

NOTICE OF INTENT

Office of the Governor
Louisiana Public Defender Board

Performance Standards for Criminal Defense Representation in Indigent Capital Cases (LAC 22:XV.19)

The Public Defender Board, a state agency within the Office of the Governor, proposes to adopt LAC 22:XV.Chapter 19, as authorized by R.S. 15:148. These proposed Rules are promulgated in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950, et seq. The purpose of these Rules is to establish policies and procedures to ensure that public defenders, assistant public defenders, and assigned counsel perform to a high standard of representation and to promote professionalism in the representation of indigent capital defendants.

R.S. 15:148 directs the Louisiana Public Defender Board to adopt rules to: 1) create mandatory statewide public defender standards and guidelines that require public defender services to be provided in a manner that is uniformly fair and consistent throughout the state.; and 2) create separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board. In compliance with the directives of R.S. 15:148, the Public Defender Board proposes to adopt these performance standards for attorneys representing indigent capital defendants.

Title 22 CORRECTIONS, CRIMINAL JUSTICE AND LAW ENFORCEMENT

Part XV. Public Defender Board

Chapter 19. Performance Standards for Criminal Defense Representation in Indigent Capital Cases §1901. Purpose, Findings and Intentions

A. The standards for attorneys representing indigent defendants in capital cases are intended to serve several purposes. First and foremost, the standards are intended to encourage public defenders, assistant public defenders, and assigned counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent capital defendants. These standards apply to trial level, appellate, and post-conviction representation. It is the intention of these rules to adopt and apply the standards for capital defense set out by the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, its associated Commentary, and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.

B. The standards are also intended to alert defense counsel to courses of action that are necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions that should be taken in each case to ensure that the capital client receives high quality legal representation. The standards are further intended to provide a measure by which the performance of individual attorneys and defender offices may be evaluated by case supervisors, responsible agencies and the state public defender and to assist in training and supervising attorneys. While the great majority of the requirements detailed in these standards reflect accepted minimum levels of practice in capital defense, some standards have been added to assist in the supervision, development and accountability of indigent capital defense service provision.

C. The language of these standards is general, implying flexibility of action which is appropriate to the situation. Use of judgment in deciding upon a particular course of action is reflected by the phrases "should consider" and "where appropriate". In those instances where a particular action is required in providing quality representation, the standards use the words "should" or "shall". Even where the standards use the words "should" or "shall", in certain situations the lawyers best informed professional judgment and discretion may indicate otherwise.

D. There is a limitless variety of circumstances presented by indigent capital defense and this variation in combination with changes in law and procedure requires that attorneys approach each new case with a fresh outlook. Therefore, though the standards are intended to be comprehensive, they are not exhaustive. Depending upon the type of case and the particular jurisdiction, there may well be additional actions that an attorney should take or should consider taking in order to provide zealous and effective representation. Attorneys are expected to use their individual professional judgment in representing clients. If that judgment mandates a departure from these standards, the attorney should be aware of and be able to articulate the reasons that a departure from the standards is in the client's best interests and consistent with high quality legal representation.

E. Minimum standards that have been promulgated concerning representation of defendants in non-capital cases, and the level of adherence to such standards required for non-capital cases are not sufficient for death penalty cases. Counsel in death penalty cases are 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 adequate time and resources for preparation. These Performance Standards have been adapted from the State of Louisiana Performance Standards for Criminal Defense Representation in Indigent Criminal Cases in the Trial Court, adding capital specific issues and procedures where necessary. In light of the recognition that "death is different" and

capital prosecutions necessitate heightened procedural safeguards, these standards should be interpreted in order to compel high quality legal representation.

F. In accordance with La. R.S. 15:173 the exercise of the authority to promulgate standards is not intended to create any new right, right of action, or cause of action or eliminate any right, right of action, or cause of action existing under current law. Accordingly, these standards shall not be construed to provide any criminal defendant the basis of any claim that the attorney or attorneys appointed to represent him pursuant to the Louisiana Public Defender Act of 2007 performed in an ineffective manner.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1903. General Standards for Capital Defense Counsel

A. Obligations of Defense Counsel

1. Since the death penalty differs from all other criminal penalties, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.
2. The minimum standard in a capital case is high quality representation. To provide high quality representation counsel should zealously preserve, protect, and promote the client's rights and interests, and be loyal to the client. Counsel should serve as the client's counselor and advocate with courage and devotion, free from conflicts of interest and political or judicial interference. Zealous, high quality representation is to be provided in accordance with the Louisiana Rules of Professional Conduct.
3. To ensure the preservation, protection and promotion of the client's right and interests, counsel should:
 - a. be proficient in the applicable substantive and procedural law;
 - b. acquire and maintain appropriate experience, skills and training;
 - c. devote adequate time and resources to the case
 - d. engage in the preparation necessary for high quality representation;
 - e. endeavor to establish and maintain a relationship of trust and open communication with the client;
 - f. make accommodations where necessary due to a client's special circumstances, such as incompetence, mental or physical disability/illness, language barriers, youth, cultural differences, and circumstances of incarceration
4. The primary and most fundamental obligation of a capital defense attorney to the administration of justice and as an officer of the court is to provide zealous, effective, high quality, ethical representation for his or her clients at all stages of the criminal process.
5. If personal matters make it impossible for defense counsel to fulfill the duty of zealous, high quality representation, he or she has a duty to refrain from representing the client.
6. Where counsel is unable to provide high quality representation in a particular case, counsel must promptly bring this deficiency to the attention of the capital case supervisor and the capital case coordinator or Responsible Agency. If the deficiency cannot be remedied, then counsel must bring the matter to the attention of the court and seek the relief appropriate to protect the interests of the client. Counsel may be unable to provide high quality representation due to a range of factors: lack of resources, insufficient time, excessive workload, poor health or other personal considerations, inadequate skill or experience etc.
7. Counsel assigned 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 as a non-capital one. Even if the case has not been filed as a capital case, if there exists a reasonable possibility to believe that the case could be amended to a capital charge, counsel should be guided by capital defense techniques and these standards. In considering whether there is any reason to believe that the case could be amended, counsel should have regard to the nature of the allegations, the practice of the local prosecuting agency, statements by law enforcement and prosecutors, media and public sentiment, and any political factors that may impact the charging decision.

B. Training and Experience of Capital Defense Counsel

1. In order to provide high quality legal representation, counsel should have a mastery of any substantive criminal law and laws of criminal procedure that may be relevant to counsel's representation. Counsel should also

be familiar with the prevailing customs or practices of the relevant court, and the policies and practices of the prosecuting agency.

2. In providing representation at any stage in a capital case, counsel should be familiar with all applicable areas of law relevant to capital trials, appeals, and state and federal post-conviction relief.

3. Prior to agreeing to undertake representation in a capital case, counsel should have sufficient experience or training to provide high quality representation. Counsel should not accept a capital case assignment unless he or she has been certified for the specific level of representation assigned, and has the necessary knowledge and skills to handle the particular case.

4. If after being assigned a case counsel finds that the case involves particular issues or procedures in which counsel does not have the experience or training necessary to provide high quality legal representation, counsel should acquire the necessary knowledge or skills or request resources for another attorney to provide such services.

5. In providing high quality representation, counsel should consult with and take advantage of the skills and experience of other members of the criminal defense community and certified capital defenders, in particular. Further, where considerations of timing, resources or the interests of the client make it appropriate, counsel should request assignment of an additional attorney(s). Similarly, where appropriate, counsel should request assignment of an additional attorney(s) with specialized experience or knowledge to assist directly in particular aspects of the representation.

6. Capital defense counsel should complete a comprehensive training program in the defense of capital cases as required by the Capital Guidelines. Counsel should, on an ongoing basis, attend and successfully complete specialized training programs in the defense of capital cases. In addition to specific training, counsel should stay abreast of changes and developments in the law and other matters relevant to the defense of capital cases.

7. As a component of acquiring and maintaining adequate training, counsel should consult with other attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, and other court personnel. More experienced counsel should offer to mentor less experienced attorneys.

C. Resources and Caseload

1. Counsel should not accept a capital case assignment unless he or she has available sufficient resources to offer high quality legal representation to the client in the particular matter, including adequate funding, investigative services, mitigation services, support staff, office space, equipment, and research tools.

2. If after being assigned a case counsel discovers that he or she does not have available sufficient resources, then counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. Counsel should seek necessary resources from all available sources, including litigating for those resources or for appropriate relief should the resources not be made available. Counsel should document in the file the resources he or she believes are needed and any attempts to obtain those resources. Counsel should create an adequate record in court to allow a full review of the denial of necessary resources or the failure to provide appropriate relief.

