 4.2 Formal and Informal Discovery

(a) As soon as practicable counsel should pursue the discovery procedures provided by the rules of the jurisdiction and informal discovery methods available to supplement the factual investigation of the case. In considering discovery requests, counsel should consider such requests may trigger reciprocal discovery obligations. Counsel should be aware of and familiar with the most recent “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (“Recommendations”).³ These protocols were recommended by the Department of Justice/Administrative Office Joint Electronic Technology Working Group (JETWG) to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases.

(b) Counsel should consider seeking discovery of the following items:

- (1) potential exculpatory information;
- (2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
- (3) all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;

³ The Recommendations can be found at <http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>.

- (4) the prior criminal record of the client and any evidence of other misconduct the government may intend to use against the client;
- (5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
- (6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof, and
- (7) statements of co-defendants;
- (8) identity of confidential informant

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §3500 *Jencks Act*

18 U.S.C. §2518(8)(b)

Fed. R. Crim. Pro. 6(e)(3)(E)(ii), 7(f), 15, 16, 26.2

ABA Standard 4- 4.5, Compliance with Discovery Procedures; 4-4.1 Duty to Investigate and Engage Investigators

Jencks v United States, 353 U.S. 657 (1957)

Brady v. Maryland, 373 U.S. 83 (1963)

Bruton v. United States, 391 U.S. 123 (1968)

Giglio v. United States, 405 U.S. 150 (1972)

United States v. Agurs, 427 US 97 (1976)

United States v. Bagley, 473 US 667 (1985)

United States v. Presser, 844 F.2d 1275 (6th Cir. 1988)

United States v. Banks, 151 Fed. Appx. 418 (6th Cir. 2005)

Guideline 4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. In determining a theory of the case, counsel should consider available statutory and affirmative defenses. Counsel should review sources of jury instructions including Kevin F. O’Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice and Instructions – Criminal*, Circuit Pattern Instructions, case law, and historical instructions given by the presiding judge.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 12.1, 12.2, 12.3, 26.1

ABA Standard 4-1.3, Continuing Duties of Defense Counsel; 4-3.7, Prompt and Thorough Actions to Protect the Client; 4-5.2, Control and Direction of the Case

Guideline 5.1 The Decision to File Pretrial Motions

- (a) Counsel should file an appropriate motion whenever there is reason to believe the applicable law may entitle the client to relief.
- (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.
- (c) Among the issues that counsel should consider addressing in a pretrial motion are:
 - (1) the pretrial custody of the client;
 - (2) the Constitutionality of the implicated statute or statutes;
 - (3) the potential defects in the charging process and the consequences of failing to raise such defects;
 - (4) the sufficiency of the charging document;
 - (5) the propriety and prejudice of any joinder of charges or defendants in the charging document;
 - (6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
 - (7) the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including;
 - (A) the fruits of illegal searches or seizures;
 - (B) involuntary statements or confessions;
 - (C) statements or confessions obtained in violation of the accused's client's right to counsel, or privilege against self-incrimination;
 - (D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
 - (8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
 - (9) seeking resources for experts or other services;
 - (10) the client's right to a speedy trial;

- (11) the client’s right to a continuance in order to adequately prepare his or her case;
- (12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
- (13) matters of trial or courtroom procedure;
- (14) additional peremptory challenges.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12(b)

ABA Standards 4-3.7 Prompt and Thorough Actions to Protect the Client; 4-5.2, Control and Direction of the Case

Guideline 5.2 Filing and Arguing Pretrial Motions

- (a) Motions should be filed in a timely manner, comport with local court rules, and succinctly inform the court of the relevant authority relied upon.
- (b) Counsel should discuss with the client that filing a pretrial motion might affect the defendant’s speedy trial rights.
- (c) When a hearing on a motion requires the taking of evidence, counsel’s preparation for the evidentiary hearing should include:
 - (1) investigation, discovery and research relevant to the claim advanced;
 - (2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses; the use of process to secure the production of relevant evidence and the attendance of witnesses;
 - (3) the appropriate preparation of witnesses and production of exhibits and demonstrative aids;
 - (4) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs risks of having the client testify;

