

The National Legal Aid & Defender Association (NLADA) is a private, non profit, national membership organization dedicated to the provision of quality legal services for poor people. NLADA, along with other organizations and individuals, has recognized that poor defendants in this country who face the ultimate criminal sanction — death — frequently do not receive adequate representation from their government-supplied lawyers.

Capital defendants eligible for the appointment of counsel are often provided the services of attorneys who are inexperienced or otherwise unqualified to handle the high-stakes, complex litigation involved in a death penalty case. Attorneys who do have adequate experience and personal skills are often not provided the resources to adequately assist their clients.

These Standards constitute an attempt to improve the quality of representation afforded to poor defendants charged with capital offenses. Some national standards have been written for appointment of counsel for eligible defendants generally, general standards for defense counsel have been established, and specific *Performance Guidelines for Criminal Defense Representation* exist in draft form. While some local standards may exist for capital representation, national standards on the assignment and performance of counsel in capital cases did not exist prior to these Standards.

Each of these Standards is followed by a commentary which sets out the rationale for the Standard. Primary and secondary authorities are included. "Should" is used as a mandatory term — what counsel "should" do is intended as a standard to be met now, not an ideal to be attained at a later time.

### **Standard 1.1 Objective**

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

### **Standard 2.1 Number of Attorneys Per Case**

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified post conviction attorneys should be assigned to represent the defendant.

### **Standard 3.1 The Legal Representation Plan**

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Standards. This Standard envisions two equally acceptable approaches for formalizing the process of appointment:

(a) The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt Standards and procedures for the appointment of counsel in capital cases consistent with these Standards, and perform all duties in connection with the appointment process as set forth in these Standards.

(b) In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

- (i) are members of the bar admitted to practice in the jurisdiction;
- (ii) have practiced law in the field of criminal defense for not less than five years;
- (iii) have demonstrated knowledge of the specialized nature of practice involved in capital cases;
- (iv) are knowledgeable about criminal defense practitioners in the jurisdiction; and
- (v) are dedicated to quality legal representation in capital cases.

The committee should adopt Standards and procedures for the appointment of counsel in capital cases, consistent with these Standards, and perform all duties in connection with the appointment process.

### **Standard 4.1 Selection of Counsel**

(a) The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

(b) The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or post conviction pursuant to the qualification requirements specified in Standard 5.1; the second roster should contain the names of attorneys eligible for appointment as co-counsel for trial, appeal or post conviction pursuant to the qualification requirements specified in the same Standard.

(c) The appointing authority should review applications from attorneys concerning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorney's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Standard 5.1 and the performance Standards established pursuant to Standards 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

(d) Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

(e) In jurisdictions where a defender office or other entity by law receives a specific portion of all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflict of interest or other reasons.

### **Standard 5.1 Attorney Eligibility**

The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

#### **I. TRIAL**

##### **A. Lead trial counsel assignments should be distributed to attorneys who:**

- (i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (ii) are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and
- (iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and
- (iv) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
- (v) are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
- (vi) have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and
- (vi) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

##### **B. Trial co-counsel assignments should be distributed to attorneys who:**

- (i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (ii) who qualify as lead counsel under paragraph A of this Standard or meet the following requirements:
  - (a) are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
  - (b) have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

- (c) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
- (d) have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and
- (e) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capital charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- (i) Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;
- (ii) Specialized post-graduate training in the defense of persons accused of capital crimes;
- (iii) The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3. 1) to ensure that they will provide competent representation.

## II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

- (i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (ii) are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and
- (iii) have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and
- (iv) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
- (v) have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and
- (vi) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, assistant appellate attorney candidates must demonstrate to the satisfaction of the appointing authority that they:

- (i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (ii) have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and
- (iii) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
- (iv) have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capital charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- (i) Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;
- (ii) Specialized post-graduate training in the defense of persons accused of capital crimes;
- (iii) The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation..