3. Counsel should maintain compliance with all applicable caseload and workload standards. When counsel's workload is such that counsel is unable to provide each client with high quality legal representation in accordance with the Capital Guidelines and these Performance Standards, counsel shall inform the case supervisor. If counsel believes the case supervisor has inadequately resolved the issue, counsel should raise the question progressively with the district and the state public defender, as appropriate. Where counsel has exhausted all avenues for reasonable resolution and the excessive workload issue has not been resolved counsel should, after providing the state public defender with reasonable notice, move to withdraw from the case or cases in which capital defense services in compliance with the Guidelines and these Performance Standards cannot be provided.

4. Counsel should never give preference to retained clients over indigent clients, or suggest that retained clients should or would receive preference.

5. Counsel representing capital clients should, due to the nature of capital cases and the necessity for time-consuming research and preparation, give priority to death penalty cases over their other caseload.

D. Professionalism

1. Counsel has an obligation to keep and maintain a thorough, organized, and current file relating to the representation of each client. Counsel's file relating to a representation includes both paper and electronic documents as well as physical objects, electronic data and audio-visual materials. Counsel's file should be maintained in a fashion that will allow counsel to provide high quality representation to the client and allow successor counsel to clearly and accurately identify the work performed, the tactical decisions made, the materials

obtained, the source from which materials and information were obtained, and the work product generated in the representation. Counsel should clearly document work performed, including analysis of file materials, in such a way that other team members and successor counsel may take advantage of the work performed and avoid unnecessary duplication of effort.

2. Counsel should act with reasonable diligence and promptness in representing the client. Counsel should be prompt for all court appearances and appointments and, in the submission of all motions, briefs, and other papers. Counsel should ensure that all court filings are proofread and edited to protect the client's rights from being forfeited due to error. Counsel should be present, alert, and focused on the client's best interests during all critical stages of the proceedings.

3. Counsel's obligation to provide high quality representation to the client continues until counsel formally withdraws, or an order relieving counsel becomes final. Unless required to do so by law or the Rules of Professional Conduct, counsel should not withdraw from a case until successor counsel has enrolled. Counsel who withdraws or is relieved should take all steps necessary to ensure that the client's rights and interests are adequately protected during any transfer of responsibility in the case. Such steps should include ensuring compliance with any filing or other deadlines in the case, and ensuring the collection or preservation of any evidence that may cease to be available if investigation were delayed.

4. All persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client, and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- a. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the representation and any litigation;
- b. promptly providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- c. sharing potential further areas of investigation and litigation with successor counsel; and
- d. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

5. Where counsel enrolls in a case in which other counsel have previously provided representation, counsel should take all steps necessary to ensure the client's rights and interests are fully protected during any transfer or reallocation of responsibility in the case. Counsel should seek to interview all persons who are or have been members of the defense team with an aim to:

- a. promptly obtaining the client's files or a copy of the files, as well as information regarding all aspects of the representation;
- b. discovering potential further areas of investigation and litigation; and
- c. facilitating cooperation from current and former defense team members in order to coordinate professionally appropriate legal strategies.

6. Current and former counsel should maintain the confidences of the client and assert all available privileges to protect the confidentiality of work product and communications with the client. Where disclosure of privileged or confidential information is strictly necessary in carrying out the representation, such disclosures should be limited to those necessary to advance the interests of the client and should be made in circumstances that limit the extent of any waiver of privilege or confidentiality.

7. Where appropriate counsel may share information with counsel for a co-defendant, and work together with counsel for a co-defendant on investigatory, preparatory and/or strategic matters, but counsel's decisions should always reflect the needs of counsel's client with special consideration for client confidentiality. Counsel should never abdicate the client's defense to a co-defendant's counsel. Counsel should maintain full control of all decisions affecting the client. Counsel should consider whether it is appropriate to enter a formal joint defense agreement with one or more co-defendants.

8. Counsel and defense team members should provide full and honest cooperation with successor counsel undertaking the investigation and preparation of a claim of ineffective assistance of counsel. In providing honest cooperation, counsel should be alert to and avoid any improper influence arising from a desire to assist the client or to protect him or herself.

9. Where counsel is the subject of a claim of ineffective assistance of counsel, he or she should not disclose any confidential or privileged information without the client's consent, unless and until a court formally determines that privilege has been waived and then only to the extent of any such waiver. The disclosure of confidential or privileged information in such circumstances should be limited to those matters necessary to respond to specific allegations by the client concerning the lawyer's representation of the client. Nothing in this Standard shall diminish the responsibility of counsel to cooperate fully with the client and successor counsel, nor limit the ability of counsel

to communicate confidential or privileged information to the client or his legal representatives within the protection of the lawyer-client relationship.

10. While ensuring compliance with the Louisiana Rules of Professional Conduct in relation to extrajudicial statements, counsel should consider the potential benefits and harm of any publicity in deciding whether or not to make a public statement and the content of any such statement. When making written or oral statements in judicial proceedings, counsel should consider the potential benefits and harm likely to arise from the public dissemination of those statements. In responding to adverse publicity, counsel should consider the interests of the client and whether a statement is required to protect the client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.

11. At each stage and subject to the circumstances of each case, counsel should be mindful of the desirability of treating any victim or other person affected by the crime alleged against the client with respect, dignity, and compassion. Counsel should avoid disparaging the victim directly or indirectly, unless necessary and appropriate in the circumstances of the particular case. Counsel should undertake victim outreach through an appropriately qualified team member, or the use of an expert in defense initiated victim outreach.

E. Conflicts of Interest

1. Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Conflicts of interest experienced by one counsel are relevant to all counsel: the existence of a conflict free lawyer on the defense team does not ameliorate the potential harm caused by a conflict affecting another lawyer on the team. Counsel should have a procedure for identifying conflicts when receiving new assignments and reviewing existing cases for conflicts where there is a relevant change in circumstances. At a minimum, counsel should maintain a conflict index containing the names of current and former clients which should be checked against the name of the client and, where known, the name of the victim(s), the name of any co-defendant(s), and the names of any important witnesses.

2. Where a capital case involves multiple defendants, a conflict will be presumed between the defendants and separate representation will be required. However, there are many other situations in which conflicts can arise. In addition to the current or prior representation of co-defendants or witnesses, conflicts can arise, for example, when a capital defense lawyer: is subject to investigation or criminal prosecution by state or federal authorities; is representing or has represented a witness or victim; is seeking employment with prosecuting agencies; has a financial, political or personal interest in the proceedings; has an excessive workload; or, is related to a victim or the judge. Disclosure of potential conflicts should be made under any of these circumstances and counsel should err in favor of disclosure of any other potential conflicts.

3. Conflicts of interest should be promptly resolved in a manner that advances the interests of the client and complies with the Louisiana Rules of Professional Conduct.

4. If a conflict develops during the course of representation, counsel has a duty to notify the client and, where required, the court in accordance with the rules of the court and the Louisiana Rules of Professional Conduct. Defense counsel should fully disclose to the client, at the earliest feasible opportunity, any interest in or connection with the case or any other matter that might be relevant to counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

5. Where the client files a motion, complaint, or grievance against counsel in regard to the quality of his or her representation, counsel should notify the Case Supervisor and the agency responsible for the assignment of counsel to the case.

6. Any waiver of conflict that is obtained should comply with the requirements of the Louisiana Rules of Professional Conduct, and should be obtained only after the client has been told: that a conflict of interest exists; the consequences to his defense from continuing with conflict-laden counsel; and that he has a right to obtain other counsel. In a capital case, any waiver of conflict should be obtained through and after consultation by the client with independent counsel. In order to allow the monitoring of the procedure of obtaining of a waiver, the Capital Case Coordinator should be advised prior to obtaining a conflict waiver from an indigent capital defendant and should approve or provide for the assignment of independent counsel.

F. Allocation of Authority between Counsel and Client

1. The allocation of authority between counsel and the client shall be managed in accordance with Louisiana's Rules of Professional Conduct, having particular regard to Rules 1.2, 1.4, 1.14 and 1.16.

2. Counsel serves as the representative of the client and shall abide by the client's decisions regarding the objectives of the representation. However, counsel shall provide the client with his or her professional opinions with regard to the objectives of the representation. In counseling the client, counsel shall refer not only to the law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's

situation. Counsel may enlist the assistance of others to assist in ensuring that the client is able to make informed decisions. Counsel shall reasonably consult with the client about the means by which the client's objectives are to be accomplished and may take such action as is impliedly authorized by the representation.