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12, 17

ABA Standards 4-1.5, Preserving the Record; 4-4.6. Preparation for Court Proceedings, and Recording and Transmitting Information

Guideline 5.3 Subsequent Filing of Pretrial Motions

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

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12

ABA Standards 4-1.5, Preserving the Record; 4-8.1, Post-Trial Motions

Guideline 6.1 Duties of Counsel and the Plea Negotiation Process

- (a) Counsel should consider the possibility of a plea without a negotiated agreement.
- (b) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. Counsel should explain fully the rights that would be waived by a decision to enter a plea of guilty and not to proceed to trial. These discussions should take place in person with the client.
- (c) Ordinarily counsel should obtain the consent of the client before entering into any plea negotiation unless a compelling reason makes it impracticable to do so.
- (d) Counsel must keep the client fully informed of any continued plea discussion and negotiations and convey any offers made by the prosecution for a negotiated settlement.
- (e) Counsel must not accept any plea agreement without the client's express authorization.
- (f) The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3553

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

United States Sentencing Guidelines, <http://www.ussc.gov/guidelines-manual/guidelines-manual>

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Missouri v. Frye, 556 U.S. 134 (2012)

Guideline 6.2 The Contents of the Negotiations

- (a) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:
 - (1) the maximum term of imprisonment, the fine, mandatory special assessment, and restitution that may be ordered, any mandatory punishment, and the federal sentencing system, including the impact of the advisory sentencing guidelines on the determination of the sentence;
 - (2) the possibility of forfeiture of assets;
 - (3) consequences of conviction, including deportation, sex offender registration, possible civil commitment, and civil disabilities;
 - (4) any possible and likely sentence enhancements or parole consequences;
 - (5) consequences including probation, supervised release, or parole revocation in the same or other jurisdictions;
 - (6) the possible and likely place and manner of confinement;
 - (7) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
 - (8) the possibility of concurrent or consecutive sentences with any undischarged state sentence and the impact of primary custody on any resulting sentence.
- (b) In developing a negotiation strategy, counsel should be aware that all terms of a settlement agreement are potentially negotiable, and counsel should be completely familiar with:
 - (1) concessions the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
 - (A) not to proceed to trial on the merits of the charges;
 - (B) to decline from asserting or litigating any particular pretrial motions;
 - (C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.
 - (D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
 - (2) benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
 - (A) the client will receive acceptance of responsibility;

- (B) the prosecution will recommend the low end of the guideline range or a sentence below the guideline range;
 - (C) certain potential enhancements will not apply;
 - (D) the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - (E) the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
 - (F) to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement;
 - (G) the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - (H) the defendant will receive, with the agreement of the court, a specified sentence or sanction, or a sentence or sanction within a specified range;
 - (I) 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;
 - (J) the prosecution will not advocate for certain information or evidence, at the time of sentencing and/or in communications with the preparer of the official presentence report;
 - (K) the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement.
- (c) In conducting plea negotiations, counsel should be familiar with:
- (1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, a Rule 11(c)(1)(C) plea, a diversion agreement, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and a plea to the charges without an agreement;
 - (2) the advantages and disadvantages of each available plea according to the circumstances of the case;
 - (3) whether the plea agreement is binding on the Court, the probation office, the prison, and the parole authorities;
 - (4) statutory, guideline, and collateral consequences; and

(5) the interaction of the plea agreement with other sentences.