### III. POST CONVICTION

Assignments to represent indigents in post conviction proceedings in capital cases should be distributed to attorneys who:

- (i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (ii) are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
- (iii) have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as post conviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and
- (iv) are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and
- (v) have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the post conviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and
- (vi) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two post conviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or post conviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capital charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- (i) Experience in trial, appeal and/or post conviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;
- (ii) Specialized post-graduate training in the defense of persons accused of capital crimes;
- (iii) The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

### **Standard 6.1 Workload**

Attorneys accepting appointments pursuant to these Standards should provide each client with quality representation in accordance with constitutional and professional Standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

### **Standard 7.1 Monitoring; Removal**

(a) The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender office to respond in writing.

(b) In fulfilling its monitoring function, however, the appointing authority should not attempt to interfere with the conduct of particular cases. Representation of an accused establishes an inviolable attorney-client relationship. In the context of a particular case, removal of counsel from representation should not occur over the objection of the client.

(c) No attorney or defender office should be readmitted to the appointment roster after removal under (a) above unless such removal is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

### **Standard 8.1 Supporting Services**

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Standards with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.

### **Standard 9.1 Training**

Attorneys seeking eligibility to receive appointments, pursuant to these Standards should have completed the training requirements specified in Standard 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

### **Standard 10.1 Compensation**

(a) Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

(b) Capital counsel should also be fully reimbursed for reasonable incidental expenses.

(c) Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

### **Standard 11.1 Establishment of Performance Standards**

(a) The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

(b) The Standards of performance should include, but should not be limited to the specific Standards set out in Standards 11.3 through 11.9.

(c) The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

### **Standard 11.2 Minimum Standards Not Sufficient**

(a) Minimum Standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such Standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

(b) Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

### **Standard 11.3 Determining that the Death Penalty is Being Sought**

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

## Standard 11.4.1 Investigation

(a) Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

(b) The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

(c) The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

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

(1) Charging documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

- (A) the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
- (B) the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
- (C) any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

(2) An in-depth interview of the client should be conducted within 24 hours of counsel's entry into the case unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

- (A) seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;
- (B) explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;
- (C) collect information relevant to the sentencing phase of trial including, but not limited to: medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct all supervision and in the institution, education or training, and clinical services); and religious and cultural influences.
- (D) seek necessary releases for securing confidential records relating to any of the relevant histories.
- (E) obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

(3) Potential witnesses:

Counsel should consider interviewing potential witnesses, including:

- (A) eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
- (B) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;
- (C) members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

(4) The police and prosecution:

Counsel should make efforts to secure information in the possession of the prosecution of law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) Physical evidence:

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

(6) The scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g. weather, time of day, and lighting conditions).

(7) Expert assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

- (A) preparation of the defense;
- (B) adequate understanding of the prosecution's case;
- (C) rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;
- (D) Presentation of mitigation.

Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

### **Standard 11.4.2 Client Contact**

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

### **Standard 11.5.1 The Decision to File Pretrial Motions**

(a) Counsel should consider filing a pretrial motion wherever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

(b) Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and post conviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial motion are:

- (1) the pretrial custody of the accused;
- (2) the constitutionality of the implicated statute or statutes;
- (3) the potential defects in the charging process;
- (4) the sufficiency of the charging document;
- (5) the propriety and prejudice of any joinder of charges or defendants in the charging document;
- (6) the discovery obligations of the prosecution including disclosure of aggravating factors to be used in seeking the death penalty, and any 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, including:
  - (A) the fruits of illegal searches or seizures;
  - (B) involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
  - (C) unreliable identification testimony which would give rise to a substantial likelihood of irreparable misidentification;

- (8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
- (9) access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
- (10) the defendant's right to a speedy trial;
- (11) the defendant's right to a continuance in order to adequately prepare his or her case;
- (12) matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion *in limine*, including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
- (13) matters of trial or courtroom procedure;
- (14) change of venue;
- (15) abuse of prosecutorial discretion in seeking the death penalty;
- (16) challenges to the process of establishing the jury venire.

### **Standard 11.6.1 The Plea Negotiations Process**

(a) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and or factual considerations that bear on the potential results of going to trial.

(b) Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

(c) Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

(d) Counsel should not accept any plea agreement without the client's express authorization.

(e) The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate.