3. The attorney shall explain to the client those decisions that ultimately rest with the client and the advantages and disadvantages inherent in these choices. Counsel shall abide by the client's decision, made after meaningful consultation with counsel, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to appeal. However, counsel shall not abide by such a decision where the client is incompetent, including where the client is, in the circumstances, incapable of making a rational choice not substantially affected by mental disease, disorder or defect. In such circumstances, counsel should take the steps described in these standards relating to the representation of persons with diminished capacity and the raising of the client's incompetence.

4. Strategic and tactical decisions should be made by counsel after consultation with the client where feasible and appropriate. When feasible and appropriate, counsel and other team members should seek the client's input regarding decisions to be made in the case. Counsel should candidly advise the client regarding the probable success and consequences of adopting any particular posture in the proceedings, and provide the client with all information necessary to make informed decisions. Counsel should provide the client with his or her professional opinion on what course to adopt whenever possible. In order to ensure that consultation with the client is meaningful, counsel should make accommodations where necessary due to a client's special circumstances, such as incompetence, mental or physical disability/illness, language barriers, youth, cultural differences, and circumstances of incarceration.

5. While counsel is ordinarily responsible for determining the means by which the objectives of representation are to be accomplished, where the client revokes counsel's express or implied authority to take a particular course of action, counsel may not act as the agent of the client without that authority. This will not prevent counsel from taking professionally responsible steps required by these Standards but counsel must not purport to be speaking on behalf of or otherwise acting as the agent of the client.

6. Counsel shall not take action he or she knows is inconsistent with the client's objectives of the representation. Counsel may not concede the client's guilt of the offense charged or a lesser included offense without first obtaining the consent of the client.

7. Where counsel and the client disagree as to the means by which the objectives of the representation are to be achieved counsel should consult with the client and seek a mutually agreeable resolution of the dispute. Counsel should consult with the case supervisor and utilize other defense team members in his or her efforts to resolve a dispute.

8. Where the client seeks to discharge counsel, every reasonable effort should be made to address the client's grievance with counsel and avoid discharge. Counsel should caution the client as to the possible negative consequences of discharging or attempting to discharge counsel and the likely result if any such attempt. Should the client persist with his desire to discharge counsel, the case supervisor and responsible agency should be immediately informed and counsel may request a substitution of counsel by the responsible agency. Counsel must move to withdraw when actually discharged by the client.

9. Where the client insists upon taking action with which the counsel has a fundamental disagreement or the representation has been rendered unreasonably difficult by the client, counsel shall advise the case supervisor and may request a substitution of counsel by the responsible agency. Where a substitution of counsel is not permitted, counsel may move to withdraw from the representation only with the prior consent of the responsible agency.

10. Any withdrawal of counsel, including a substitution of counsel, should occur with the leave of the court. Should the court refuse counsel leave to withdraw, then counsel should continue to represent the defendant.

11. Where counsel or a client make a reasonable request for substitution of counsel, the district defender or state public defender, as appropriate, shall take all reasonable steps to substitute counsel. Where substitution of counsel is not possible, every effort should be made to avoid the withdrawal or discharge of counsel, including the assignment of additional counsel, consultation with persons experienced in resolving such disputes and providing counsel access to expert advice and training designed to assist in resolving the dispute.

12. A client's capacity to make adequately considered decisions in connection with the representation may be diminished, whether because of mental impairment or for some other reason. Where counsel reasonably believes that the client has diminished capacity, he or she should:

- a. as far as reasonably possible, maintain a normal client-lawyer relationship with the client;
- b. if the client is at risk of substantial harm unless action is taken and the client cannot adequately act in his own interests, take reasonably necessary protective action. Such action may include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary

surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In appropriate cases, counsel may seek the appointment of a fiduciary, including a guardian, curator or tutor, to protect the client's interests.

c. in taking any protective action, be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

13. If counsel believes that the client will now or in the future seek to abandon some or all of the mitigation case or waive appellate or post-conviction review, counsel should notify the case supervisor and appropriate action should be taken to respond to this situation. Given the gravity and complexity of this situation, counsel and the case supervisor should consider consultation with additional counsel experienced and skilled in this area.

14. The client has a right to view or be provided with copies of documents in counsel's file. Acknowledging the dangers of case related materials being held in custodial facilities, counsel should strongly advise the client against maintaining possession of any case related material. Counsel should provide alternatives to satisfy the client's requests, such as more frequent visits with team members to review relevant documents in a confidential setting, or transferring file to successor counsel. Upon the termination of the representation, the client will ordinarily be entitled to counsel's entire file upon request.

G. Assembling the Defense Team

1. Counsel are to be assigned in accordance with the Capital Defense Guidelines. Where possible, lead counsel should participate in the decision of who should be assigned as additional counsel. Lead counsel should advocate for the assignment of additional counsel with the skills, experience and resources appropriate to the provision of high quality representation in the case. Lead counsel should have regard to his or her own strengths and weaknesses in recommending the assignment of additional counsel in order to ensure the formation of a defense team capable of providing high quality representation to the client in the particular case.

2. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Performance Standards and the associated Guidelines. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Standards, unless the Standard specifically imposes the duty on "lead counsel."

3. As soon as practical after assignment and at all stages of a capital case, the director of the law office assigned the case, the contracting agency or lead counsel should assemble a defense team by:

- a. providing advice regarding the number and identity of the additional counsel to be assigned;
- b. selecting and making any appropriate staffing, employment or contractual agreements with non-attorney team members in such a way that the defense team includes:
 - i. at least one mitigation specialist and one fact investigator;
 - ii. at least one member with specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma;
 - iii. individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's history;
 - iv. sufficient support staff, such as secretarial, law clerk and paralegal support, to ensure that counsel is able to manage the administrative, file management, file review, legal research, court filing, copying, witness management, transportation and other practical tasks necessary to provide high quality representation; and,
 - v. any other members needed to provide high quality legal representation, including people necessary to: reflect the seriousness, complexity or amount of work in a particular case; meet legal or factual issues involving specialist knowledge or experience; ensure that the team has the necessary skills, experience and capacity available to provide for the professional development of defense personnel through training and case experience; or, for other reasons arising in the circumstances of a particular case.

4. In selecting team members, lead counsel should have specific regard to the overall caseload of each team member (whether indigent, pro bono or privately funded) and should monitor the caseloads of all team members throughout the representation. Counsel should have regard to the benefits of a racially and culturally diverse team.

5. Where staff assignments to a team are made by the director of a law office or the contracting agency, rather than lead counsel, lead counsel remains responsible for ensuring that the staffing assignments and the defense team are in compliance with the Capital Guidelines and Performance Standards and are sufficient to permit high quality representation.

6. The defense team refers to those persons directly responsible for the legal representation of the client and those persons directly responsible for the fact and mitigation investigation. While others may assist the defense team, including lay and expert witnesses, they are not a part of the defense team as that term is used in this section. The mitigation specialist retained as a part of the defense team is not intended to serve as a testifying witness and, if such a witness is necessary, a separate expert mitigation specialist should be retained.

7. Team members should be fully instructed on the practices and procedures to be adopted by the team, including the procedure for communication and decision-making within the team and how such matters will be recorded in the client file. Team meetings should be conducted no less than once every two weeks and should, wherever possible, include the in-person attendance of all team members. Team meetings should have an agenda and a record of the matters discussed, tasks assigned and decisions made at the team meeting should be maintained in the client file. All members of the team should be encouraged to participate and contribute.

8. Counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. Counsel should promptly take the steps necessary to ensure that the defense team receives the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. If such resources are denied, counsel should make an adequate record to preserve the issue for judicial review and seek such review. It is the responsibility of counsel to be fully aware of the potential resources available to assist in the representation of the client and the rules and procedures to be followed to seek and obtain such resources.

9. While lead counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case, all additional counsel should ensure that the team and its members are providing high quality representation in accordance with these Performance Standards and associated Guidelines.

10. In general, counsel should avoid assigning one lawyer to handle the guilt-innocence phase and another lawyer to handle the penalty phase.

H. Scope of Representation

1. Counsel should represent the client in the matter assigned from the time of assignment until relieved by the assignment of successor counsel or by order of the court.