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

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3553

First Step Act, Pub. L. 115-391, 18 U.S.C. § 3624(b) (earned time credits)

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

U.S.S.G. § 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 6.3 Client Cooperation and the Duties of Counsel

- (a) Counsel should communicate to the client any opportunity for cooperation. Counsel should explain the potential benefits, as well as the possible negative consequences of cooperation. These discussions should take place in person with the client.
- (b) Before the client cooperates, counsel should seek an offer of immunity (*i.e.*, a *Kastigar* letter) from the government. Counsel should review the impact of any offer of immunity with the client, including ensuring that the client understands he or she may be required to provide active cooperation, grand jury testimony, or trial testimony to receive the full benefit of cooperation. Any proffer should be pursuant to a written agreement.
- (c) Counsel should ensure the client understands the potential impact of cooperation on his or her sentence is dependent on the government's determination the cooperation was "substantial", based on the value, quantity, and quality of the cooperation. The client should also understand that the judge has the ultimate discretion to grant in whole, in part, or to reject, any sentence recommendation made by the government.
- (d) If a client decides to cooperate, counsel should prepare the client prior to any proffer. Unless there is a compelling reason not to do so, counsel should attend any meetings between the client and the government.
- (e) Counsel should maintain awareness of a client's continuing cooperation and should document all cooperation.
- (f) Counsel should secure a cooperation clause in a plea agreement or cooperation agreement as part of plea negotiations.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3553

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

U.S.S.G. § 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 6.4 The Decision to Enter a Plea of Guilty

- (a) Counsel should inform the client in person of any tentative negotiated agreement with the prosecution. Counsel should explain to the client the full content of the agreement, its advantages and disadvantages, and the potential consequences of the agreement.
- (b) The decision to enter a plea of guilty rests solely with the client. Counsel should not attempt to unduly influence that the client's decision.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 11, 35

U.S.S.G. § 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences

Guideline 6.5 Entry of the Plea before the Court

- (a) Prior to the entry of the plea, counsel should:
 - (1) make certain that the client understands – after an in-person discussion – the rights they will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
 - (2) make certain that the client fully and completely understands the conditions and limits of the plea agreement, the maximum punishment, and the sanctions and other consequences to which the client will be exposed by entering a plea;
 - (3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

- (b) When entering the plea, counsel should make sure the full content and conditions of the plea agreement are placed on the record before the court.
- (c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. If the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. If the client is in custody prior to the entry of the plea, counsel should, if practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3553

Fed. R. Crim. Pro. 11

Federal Judicial Center, *Benchbook for U.S. District Court Judges* (6th ed. 2013)

U.S.S.G. § 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 7.1 General Trial Preparation

- (a) The decision to proceed to trial and whether to waive a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- (b) Counsel should have the following materials available at the time of trial:
 - (1) scheduling order;
 - (2) copies of all relevant documents filed in the case;
 - (3) relevant documents prepared by investigators;
 - (4) voir dire questions for submission by the Court or, if permitted, for use by counsel;
 - (5) outline or draft 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;
 - (9) prior statements of all prosecution witnesses (e.g., transcripts, police reports);
 - (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 (*see* Guideline 7.7);
 - (15) copies of all relevant statutes and cases;
 - (16) outline or draft of closing argument;
 - (17) outline of Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29 (a).
- (c) Counsel should be fully informed as to the Rules of Evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
 - (d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
 - (e) Counsel should provide advance notice of defenses as required in Fed. R. Crim. Pro. 12.1 (Notice of an Alibi Defense), 12.2 (Notice of an Insanity Defense), and 12.3 (Notice of a Public-Authority Defense).
 - (f) Counsel should consider conducting a mock jury simulation.
 - (g) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request that all trial proceedings be recorded, including voir dire, bench and chambers conferences, jury instruction conferences, the jury instructions read to the jury, and the verdict.
 - (h) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing, and provide appropriate clothing. Counsel should mitigate the impact of the client's custodial status.
 - (i) Counsel should plan the most convenient system for conferring with the client throughout the trial. Counsel should consider seeking a court order to have the client available for conferences to ensure a meaningful opportunity for effective communication. If the client suffers from physical, mental, or emotional conditions impairing his or her ability to concentrate, counsel should request an amendment to the trial schedule to accommodate the client's legitimate needs.
 - (j) Counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 12.1 Notice of Alibi Defense