### **Standard 11.6.2 The Contents of Plea 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 penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
- (2) where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
- (3) the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

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

- (1) concessions that the client might offer, such as:
  - (a) an agreement not to proceed to trial on the merits of the charges;
  - (b) an agreement not to assert or further litigate particular legal issues;
  - (c) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
  - (d) an agreement to engage in or refrain from any other conduct, appropriate to the case.
- (2) benefits the client might obtain from a negotiated settlement, including *inter alia*:
  - (a) a guarantee that the death penalty will not be imposed;
  - (b) an agreement that the defendant will receive, with the assent of the court, a specified sentence;



- (c) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - (d) an agreement that one or more of multiple charges will be reduced or dismissed;
  - (e) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
  - (f) an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.
- (c) In conducting plea negotiations, counsel should be familiar with:
- (1) the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt;
  - (2) the advantages and disadvantages of each available plea according to the circumstances of the case;
  - (3) whether a plea agreement can be made binding on the court and on penal/parole authorities.
- (d) In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

### **Standard 11.6.3 The Decision to Enter a Plea of Guilty**

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

(b) The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

### **Standard 11.6.4 Entry of the Plea Before the Court**

(a) Prior to the entry of the plea, counsel should:

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

(b) During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

### **Standard 11.7.1 General Trial Preparation**

(a) As the investigations mandated by Standard 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

(b) If inconsistencies between guilt/innocence and penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics.

### **Standard 11.7.2 Voir dire and Jury Selection**

(a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

(b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

### **Standard 11.7.3 Objection to Error and Preservation of Issues for Post Judgment Review**

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review.

### **Standard 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases**

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

### **Standard 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures**

(a) Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the caselaw and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

(b) If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Standards 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.

(c) Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.

(d) Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

(e) Counsel should develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained.

### **Standard 11.8.3 Preparation for the Sentencing Phase**

(a) As set out in Standard 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

(b) Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

(c) Prior to the sentencing phase, counsel should discuss with the client specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

(d) If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

(e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

(f) In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

- (1) Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;
- (2) Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;
- (3) Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;
- (4) Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

#### **Standard 11.8.4 The Official Presentence Report**

(a) If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:

- (1) The strategic implications of requesting that an optional report be prepared;
- (2) The value of providing to the report preparer information favorable to the client.

(b) Counsel should consider whether the client should speak with the person preparing report and, if so, whether counsel should be present.

(c) Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

(d) Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

#### **Standard 11.8.5 The Prosecutor's Case at the Sentencing Phase**

(a) Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Standard 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

(b) If counsel determines that the prosecutor plans to rely on offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

#### **Standard 11.8.6 The Defense Case at the Sentencing Phase**

(a) Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

(b) Among the topics counsel should consider presenting are:

- (1) Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
- (2) Educational history (including achievement, performance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;
- (3) Military service, (including length and type of service, conduct, and special training);
- (4) Employment and training history (including skills and performance, and barriers to employability);
- (5) Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
- (6) Rehabilitative potential of the client;
- (7) Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses;
- (8) Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

(c) Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

(d) Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

#### **Standard 11.9.1 Duties of Trial Counsel in Post Judgment Proceedings**

(a) Counsel should be familiar with all state and federal post judgment options available to the client. Counsel should consider and discuss with the client the post judgment procedures that will or may follow imposition of the death sentence.

(b) Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to post judgment review of the conviction and sentence. Counsel should consider what other post judgment action, if any, counsel could take to maximize the client's opportunity to seek, appellate and post conviction relief.

(c) Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.

(d) Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

### **Standard 11.9.2 Duties of Appellate Counsel**

(a) Appellate counsel should be familiar with all state and federal appellate and post conviction options available to the client, and should consider how any tactical decision might affect later options.

(b) Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is warranted.

(c) Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.

(d) Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

(e) Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

### **Standard 11.9.3 Duties of Post Conviction Counsel**

(a) Post conviction counsel should be familiar with all state and federal post conviction remedies available to the client.

(b) Post conviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case relating to both the guilt/innocence and sentencing phases. Post conviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, post conviction counsel should obtain and review all prior counsels' file(s).

(c) Post conviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing post conviction proceedings.

### **Standard 11.9.4 Duties of Clemency Counsel**

(a) Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

(b) Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

(c) Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

### **Standard 11.9.5 Duties Common to All Post Judgment Counsel**

(a) Counsel representing a capital client at any point after imposition of the death sentence should be familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

(b) Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

(c) Counsel should continually monitor the client's mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.