2. Ordinarily, counsel representing a capital defendant should assume responsibility for the representation of the defendant in all pending criminal and collateral proceedings involving the client for which counsel is adequately qualified and experienced. Counsel should represent the client in any new criminal proceeding arising during the course of the capital representation. Counsel should investigate and commence appellate or collateral proceedings regarding other criminal convictions of the client where the favorable resolution of such an action is likely to be of significance in the capital proceeding. Counsel shall have the discretion to assist incarcerated clients seeking redress of institutional grievances or responding to institutional proceedings and should do so where the resolution of the grievance or proceeding is likely to be of significance in the capital proceeding.

3. Where it is not appropriate for counsel to assume the representation of the defendant in other proceedings due to a lack of appropriate experience or qualifications, lack of sufficient resources, or for other reasons, counsel should take all reasonable steps to ensure that appropriately qualified counsel is representing the client and is, where possible, capitally certified.

4. Counsel should maintain close communication with and seek the cooperation of counsel representing the client in any other proceeding to ensure that such representation does not prejudice the client in his capital proceedings and is conducted in a manner that best serves the client's interests in light of the capital proceedings.

5. Where counsel's representation of a defendant is limited in its scope, lead counsel should ensure that the limitation is reasonable in the circumstances and obtain the client's informed consent to the limited scope of the representation. In obtaining informed consent, lead counsel should explain the exact limits of the scope of the representation, including both those purposes for which the client will and will not be represented. Where possible, the agreement to provide representation that is limited in its scope should be communicated in writing.

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HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1905. Performance Standard 2: Relations with Client

A. Counsel's Obligation to Build and Maintain Relationship with Client

1. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust and confidence with the client, and should maintain close contact with the client. Representation of a capital client should proceed in a client-centered fashion with a strong emphasis on the relationship between the defense team and the client.
2. Counsel should make every appropriate effort to overcome barriers to communication and trust, including those arising from the client's special circumstances, such as incompetence, mental or physical disability/illness, language barriers, youth, and cultural differences, circumstances of incarceration, prior experiences in the criminal justice system, and prior experiences of legal representation. Where barriers to communication or trust with counsel cannot be adequately overcome to allow for high quality representation of the client, the capital case supervisor should be informed, and such further steps as are necessary should be taken. In an appropriate case, this may include seeking the assignment of additional counsel or other team members or the substitution of counsel.
3. Lead counsel should ensure that the defense team as a whole is able to establish and maintain a relationship of trust and confidence with the client. Where a particular team member is unable to overcome barriers to communication or trust, lead counsel should take all reasonable steps to remedy the problem. Where the relationship cannot be sufficiently improved, lead counsel should strongly consider removing or replacing the team member, or seeking removal or replacement from the director of the law office or contracting agency.
4. Understanding that a relationship of trust and confidence with the client is essential to the provision of effective representation of a capital client, the defense team must take all reasonable steps to ensure that both the representation provided and the manner in which that representation is provided operate to develop and preserve such a relationship.
5. Understanding that regular contact and meaningful communication are essential to the provision of effective representation of a capital client, the defense team should take all reasonable steps to ensure that the client is able to communicate regularly with the defense team members in confidential circumstances and should ensure that the client is visited by defense team members frequently, particularly where the client is in custody. Counsel may rely upon other members of the defense team to provide some of the required contact with the client, but visits by other team members cannot substitute for counsel's own direct contact with the client. Given lead counsel's particular responsibilities, visits by other counsel in the case cannot substitute for lead counsel's own direct contact with the client.
6. In a trial level case, a capital client should be visited by a member of the defense team no less than once every week, though visits would be expected to be much more frequent where there is active investigation or litigation in the case or in the lead up to trial. In a trial level case a capital client should be visited by an attorney member of the defense team no less than once every two weeks and by lead counsel no less than once month, though visits by counsel would be expected to be much more frequent where there is active investigation or litigation in the case or in the lead up to, during, and following trial.
7. In an appellate or post-conviction case, a capital client may be visited less frequently, but regular communication and actual visits remain critical to effective representation. In an appellate or post-conviction case, a capital client should be visited by a member of the defense team no less than once every two weeks, by an attorney member of the defense team no less than once a month and by lead counsel no less than once every two months, though visits would be expected to be much more frequent where there is active investigation or litigation in the case or in the lead up to, during, and following any major hearing and in the lead up to any execution date.
8. In all capital cases, where barriers to communication or trust exist or the circumstances call for more frequent contact, visits by defense team members, including counsel, should be as frequent as necessary to ensure high quality representation and to protect the interests of the client.
9. Counsel at all stages of the case need to monitor the client's physical, mental, and emotional condition and consider any potential legal consequences or adverse impact upon the adequate representation of the client. Counsel should monitor the client's physical, emotional, and mental condition throughout the representation both personally, through the observations of other team members and experts, and through review of relevant records. If counsel observes changes in the client's appearance or demeanor, counsel should promptly conduct an investigation of any circumstances contributing to this change, and take all reasonable steps to advance the best interests of the client. Recognizing the potential adverse consequences for the representation inherent in any substantial impairment of the client's physical, mental and emotional condition, counsel should take all reasonable steps to improve the client's physical, mental and emotional condition where possible.
10. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
 - a. the progress of and prospects for the investigation and what assistance the client might provide;
 - b. current or potential legal issues;

- c. current or potential strategic and tactical decisions, including the waiver of any rights or privileges held by the client;
- d. the development of a defense theory;
- e. presentation of the defense case;
- f. potential agreed-upon dispositions of the case, including any possible disposition currently acceptable to the prosecution;
- g. litigation deadlines and the projected schedule of case-related events; and
- h. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

11. Counsel shall inform the client of the status of the case at each step and shall provide information to the client regarding the process and procedures relevant to the case, including any anticipated time frame.

12. In the absence of a specific agreement to the contrary, counsel shall provide the client with a copy of each substantive document filed or entered in the case by the court and any party. Counsel shall warn any incarcerated client of the dangers of keeping case related material in a custodial environment and take steps to ensure that the client may have reasonable access to the documents and materials in the case without the necessity of keeping the documents in the prison.

13. Upon disposition of the case or any significant issue in the case, counsel shall promptly and accurately inform the client of the disposition.

14. Counsel should treat the client with respect. Counsel should never demean, disparage, or be hostile towards the client. It is the responsibility of lead counsel to ensure that all members of the defense team satisfy this standard.

15. Counsel shall respond in a timely manner to all correspondence from a client, unless the correspondence is wholly unreasonable in its volume or interval.

16. Counsel should maintain an appropriate, professional office and should maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel should provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g. what days and/or hours calls will be accepted). Counsel should determine whether telephone communications will be confidential and where they are not, should take all reasonable steps to ensure that privileged, confidential, or potentially damaging conversations are not conducted during any monitored or recorded calls.

17. Counsel should advise the client at the outset of the representation and frequently remind the client regarding his rights to silence and to counsel.

a. counsel should carefully explain the significance of remaining silent, and how to assert the rights to silence and counsel. Counsel should specifically advise the client to assert his rights to silence and counsel if approached by any state actor seeking to question him about the charged offense, any other offense, or any other matter relevant to guilt, penalty, or a possible claim for relief. Counsel should take all reasonable steps to assist the client in asserting these rights, including providing a written assertion of rights for the client to use and asserting these rights on behalf of the client. Counsel should have regard to any special need or vulnerability of the client likely to impact his effective assertion of his rights.

b. in particular, counsel should advise the client not to speak with police, probation officers, or other government agents about the offense, any related matters, or any matter that may prove relevant in a penalty phase hearing without the presence of counsel. The client should be advised not to speak or write to any other person – including family members, friends, or co-defendants – about any such matters. The client should also be advised not to speak to any state or court appointed expert without the opportunity for prior consultation with counsel.

c. counsel should also be conscious of the possible interest of media organizations and individual journalists and should advise the client not to communicate with the media, except as a part of a considered strategy undertaken on the advice of counsel.

18. If counsel knows that the client will be coming into contact with a state actor in circumstances relevant to the representation, counsel should seek to accompany the client to prevent any potentially harmful statements from being made or alleged.