Fed. R. Crim. Pro. 12.2 Notice of Insanity Defense

Fed. R. Crim. Pro. 12.3 Notice of Public-Authority Defense

Fed. R. Crim. Pro. 23 Jury or Nonjury Trial

Fed. R. Crim. Pro. 29 Motion for a Judgment of Acquittal

Fed. R. Crim. Pro. 51 (a) Preserving a Claim of Error

ABA Standards 4-4.3, Relationship with Witnesses; 4-4.4, Relationship with Expert Witnesses; 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-7.1, Scheduling Court Hearings; 4-7.2 Civility with Courts, Prosecutors, and others

Guideline 7.2 Voir Dire and Jury Selection

(a) Preparation

- (1) Counsel should be familiar with the venire selection procedures in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
- (2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.
- (3) Counsel should be familiar with the court's orientation process for jurors and consider attending the judge's instructions to the venire.
- (4) Prior to jury selection, counsel should seek to obtain a prospective juror list and any questionnaires and determine juror suitability.
- (5) Counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - (A) to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
 - (B) to convey to the panel certain legal principles which are critical to the defense case;
 - (C) to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - (D) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

- (E) to establish a relationship with the jury, if voir dire is conducted by an attorney.
- (6) Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
- (7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
- (8) Counsel should consider whether to seek expert assistance in the jury selection process.
- (9) Counsel should consider whether the use of juror questionnaire, distributed to the venire panel, would facilitate an initial screening of the jury pool, streamline individual voir dire, or serve a specific case-related purpose. If so, counsel should submit a proposed questionnaire for the Court's consideration. If counsel's request is denied, the issue should be preserved for review on appeal through an appropriate record.

(b) Examining the Prospective Jurors

- (1) Counsel should consider seeking permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.
- (2) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.
- (3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the voir dire as to those sensitive questions.
- (4) In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.
- (5) The jury should be instructed and questioned about implicit bias.

(c) Challenges

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

Related Statutes, Standards, and Federal Rules:

28 U.S.C. § 1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro. 23, 24

ABA Principles for Juries and Jury Trials

ABA Standards 4-7.3, Selection of Jurors; 4-7.4, Relationship with Jurors

Batson v. Kentucky, 476 U.S. 79 (1986)

Guideline 7.3 Opening Statement

- (a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- (b) Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
- (c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.
- (d) Counsel's objective in making an opening statement may include the following:
 - (1) to provide an overview of the defense case;
 - (2) to identify the weaknesses of the prosecution's case;
 - (3) to emphasize the prosecution's burden of proof;
 - (4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;
 - (5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - (6) to clarify the jurors' responsibilities;
 - (7) to state the inferences counsel wishes the jury to draw.
- (e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
- (f) If the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
 - (1) the significance of the prosecutor's error;
 - (2) the possibility that an objection might enhance the significance of the information in the jury's mind;
 - (3) whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Related Statutes, Standards, and Federal Rules:

ABA Standard 4-7.5, Opening Statement at Trial; 4-7.9, Facts Outside the Record

Guideline 7.4 Confronting the Prosecution's Case

- (a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
- (b) Counsel should be aware of each of the specific elements that the government must prove beyond a reasonable doubt.
- (c) In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- (d) In preparing for cross-examination, counsel should:
 - (1) maintain a consistent focus on the theory of the defense and closing argument when deciding the need to cross-examine a witness;
 - (2) consider whether cross-examination of each individual witness is likely to generate helpful information;
 - (3) anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
 - (4) consider a cross-examination plan for each of the anticipated witnesses;
 - (5) be alert to inconsistencies in a witness's testimony;
 - (6) be alert to possible variations in a witness's testimony;
 - (7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - (8) review relevant statutes and local law enforcement regulations for possible use in cross-examining law enforcement witnesses;
 - (9) be alert to issues relating to witness credibility, including bias and motive for testifying.
- (e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses, including expert, who may not be competent to give particular testimony. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

- (f) Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.
- (g) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Related Statutes, Standards, and Federal Rules:

Jencks Act, 18 U.S.C. § 3500

Federal Rules of Evidence

Fed. R. Crim. Pro. 26.2, 26.3, 29

ABA Standard 4-7.7, Examination of Witnesses in Court

Guideline 7.5 Presenting the Defense Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
- (c) Counsel should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should:
 - (1) develop a plan for direct examination of each potential defense witness;
 - (2) determine the implications that the order of witnesses may have on the defense case;
 - (3) consider the possible use of character witnesses;

- (4) consider the need for expert witnesses.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should be familiar with the parameters of redirect examination and conduct redirect as appropriate.
- (h) At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

Related Statutes, Standards, and Federal Rules:

Federal Rules of Evidence

ABA Standard 4-7.6, Presentation of Evidence

Guideline 7.6 Closing Argument

- (a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- (b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- (c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - (1) highlighting weaknesses in the prosecution's case;
 - (2) describing favorable inferences to be drawn from the evidence;
 - (3) incorporating into the argument.
 - (A) helpful testimony from direct and cross-examinations;
 - (B) verbatim instructions drawn from the jury charge;

- (C) responses to anticipated prosecution arguments;
- (4) the effects of the defense argument on the prosecutor's rebuttal argument.
- (d) If the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 - (1) whether counsel believes that the case will result in a favorable verdict for the client;
 - (2) the need to preserve the objection for a double jeopardy motion;
 - (3) the possibility that an objection might enhance the significance of the information in the jury's mind.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 29.1, 30(b)

ABA Standard 4-7.8, Closing Argument to the Trier of Fact; 4-7.9, Facts Outside the Record

Guideline 7.7 Jury Instructions

- (a) Counsel should be familiar with the local rules and the individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- (b) Counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. If at all possible, counsel should provide case law in support of the proposed instructions.
- (c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- (d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.
- (e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if

necessary, request additional or curative instructions.

- (f) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request the judge disclose the proposed supplemental charge to counsel before it is delivered to the jury and afford counsel the opportunity to object and make a record on the instruction.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 30

ABA Standard 4-1.5, Preserving the Record

Guideline 8.1 Obligations of Counsel in Sentencing

- (a) Among counsel's obligations in the sentencing process are:
 - (1) to be aware of the pertinent advisory sentencing guidelines and relevant sentencing factors pursuant to 18 U.S.C. § 3553(a);
 - (2) if the client pleads guilty, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
 - (3) 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;
 - (4) to ensure all reasonably available mitigating and favorable information, likely to benefit the client, is presented to the court;
 - (5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report.
 - (6) to consider the need for sentencing mitigation experts, and to seek the assistance of such specialists when warranted.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3551 et. seq. General Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; § 3581 et. seq. Imprisonment; § 3361 et. seq. Miscellaneous Sentencing Provisions

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, <http://www.usc.gov/guidelines-manual/guidelines-manual>

ABA Standard 4-1.3(f) Continuing Duties of Defense Counsel; 4-6.3 Plea Agreements and Other Negotiated Dispositions; 4-6.4(b), Opposing Waivers of Rights in Disposition Agreements; 4-8.3 Sentencing

Williams v. Taylor, 529 U.S. 362 (2000)

United States v. Mellies, 496 F. Supp. 2d 930 (M.D. Tenn., 2007) (bond pending sentencing for exceptional circumstances)

United States v. Christman, 596 F.3d 870 (2010) (same)

BOP Program Statements

Guideline 8.2 Sentencing Options, Consequences and Procedures

- (a) Counsel should be familiar with the sentencing provisions and options applicable to the case, including, but not limited to:
 - (1) the advisory United States Sentencing Guideline calculation, including grounds for departures and variances;
 - (2) deferred sentence, judgment without a finding, and diversionary programs (including pretrial diversion);
 - (3) supervised release and required and permissible conditions of supervised release;
 - (4) availability of probationary sentences and required and permissible conditions of probation;
 - (5) restitution;
 - (6) fines;
 - (7) court costs;
 - (8) imprisonment including any mandatory minimum requirements;
 - (9) facilities appropriate to address the client's mental, physical, or emotional conditions; and
 - (10) forfeiture.