B. Counsel's Initial Interviews with Client

1. Recognizing that first contact with a capital client is an extremely important stage in the representation of the client, counsel should take all reasonable steps to conduct a prompt initial interview designed to protect the client's position, preserve the client's rights, and begin the development of a relationship of trust and confidence.
2. Counsel should take all reasonable steps to ensure that the client's rights are promptly asserted, that the client does not waive any right or entitlement by failing to timely assert the right or make a claim, and that any exculpatory or mitigating evidence or information that may otherwise become unavailable is identified and preserved.
3. Counsel should ensure that a high level of contact is maintained at the outset of the representation that is at least sufficient to begin to develop a relationship of trust and confidence, and to meaningfully communicate information relevant to protecting the client's position and preserving the client's rights.
4. An initial interview of pre-trial clients should be conducted within twenty-four hours of counsel's entry into the case unless exceptional circumstances require counsel to postpone this interview. In that event or where the client is being represented in appellate or post-conviction proceedings, the interview should be conducted as soon as reasonably possible.
5. If non-certified counsel is meeting with the client before the assignment of appropriately certified counsel, the information obtained should ordinarily be limited to that necessary to advise the client concerning the current procedural posture of the case and to provide for the assertion of the client's rights to silence and to counsel.
6. Preparing for the Initial Interview:
 - a. prior to conducting the initial interview of a pre-trial client, counsel should, where possible and without unduly delaying the initial interview:
 - i. be familiar with the elements of the offense(s) and the potential punishment(s), where the charges against the client are already known;
 - ii. obtain copies of any relevant documents that are available, including copies of any charging documents, warrants and warrant applications, law enforcement and other investigative agency reports, autopsy reports, and any media accounts that might be available; and,
 - iii. consult with any predecessor counsel to become more familiar with the case and the client.
 - b. In addition, where the pre-trial client is incarcerated, counsel should:
 - i. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
 - ii. 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; and
 - iii. be familiar with any procedures available for reviewing the trial judge's setting of bail.
 - c. prior to conducting the interview of a client at appellate and post-conviction stages, counsel should, where possible and without unduly delaying the initial interview:
 - i. be familiar with the procedural posture of the case;
 - ii. obtain copies of any relevant documents that are available that provide information on the nature of the offense and the conduct and outcome of prior stages of the proceedings;
 - iii. consider consulting with any predecessor counsel to become more familiar with the case and the client.
7. Conducting the Interviews
 - a. counsel should not expect to adequately communicate all relevant information or begin to develop the necessary relationship with the client in a single interview but should undertake an initial series of interviews designed to achieve these goals. Given the peculiar pressures and issues presented in a capital case, counsel should seek to develop a relationship of trust and confidence before questioning the client about matters relevant to the offense or mitigation.
 - b. counsel should always interview the client in an environment that protects the attorney-client privilege. Counsel should take reasonable efforts to compel court and other officials to make necessary accommodations for private discussions between counsel and client in courthouses, lock-ups, jails, prisons, detention centers, hospitals, forensic mental health facilities and other places where clients confer with counsel.

- c. counsel should take all reasonable steps to ensure, at the initial interview and in all successive interviews and proceedings, that barriers to communication and trust are overcome.
- d. the scope and focus of the initial interviews will vary according to the circumstances of the case, the circumstances of the client, and the circumstances under which the interviews occur.
- e. information to be provided to the client during initial interviews includes, but is not limited to:
 - i. the role of counsel and the scope of representation, an explanation of the attorney-client privilege, the importance of maintaining contact with counsel, and instructions not to talk to anyone, including other inmates, about the facts of the case or matters relevant to the sentencing hearing without first consulting with the attorney;
 - ii. describing the other persons who are members of the defense team, how and when counsel or other appropriate members of the defense team can be contacted and when counsel or other members of the defense team will see the client next;
 - iii. a general overview of the procedural posture and likely progression of the case, an explanation of the charges, potential penalties, and available defenses;
 - iv. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers;
 - v. realistic answers, where possible, to the client's most urgent questions;
 - vi. an explanation of the availability, likelihood, and procedures that will be followed in setting the conditions of pretrial release; and
 - vii. a detailed warning of the dangers with regard to the search of client's cell and personal belongings while in custody, and the fact that conversations with other inmates, telephone calls, mail, and visitations may be monitored by jail officials. The client should also be warned of the prevalence and danger presented by jailhouse informants making false allegations of confessions by high profile prisoners and advised of the strategies the client can employ to protect himself from such false allegations.
- f. information that should be acquired as soon as appropriate from the client includes, but may not be limited to:
 - i. the client's immediate medical needs and any prescription medications the client is currently taking, has been prescribed or might require;
 - ii. whether the client has any pending proceedings, charges, or outstanding warrants in or from other jurisdictions or agencies (and the identity of any other appointed or retained counsel);
 - iii. the ability of the client to meet any financial conditions of release or afford an attorney;
 - iv. the existence of potential sources of important information which counsel might need to act immediately to obtain and/or preserve;
- g. appreciating the unique pressure placed upon capital defendants and the extremely sensitive nature of the enquiries that counsel must make, counsel should exercise great caution in seeking to explore the details of either the alleged offense or matters of personal history until a relationship of trust and confidence has been established that will permit full and frank disclosure.
- h. where possible, counsel should obtain from the client signed release forms necessary to obtain client's medical, psychological, education, military, prison, and other records as may be pertinent.
- i. counsel should observe, and consider arranging for, documentation of any marks or wounds pertinent to the case, and secure and document any transient physical evidence.

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§1907. Performance Standard 3: Investigation

A. Counsel's responsibility to investigate

- 1. Counsel has an ongoing duty to conduct a high quality, independent, exhaustive investigation of all matters relevant to the guilt phase, penalty phase, any possible agreed upon disposition, any potential claim for relief, and any possible reduction of the case to a non-capital prosecution. A high quality, exhaustive investigation will be prompt, thorough, and independent.

2. Counsel should act promptly to ensure that the client is not prejudiced by the loss or destruction of evidence or information, whether in the form of physical evidence, records, possible witness testimony or information from a non-testifying witness. Counsel should take reasonable steps to gather and preserve evidence and information at risk of loss or destruction for later use in the case or for use by successor counsel. These steps may include retaining an expert to gather, preserve or examine evidence before it is altered or destroyed or to interview witnesses who may become unavailable. Counsel should be conscious of any procedural limitations or time bars and ensure that the investigation be conducted in a timely fashion to avoid any default or waiver of the client's rights. Similarly, counsel should be aware of or promptly become aware of the period for which relevant records are retained and ensure that the investigation be conducted in a timely fashion to avoid the destruction of relevant records.
3. The investigation relevant to the guilt phase of the trial should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
4. The investigation relevant to the penalty phase of the trial should be conducted regardless of any statement by the client that evidence bearing upon the penalty is not to be collected or presented. This investigation should comprise extensive and ongoing efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence or argument that may be offered by the prosecutor.
5. No area of inquiry or possible evidence in the guilt or penalty phase investigations should be ruled out until a thorough investigation has been conducted. Counsel should seek to investigate all available evidence and information and defer strategic decisions regarding what evidence to present until after a thorough investigation has been conducted. Both at guilt and penalty phases, counsel should not halt investigation after one seemingly meritorious defense theory has been discovered, but should continue to investigate, both following up on evidence supporting known defense theories and seeking to discover other potential defense theories.
6. Where counsel enrolls in a case in which other counsel have previously provided representation, counsel should not rely on a prior defense team's investigation or theory of the case, but rather should independently and thoroughly investigate and prepare the defense, especially where prior counsel had a conflict of interest, or there is reason to believe counsel's performance was deficient.
7. Counsel are responsible for ensuring that a high quality, exhaustive investigation is conducted but are not personally responsible for performing the actual investigation. A team should be assembled containing sufficient members possessing the appropriate skills and resources to conduct a high quality and exhaustive investigation.

B. Conduct of the investigation

1. Counsel should conduct a high quality, independent and exhaustive investigation of all available sources of information utilizing all available tools including live witness interviews, compulsory process, public records law, discovery, scene visits, obtaining releases of confidential information, pre-trial litigation, the use of experts in the collection and analysis of particular kinds of evidence and audio/visual documentation. Principle sources of information in an investigation will include: information obtained from the client; information and statements obtained from witnesses; discovery obtained from the state; records collected; physical evidence; and direct observations.
2. A high quality, independent and exhaustive investigation will include investigation to determine the existence of other evidence or witnesses corroborating or contradicting a particular piece of evidence or information.
3. A high quality, independent and exhaustive investigation will include an investigation of all sources of possible impeachment of defense and prosecution witnesses.
4. Information and evidence obtained in the investigation provided should be properly preserved by memo, written statement, affidavit, or audio/video recordings. The manner in which information is to be obtained and recorded should be specifically approved by lead counsel having regard to any discovery obligations which operate or may be triggered in the case. In particular, the decision to take signed or recorded statements from witnesses should be made in light of the possibility of disclosure of such statements through reciprocal discovery obligations. Documents and physical evidence should be obtained and preserved in a manner designed to allow for its authentication and with regard to the chain of custody.
5. A high quality, exhaustive investigation should be conducted in a manner that permits counsel to effectively impeach potential witnesses, including state actors and records custodians, with statements made during the investigation. Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

6. A written record should be kept of all investigative activity on a case, including all record requests and responses and attempts to locate and interview witnesses, whether successful or unsuccessful. The written record should be sufficient to allow counsel to identify and prove, if necessary, when, where and under what circumstances each piece of information or evidence was obtained. The written record should also be sufficient to allow counsel to identify and prove that the investigation disclosed an absence of relevant information or evidence, for example, where a record custodian denies possession of relevant records or a witness denies knowledge of a relevant fact.