- (b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
- (1) credit for pre-trial detention;
 - (2) possibility of concurrent or consecutive sentence with any undischarged or unimposed state sentence and an understanding of primary and secondary custody;
 - (3) availability and effect of good-time and earned-time credits on the client's release date;
 - (4) place of confinement and level of security and classification;
 - (5) need for judicial recommendation for designation and/or program participation;
 - (6) self-surrender to place of custody;
 - (7) eligibility for correctional programs and furloughs;
 - (8) available drug rehabilitation programs, psychiatric treatment, and health care;
 - (9) consequences of criminal conviction for non-citizen clients including possibility of deportation;
 - (10) use of the conviction for sentence enhancement in future proceedings;
 - (11) loss of civil rights and possible restoration of the rights;
 - (12) impact of a fine or restitution and any resulting civil liability;
 - (13) restrictions on or loss of license;
 - (14) need to register as a state or federal sex offender; and
 - (15) consequences of violating probation or supervised release, including modifications and revocations.

- (c) Counsel should be familiar with the sentencing procedures, including:
- (1) the impact and limitations of the plea-bargaining process on the court and the sentencing guideline system;
 - (2) the practices of the officials who prepare the presentence report and the defendant's rights in that process;
 - (3) the access to the presentence report by counsel and the defendant;
 - (4) the prosecution's practice in preparing a memorandum on punishment;
 - (5) the use of a sentencing memorandum by the defense;
 - (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 of evidence 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.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3551 et. seq. Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; § 3581 et. seq. Imprisonment; § 3361 et. seq. Miscellaneous Sentencing Provisions; § 3771 et seq. Crime Victims' Rights

Victim and Witness Protection Act

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, <http://www.ussc.gov/guidelines-manual/guidelines-manual>

ABA Standard 4-6.3 Plea Agreements and Other Negotiated Dispositions; 4-6.4(b), Opposing Waivers of Rights in Disposition Agreements; 4-8.3 Sentencing

Padilla v. Kentucky, 559 U.S. 356 (2010)

Guideline 8.3 Preparation for Sentencing

- (a) In preparing for sentencing, counsel should consider the need to:

- (1) prepare the client to be interviewed by the official preparing the presentence report and be present with the client during the interview;
- (2) inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
- (3) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
- (4) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
- (5) ensure the client has adequate time to examine the presentence report;
- (6) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
- (7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
- (8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
- (9) collect documents and affidavits to support the defense position and prepare witnesses to testify at the sentencing hearing; if required by local rule, counsel should preserve the client's opportunity to present tangible and testimonial evidence;
- (10) inform the client of the consequences of any waivers contained in the plea agreement that may restrict appeals, collateral relief, or requests for relief based on developments in the law or revisions to sentencing procedures.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3143(a), Release Pending Sentencing

18 U.S.C. § 3551 et. seq. General Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; § 3581 et. seq. Imprisonment; § 3361 et. seq. Miscellaneous Sentencing Provisions; § 3771 et seq. Crime Victims' Rights

Fed. R. Crim. Pro 32

ABA Standard 4-5.2(b) Control and Direction of the Case, 4-8.2 Reassessment of Options After Trial; 4-8.3 Sentencing

Taylor v. United States, 495 U.S. 575 (1990)

Apprendi v. New Jersey, 530 US 466 (2000)

Blakely v. Washington, 542 US 296 (2004)

Shepard v. United States, 544 U.S. 13 (2005)

United States v. Booker, 543 US 220 (2005)

Rita v. United States, 551 U.S. 338 (2007)

Gall v. United States, 552 U.S. 38 (2007)

Kimbrough v. United States, 552 U.S. 85 (2007)

Begay v. United States, 553 U.S. 137 (2008)

Chambers v. United States, 555 U.S. 122 (2009)

United States v. Ford, 560 F.3d 420 (6th Cir. 2009)

Spears v. United States, 555 U.S. 261 (2009)

Pepper v. United States, 562 U.S. 476 (2011)

Descamps v. United States, 570 U.S. 254 (2013)

Alleyne v. United States, 570 U.S. 99 (2013)

Paroline v. United States, 572 U.S. 434 (2014)

Johnson v. United States, 576 U.S. 591 (2015)

Welch v. United States, 578 U.S. 120 (2016)

Molina-Martinez v. United States, 578 U.S. 189 (2016)

Mathis v. United States, 579 U.S. 500 (2016)

Beckles v. United States, 580 U.S. 256 (2017)

Dean v. United States, 581 U.S. 62 (2017)

Honeycutt v. United States, 581 U.S. 443 (2017)

Sessions v. Dimaya, 138 S. Ct. 1204 (2018)

United States v. Davis, 139 S. Ct. 2319 (2019)

Borden v. United States, 141 S. Ct. 1817 (2021)

Terry v. United States, 141 S. Ct. 1858 (2021)

Wooden v. United States, 142 S. Ct. 1063 (2022)

United States v. Taylor, 142 S. Ct. 2015 (2022)

Guideline 8.4 The Official Presentence Report

- (a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:
 - (1) be present for the interview and provide relevant information favorable to the client, including, the client's version of the offense or preserve the client's Fifth Amendment rights;
 - (2) review the completed report and then review the report with the client;
 - (3) take appropriate steps to ensure that erroneous or misleading information is deleted from the report;
 - (4) take steps to preserve all appropriate defense challenges and objections to the factual accuracy of the presentence report and the manner in which sentence was imposed including:
 - (A) the court's refusal to hold a hearing on a disputed allegation adverse to the defendant;
 - (B) the prosecution's failure to prove an allegation or abide by the terms of the plea agreement;

- (C) the court's abuse of discretion in finding as fact an allegation not proven.
- (5) Counsel should request that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to the United States Bureau of Prisons.
- (6) Counsel should request permission to see final copies of the report to be distributed to be sure the disputed information has been removed from all portions of the report.
- (7) Be familiar with how the Bureau of Prisons will use the information contained in the report.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3552, 3153(c)(2)(c)

Fed. R. Crim. Pro. 32(c)-(f)

ABA Standard 4-8.3, Sentencing

Guideline 8.5 The Prosecution's Sentencing Position

- (a) Counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed.
- (b) Counsel should attempt to determine whether the Office of Probation and Pretrial Services will advocate for a particular type or length of sentence.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 32(d)-(h)

ABA Standard 4-8.3, Sentencing

Guideline 8.6 The Defense Sentencing Memorandum

- (a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Know when the court requires the filing of a memorandum. The memorandum should be submitted to the court with adequate time for the court to review the memorandum prior to the sentencing hearing. Among the topics counsel may wish to include in the memorandum are:
 - (1) challenges to incorrect or incomplete information and sentencing guidelines calculations in the official presentence report and any prosecution sentencing memorandum;

- (2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;
- (3) information contrary to that before the court which is supported by affidavits, letters, and public records;
- (4) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;
- (5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
- (6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;
- (7) presentation of a sentencing proposal;
- (8) facts and law supporting grounds for downward departures and/or variances.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3553(a)

Fed. R. Crim. Pro. 32

ABA Standard 4-8.3, Sentencing

Caselaw compiled in Guideline 8.3 above

Guideline 8.7 The Sentencing Process

- (a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- (b) Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
- (c) In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. If a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading

information unfavorable to the defendant.

- (d) Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- (e) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, the client's need for treatment for physical, mental, emotional conditions, or substance abuse, and permission for the client to self-surrender directly to the place of confinement.
- (f) Counsel should prepare the client to personally address the court;
- (g) Make appropriate objections to preserve sentencing issues for appeal

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3551 et. seq. General Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; § 3581 et. seq. Imprisonment; § 3361 et. seq. Miscellaneous Sentencing Provisions; § 3771 et seq. Crime Victims' Rights

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, <http://www.ussc.gov/guidelines-manual/guidelines-manual>

ABA Standard 4-8.3, Sentencing

United States v. Bostic, 371 F.3d 865 (6th Cir. 2004).