7. Counsel should conduct a high quality, exhaustive investigation of matters relevant to guilt and penalty phase, bearing in mind at all times the relevance of all information sought and obtained to each phase of the trial. Such an investigation shall extend beyond the particular client and the particular offense charged and include an investigation of: other charged or uncharged bad acts that may be alleged directly or as impeachment; any co-defendant or alleged co-conspirator; any alternate suspects; any victim or victims; relevant law enforcement personnel and agencies; and, forensic and other experts involved in the case.

8. Considerations in respect of particular sources of information will include the following:

a. interviews with the client should be conducted in accordance with Performance Standard 2.B. In particular, counsel should be conscious of the need for multiple interviews, a relationship of trust and confidence with the client and for interviews on sensitive matters to be conducted by team members with appropriate skill and experience in conducting such interviews.

b. when interviewing witnesses, live witness interviews are almost always to be preferred and telephone interviews will rarely be appropriate. Barring exceptional circumstances, counsel should seek out and interview all potential witnesses including, but not limited to:

i. eyewitnesses or other witnesses potentially having knowledge of events surrounding the alleged offense itself including the involvement of co-defendants, or alternate suspects;

ii. potential alibi witnesses;

iii. witnesses or other witnesses potentially having knowledge of events surrounding the alleged offense itself including the involvement of co-defendants, or alternate suspects;

1. members of the client's immediate and extended family;

2. neighbors, friends and acquaintances who knew the client or his family throughout the various stages of his life;

3. persons familiar with the communities where the client and the client's family live and have lived;

4. former teachers, coaches, clergy, employers, co-workers, social service providers, and doctors;

5. correctional, probation or parole officers

iv. witnesses to events other than the offense charged that may prove relevant to any affirmative defense or may be relied upon by the prosecution in its case in chief or in rebuttal of the defense case; and

v. government experts who have performed the examinations, tests, or experiments;

c. Discovery should be conducted in accordance with Performance Standard 5.F.

d. Counsel should be familiar with and utilize lawful avenues to compel the production of relevant records beyond formal discovery or compulsory process, including, the Public Records Law, the Freedom of Information Act, statutory entitlements to records such as medical treatment, military service, social security, social services, correctional and educational records. Counsel should also be familiar with and utilize avenues to obtain records through voluntary release and publicly available sources including web based searches and social media.

i. Counsel should strive to obtain records by means least likely to alert prosecution to the investigative steps being taken by the defense or the content of the records being obtained.

ii. Where appropriate, counsel should seek releases or court orders to obtain necessary confidential information about the client, co-defendant(s), witness(es), alternate suspect(s), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and procedural requirements governing disclosure of the type of confidential information being sought.

iii. Unless strategic considerations dictate otherwise, counsel should ensure that all requests, whether by compulsory process, public records law, or other specific statutory procedures, are made in a form that will allow counsel to enforce the requests to the extent possible and to seek the imposition of sanctions for non-compliance. Counsel should seek prompt compliance with such requests and must maintain a system for tracking requests that have been made: following up on requests; triggering enforcement action where requests are not complied with;

documenting where responses have been received; and, identifying which documents have been received in response to which requests and on what date.

iv. Counsel should obtain all available information from the client's court files. Counsel should obtain copies of the client's prior court file(s), and the court files of other relevant persons. Counsel should also obtain the files from the relevant law enforcement and prosecuting agencies to the extent available.

v. Counsel should independently check the criminal records for both government and defense witnesses, and obtain a certified copy of all judgments of conviction for government witnesses, for possible use at trial for impeachment purposes.

e. Counsel should move promptly to ensure that all physical evidence favorable to the client is preserved, including seeking a protective court order to prevent destruction or alteration of evidence. Counsel should make a prompt request to the police or investigative agency for access to any physical evidence or expert reports relevant to the case. Counsel should examine and document the condition of any such physical evidence well in advance of trial. With the assistance of appropriate experts, counsel should reexamine all of the government's material forensic evidence, and conduct appropriate analyses of all other available forensic evidence. Counsel should investigate not only the accuracy of the results of any forensic testing, but also the legitimacy of the methods used to conduct the testing and the qualifications of those responsible for the testing.

f. Counsel should take full advantage of the direct observation of relevant documents, objects, places and events by defense team members, experts and others.

i. Counsel should attempt to view the scenes of the alleged offense and other relevant events as soon as possible after counsel is assigned. The visit to any relevant scene should include visiting 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). Counsel should extensively, precisely, and accurately document the condition of any relevant scene using the most appropriate and effective means, including audio-visual recordings, diagrams, charts, measurements, and descriptive memoranda. The condition of the scenes should always be documented in a manner that will permit counsel to identify and prove the condition of the scenes without personally becoming a witness. Where appropriate, counsel should obtain independently prepared documentation of the condition of the scenes, such as maps, charts, property records, contemporaneous audio-visual recordings conducted by media, security cameras or law enforcement.

ii. Counsel should exercise the defendant's right to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state.

iii. Counsel for a client with one or more co-defendants should attend hearings of co-defendants, even if the issue at stake does not seem directly relevant to the client. Counsel should be particularly interested in discovering the strength of the prosecution's case against the co-defendant, and the similarities and differences between a co-defendant's defense and the client's.

iv. Counsel should also attend potentially relevant hearing involving state or defense witnesses.

C. Duty of counsel to conduct penalty phase investigation

1. Counsel should lead the defense team in a structured and supervised mitigation investigation where counsel is coordinating and, to the extent possible, integrating the case for life with the guilt phase strategy.

2. Despite the integration of the two phases of the trial, counsel should be alert to the different significance of items of evidence in the two phases and direct the investigation of the evidence for the penalty phase accordingly. Where evidence is relevant to both phases, counsel should not limit the investigation to guilt phase issues, but should further develop the mitigating evidence into a compelling case for life to be stressed at the penalty phase. All information obtained in the guilt phase investigation should be assessed for its significance to the penalty phase and, where possible, the guilt phase theory should reflect this assessment. Counsel should actively consider the benefits of presenting evidence admissible in the guilt phase that is also relevant in mitigation of punishment, and conduct the investigation and development of evidence accordingly.

3. Counsel should direct the investigation of mitigating information as early as possible in the case. Mitigation investigation may affect many aspects of the case including the investigation of guilt phase defenses, charging decisions and related advocacy, motion practice, decisions about needs for expert evaluations, client relations and communication, and plea negotiations.

4. Counsel has an ongoing duty to conduct a high quality, independent and exhaustive investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.

5. Counsel should investigate all available sources of information and use all appropriate avenues to obtain all potentially relevant information pertaining to the client, his siblings, parents, and other family members extending back at least three generations, including but not limited to: medical history consisting of complete prenatal, pediatric, and adult health information (including hospitalizations, mental and physical illness or injury, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage); exposure to harmful substances in utero and in the environment; substance abuse and treatment history; mental health history; history of maltreatment and neglect; trauma history (including exposure to criminal violence, exposure to war, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences); educational history (including achievement, performance, behavior, activities, special educational needs including cognitive limitations and learning disabilities, and opportunity or lack thereof); social services, welfare, and family court history (including failures of government or social intervention, such as failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities), employment and training history (including skills and performance, and barriers to employability); military experience (including length and type of service, conduct, special training, combat exposure, health and mental health services); immigration experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile criminal and correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

6. Counsel should not refrain from fully investigating potentially double-edged mitigation and such an investigation should include the full context of the mitigating evidence so as to reduce any potentially negative impact of such evidence at trial or to ensure that the mitigating effect of the evidence outweighs any negatives that may arise from the introduction of the evidence. Counsel should adopt such strategies as are necessary to reduce any potentially negative impact of such evidence, including effective voir dire, motions in limine, limiting instructions and the presentation of other evidence designed to maximize the mitigating effect of the evidence and reduce its negative potential.