Guideline 8.8 Self-Surrender

Where a client on bond receives a custodial sentence, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3143(b), 3146

Fed. R. Crim. Pro. 34

Guideline 9.1 Motion for a New Trial

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

- (b) When a judgment of guilt has been entered against the client after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
- (1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;
 - (2) A motion for new trial is neither a jurisdictional nor a procedural prerequisite to a direct appeal of a conviction or an order disposing of a post-conviction pleading in federal court. It is not necessary to preserve a client's right to appeal. Filing such a motion may have the effect of tolling the deadline for filing a notice of appeal.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 33, 34, 35, 58(f)

ABA Standard 4-8.1, Post-Trial Motions

Guideline 9.2 Right to Appeal

- (a) Counsel should inform the client of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. Counsel appointed under the Criminal Justice Act must file a notice of appeal if the client indicates a desire to appeal. Counsel must perfect the record on appeal for the client, including obtaining any necessary transcripts at public expense. In the event a plea agreement contains a waiver of the client's right to appeal or to collaterally challenge the conviction or sentence, counsel is still obligated to file a notice of appeal, perfect the appeal, and file a brief if directed to do so. Counsel should consult the Circuit's rules to determine whether notice of the appeal waiver must be provided by counsel for the client and if so advise the client of that fact.
- (b) If counsel requests leave to withdraw at the Circuit, counsel must request the appointment of substitute counsel or must advise the Circuit if the client is asserting his or her right to proceed in pro se. Unless permitted to withdraw, counsel must submit a brief on all arguable issues. If counsel believes the appeal is meritless, counsel must determine the Circuit's requirements regarding the filing of a brief in conformity with *Anders v. California*, 386 U.S. 738 (1967). The decision to file an *Anders* brief should not be taken lightly and should be made only after a thorough consideration of all potential issues. Regardless of whether a merits or *Anders* brief is filed, counsel is obligated to act as an advocate for the client.
- (c) If the appeal is decided adversely to the client, counsel must inform the client of his or her rights to petition for rehearing and/or rehearing en banc and the applicable time limits. Counsel must advise the client of the standards governing each petition and must

advise the client if there are any grounds on which to base such a petition. *See* Federal Rules of Appellate Procedure and local rules for the circuit.

(d) Counsel must advise the client of his or her right to petition the United States Supreme Court for review through a petition for writ of certiorari and the time limit for the petition. Counsel should be aware of district or circuit rules governing the obligation to file. If counsel was allowed to withdraw based on the Circuit's determination the appeal was meritless, counsel should advise the client of his or her right to petition the Supreme Court for certiorari, the time limit for the filing of the petition, and provide any documents or information requested to assist the client in submitting the petition.

(e) If allowed to withdraw from the appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. § 1291; 18 U.S.C. §§ 3557, 3742

Fed. R. Crim. Pro. 32(j), 58(g)

Fed. R. App. Pro. 3, 4(b)

ABA Standard 4-9.1, Preparing to Appeal; 4-9.2, Counsel on Appeal; 4-9.3, Conduct of Appeal

Evitts v. Lucey, 469 U.S. 387 (1985)

Guideline 9.3 Bail Pending Appeal

If the client indicates a desire to appeal the judgment and/or sentence of the court, counsel should advise the client of the applicable standards for obtaining release pending appeal. *See* 18 U.S.C. § 3143(b).

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§3141(b), 3143(b)

Fed. R. Crim. Pro. 38

ABA Standard 4-8.2, Reassessment of Options After Trial

Carbo v. United States, 82 S. Ct. 662 (1962)

United States v. DiSomma, 951 F.2d 494 (2d Cir. 1991)

United States v. Goforth, 546 F.3d 712 4th Cir. 2008)

United States v. Roth, 642 F. Supp. 2d 796 (E.D. Tenn. 2009)

United States v. Williams, 903 F. Supp. 2d 292 (M.D. Pa. 2012)

United States v. DiMattina, 885 F. Supp. 2d 572 (E.D.N.Y. 2012)