7. While the client and the client's immediate family can be very important sources of information, they are far from the only potentially significant and powerful sources of information for mitigation evidence, and counsel should not limit the investigation to the client and his or her family. Further, when evaluating information from the client and the client's family, counsel should consider any impediments each may have to self-reporting or self-reflection.

8. Counsel should exhaustively investigate evidence of any potential aggravating circumstances and other adverse evidence that may be used by the state in penalty phase to determine how the evidence may be rebutted or mitigated.

a. Counsel should interview all known state witnesses for the penalty phase, including any expert witnesses.

b. Counsel's investigation of any prior conviction(s) which may be alleged against the client should include an investigation of any legal basis for overturning the conviction, including by appellate, state post-conviction or federal habeas corpus proceedings. Where such a basis exists, counsel should commence or cause to be commenced litigation directed to overturning the conviction. Representation in such proceedings should be determined in accordance with Standard I.H.

c. Counsel should actively consider the evidence that the state may be permitted to present in rebuttal of the defense case at penalty phase and investigate the evidence to determine how the evidence may be excluded, rebutted or mitigated.

9. Counsel should exhaustively investigate the possibility that there exists any absolute bar to the imposition of the death penalty.

a. Counsel should conduct a high quality, independent, exhaustive investigation to determine whether the client may suffer from intellectual disability. Counsel should not rely on his or her own assessment or impression of the client in determining whether the client has a viable claim of mental retardation as intellectual disability may be difficult to accurately assess and many clients will mask such disability even at the risk of their lives. Where a potential intellectual disability claim exists, the defense team should include members with expertise in the recognition, investigation and development of evidence of intellectual disability as well as the litigation of issues of intellectual disability. Where the defense team does not contain sufficient expertise in this regard, lead counsel should use all available avenues to secure additional counsel or other team members with expertise in investigating and litigating issues of intellectual disability.

b. In view of the decision of *Roper v. Simmons*, 543 U.S. 551 (2005), especially in cases involving foreign born clients, where the client's date of birth may be difficult to document, a special investigation may be required to ascertain the true "age" of the client to ensure that he is "death eligible" and, if not, ensure that the client is not exposed to the possibility of a death sentence.

c. Counsel should attempt to identify and develop other grounds which, though currently not providing an absolute bar to imposition of a death sentence, may in the future provide such exemption, such as serious mental illness, post-18 cognitive impairment, or guilt as a principal not directly responsible for the death.

d. Counsel should ensure that the presentation of evidence of an absolute bar to the death penalty, such as intellectual disability, is not limited to bare proof of the dispositive fact but fully presents the mitigating effect of the evidence, including the continuing mitigating effect of the evidence even where the evidence does not wholly satisfy the legal bar to the death penalty.

10. Counsel should direct team members to conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Counsel should not fail to seek to interview any of the client's immediate family members. Multiple interviews will be necessary to establish trust, elicit sensitive information, and conduct a thorough and reliable life-history investigation. Team members should endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding

11. Counsel should direct team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, criminal and incarceration, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death. Records should be reviewed as they are received by the team so that any gaps in the evidence can be discovered and filled, further areas of investigation can be uncovered and pursued, and the defense theory can properly incorporate all available documentary evidence.

12. Counsel should direct team members to provide counsel with documentary evidence of the investigation through the use of such methods as memoranda, genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

13. Counsel should ensure that the investigation develops available evidence to humanize the client in the eyes of the jury, reflect the client's inherent dignity and value as a human being, demonstrate the client's positives and provide a basis for demonstrating these matters through factually valid narratives and exhibits, rather than merely adjectives. The investigation shall focus more broadly than identifying the causes of any offending conduct.

14. After thorough investigation counsel should begin selecting and preparing witnesses who will testify, who may include but are not limited to:

a. Lay witnesses, or witnesses who are familiar with the client or his family, including but not limited to:

i. the client's family and those familiar with the client;

ii. the client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

iii. social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

iv. witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

v. former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence.

vi. witnesses who can testify about the applicable alternative to a death sentence and/or the condition under which the alternative sentence would be served.

vii. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

b. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:

- i. medical doctors, psychiatrists, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; neurological impairment (brain damage); substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning;
- ii. anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion;
- iii. persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants;
- iv. persons with specialized knowledge about gangs and gang culture; and
- v. persons with specialized knowledge of institutional life, either generally or within a specific institution, including prison security and adaptation experts.

15. Counsel should direct team members to aid in preparing and gathering demonstrative evidence, such as photographs, videotapes and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts and letters of praise or reference.

D. Securing the Assistance of Experts

1. Counsel should secure the assistance of experts where appropriate for:

- a. an adequate understanding of the prosecution's case and the preparation and presentation of the defense including for consultation purposes on areas of specialized knowledge or those lying outside counsel's experience;
- b. rebuttal of any portion of the prosecution's case at the guilt or sentencing phase of the trial;
- c. investigation of the client's competence to proceed, capacity to make a knowing and intelligent waiver of constitutional rights, mental state at the time of the offense, insanity, diminished capacity and competence to be executed; and
- d. obtaining an agreed disposition or assisting the client make a decision to accept or reject a possible agreed disposition.

2. An expert is retained to assist counsel in the provision of high quality legal representation. It is counsel's responsibility to provide high quality legal representation and the hiring of an expert, even a well-qualified expert, will not be sufficient to discharge this responsibility. Counsel has a responsibility to support and supervise the work of an expert to ensure that it is adequate and appropriate to the circumstances of the case.

3. When selecting an expert, counsel should consult with other attorneys, mitigation specialists, investigators and experts regarding the strengths and weaknesses of available experts. Counsel should interview experts and examine their credentials and experience before hiring them, including investigating the existence of any significant impeachment that may be offered against the expert and reviewing transcripts of the expert's prior testimony. If counsel discovers that a retained expert is unqualified or his opinions and testimony will be detrimental to the client, counsel should replace the expert and where appropriate, seek other expert advice.

4. When retaining an expert, counsel should provide clear information regarding the rate of payment, reimbursement of expenses, the method of billing, the timing of payment, any cap on professional fees or expenses and any other conditions of the agreement to retain. Counsel should ensure that the expert is familiar with the rules of confidentiality applicable in the circumstances and where appropriate, have the expert sign a confidentiality agreement. Counsel should monitor the hours of work performed and costs incurred by an expert to ensure that the expert does not exceed any pre-approved cap and in order to certify that the expert's use of time and expenses was appropriate in the circumstances.

5. Defense counsel should normally not rely on one expert to testify on a range of subjects, particularly where the witness lacks sufficient expertise in one or more of the areas to be canvassed. Counsel should determine whether an expert is to be used as a consulting expert or may testify in the case and should make appropriate distinctions in communications with the expert and disclosure of the identity and any report of the expert to the state. Counsel should use separate experts in the same field for consultation and possible testimony where the circumstances of the case make this necessary or appropriate.

6. Counsel should not simply rely on the opinions of an expert, but should seek to become sufficiently educated in the field to make a reasoned determination as to whether the hired expert is qualified, whether his or her

opinion is defensible, whether another expert should be hired, and ultimately whether the area of investigation should be further pursued or abandoned.

7. Experts assisting in investigation and other preparation of the defense should be independent of the court, the state and any co-defendants. Expert work product should be maintained as confidential to the extent allowed by law. Counsel and support staff should use all available sources of information to obtain all necessary information for experts. Counsel should provide an expert with all relevant and necessary information, records, materials, access to witnesses and access to the client within sufficient time to allow the expert to complete a thorough assessment of the material provided, conduct any further investigation, formulate an opinion, communicate the opinion to counsel and be prepared for any testimony. Ordinarily, counsel should not retain an expert until a thorough investigation has been undertaken.

8. Counsel should not seek or rely upon an expert opinion in the absence of an adequate factual investigation of the matters that may inform or support an expert opinion. While an expert may be consulted for guidance even where relatively little factual investigation has been completed, counsel may not rely upon an expert opinion in limiting the scope of investigation, making final decisions about the defense theory or determining the matters to be presented to any court in the absence of a factual investigation sufficiently thorough to ensure that the expert's opinion is fully informed and well supported. Ultimately, it is the responsibility of counsel, not the expert, to ensure that all relevant material is gathered and submitted to the expert for review.

9. Counsel should ensure that any expert who may testify is not exposed to privileged or confidential information beyond that which counsel is prepared to have disclosed by the witness during his or her testimony.

E. Development of a Strategic Plan for the Case

1. During investigation and trial preparation, counsel should develop and continually reassess a strategic plan for the case. This should include the possible defense theories for guilt phase, penalty phase, agreed upon disposition, litigation of the case and, where appropriate, litigation of the case on appeal and post-conviction review.

2. The defense theory at trial should be an integrated defense theory that will be reinforced by its presentation at both the guilt and penalty phase and should minimize any inconsistencies between the theories presented at each stage and humanize the client as much as possible. Counsel should strongly consider, with the consent of the client, forgoing a guilt-innocence phase plan that denies the defendant had any involvement in the offense and instead attempt to raise doubts about whether the offense was a first-degree murder (e.g., because of the defendant's role, mental state or intent).

3. A strategy for the case should be developed from the outset of counsel's involvement in the case and continually updated as the investigation, preparation and litigation of the case proceed. Counsel should not make a final decision on the defense theory to be pursued at trial or foreclose inquiry into any available defense theory until a high quality, exhaustive, independent investigation has been conducted and the available strategic choices fully considered.

4. However, a defense theory for trial should be selected in sufficient time to allow counsel to advance that theory during all phases of the trial, including jury selection, witness preparation, motions, opening statement, presentation of evidence, closing argument and jury instructions. Similarly, the defense theory for the post-verdict, appellate and post-conviction stages of the proceedings be selected in sufficient time to allow counsel to advance that theory in the substantive filings and hearings in the case.

5. In arriving at a defense theory counsel should weigh the positive aspects of the defense theory and also any negative effect the theory may have, including opening the door to otherwise inadmissible evidence or waiving potentially viable claims or defenses.

6. From the outset of counsel's involvement in the case, a strategic planning document or documents should be produced in writing and maintained in the client's file. The strategic planning document should be amended as the investigation, preparation and litigation of the case proceed to accurately reflect the current theory or theories. The strategic planning document should be made available to all members of the defense team to assist in coordinating work on the case. However, it should remain privileged and not be shared with non-team members or any team member or expert who may testify.

7. The current strategic planning document and any prior drafts of the document should be maintained in the client's file. The capital case supervisor should be given access to the strategic planning document and any prior drafts to assist in the supervision and support of the defense team.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

A. Duty of Counsel to Seek an Agreed Disposition

1. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Standards to achieve an agreed-upon disposition.
2. After interviewing the client and developing a thorough knowledge of the law and facts of the case, counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition of the charges rather than proceeding to a trial or continuing with proceedings seeking judicial or executive review. In doing so counsel should fully explain the rights that would be waived by a decision to enter a plea or waive further review, the possible collateral consequences, and the legal factual and contextual considerations that bear upon that decision. Counsel should advise the client with complete candor concerning all aspects of the case, including a candid opinion as to the probable outcome. Counsel should make it clear to the client that the ultimate decision to enter a plea of guilty or waive further review has to be made by the client.
3. Counsel should keep the client fully informed of any discussions or negotiations for an agreed disposition and promptly convey to the client any offers made by the prosecution for an agreed disposition. Counsel shall not accept or reject any agreed-upon disposition without the client's express authorization.
4. Initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Despite a client's initial opposition, counsel should engage in an ongoing effort to persuade the client to pursue an agreed disposition that is in the client's best interest. Consideration of an agreed disposition should focus on the client's interests, the client's needs and the client's perspective.
5. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting investigation and litigation. Ongoing negotiations should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.

B. Formal Advice Regarding Agreed Dispositions

1. Counsel should be aware of, and fully explain to the client:
 - a. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses, and any mandatory (minimum) punishment, sentencing enhancements, habitual offender statutes, mandatory consecutive sentence requirements including restitution, fines, assessments and court costs;
 - b. any collateral consequences of potential penalties less than death including but not limited to forfeiture of assets, deportation or the denial of naturalization or of reentry into the United States, imposition of civil liabilities, loss of parental rights, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, the loss of the right to hold public office, potential federal prosecutions, and the use of the disposition adverse to the client in penalty phase proceedings of other prosecutions of him, as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
 - c. any registration requirements including sex offender registration and job specific notification requirements;
 - d. 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 including any possible and likely sentence enhancements or parole consequences;
 - e. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentence;
 - f. available drug rehabilitation programs, psychiatric treatment, and health care;
 - g. the possible and likely place of confinement;
 - h. credit for pretrial detention;
 - i. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - j. eligibility for correctional programs, work release and conditional leaves;
 - k. deferred sentences, conditional discharges and diversion agreements;
 - l. probation or suspension of sentence and permissible conditions of probation;
 - m. parole and post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions; and

- n. possibility of later expungement and sealing of records.
- 2. Counsel should be completely familiar with, and fully explain to the client:
 - a. concessions the client may make as part of an agreed disposition, including:
 - i. to waive trial and plead guilty to particular charges;
 - ii. to decline from asserting or litigating any particular pretrial motions; or to forego in whole or in part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications. However, the client should receive independent legal advice before being asked to waive any future claim of ineffective assistance of counsel.
 - iii. to proceed to trial on a particular date or within a particular time period;
 - iv. to enter an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case, or to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;
 - v. to provide the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;
 - vi. to enter an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
 - vii. to enter an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
 - viii. to enter an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and
 - ix. to enter agreements such as those described in the above subsections respecting actual or potential charges in another jurisdiction.
 - b. benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
 - i. that the death penalty will not be sought;
 - ii. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
 - iii. that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
 - iv. that the client will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration;
 - v. that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
 - vi. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - vii. that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
 - viii. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;
 - ix. that the prosecution will not present certain information, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, or will engage in or refrain from engaging in other actions with regard to sentencing;
 - x. such as those described in Subsections (i)-(ix) respecting actual or potential charges in another jurisdiction.
 - c. the position of any alleged victim (and victim's family members) with respect to conviction and sentencing. In this regard, counsel should:
 - i. consider whether interviewing or outreach to an alleged victim (or a victim's family members) is appropriate;

ii. consider to what extent the alleged victim or victims (or a victim's family members) might be involved in the plea negotiations;

iii. be familiar with any rights afforded the alleged victim or victims (and a victim's family members) under La. Const. Art I, § 25, La. R.S. 46:1841 et. seq. or other applicable law; and

iv. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.

3. In conducting plea negotiations, counsel should be familiar with and should fully explain to the client:

a. the various types of pleas that may be agreed to, including a plea of guilty, a nolo contendere plea in which the client is not required to personally acknowledge his or her guilt (North Carolina v. Alford, 400 U.S. 25 (1970)), and a guilty plea conditioned upon reservation of appellate review of pre-plea assignments of non-jurisdictional error (State v. Crosby, 338 So.2d 584 (La. 1976));

b. the advantages and disadvantages of each available plea according to the circumstances of the case; and

c. whether any plea agreement is or can be made binding on the court and prison and parole authorities, and whether the client or the state has a right to appeal the conviction and/or sentence and what would happen if an appeal was successful.

4. In conducting plea negotiations, counsel should become familiar with and fully explain to the client, the practices, policies, and concerns of the particular jurisdiction, judge and prosecuting authority, probation department, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations.

5. In conducting plea negotiations counsel should be familiar with and fully explain to the client any ongoing exposure to prosecution in any other jurisdiction for the same or related offending and where possible, seek to fully resolve the client's exposure to prosecution for the offending and any related offending.

C. The Advice and Decision to Enter a Plea of Guilty

1. Subject to considerations of diminished capacity, counsel should abide by the client's decision, after meaningful consultation with counsel, as to a plea to be entered.

2. Counsel should explain all matters relevant to the plea decision to the extent reasonably necessary to permit the client to make informed decisions regarding the appropriate plea. In particular, counsel should investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense at both guilt and penalty phase and on appellate post-conviction and habeas corpus review.

3. Counsel should carefully and thoroughly explore the client's understanding of the matters explained including, in particular, the procedural posture of his case, the trial and appellate process, the likelihood of success at trial, the likely disposition at trial and the practical effect of each disposition, the practical effect of each available plea decision and counsel's professional advice on which plea to enter.

4. In providing the client with advice, counsel should refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. Counsel may enlist the assistance of others to assist in ensuring that the client is able to make an informed decision having regard to these considerations.

5. Counsel should pursue every reasonable avenue to overcome any barriers to communication and trust in discussing a possible agreed disposition. Counsel should take all reasonable steps to ensure that the client's capacity to make a decision in his own best interests is not impaired, for example, by the effects of mental health, family dysfunction or conditions of confinement.

6. The considerations applicable to the advice and decision to enter a plea of guilty will also apply to the decision to enter into an agreed disposition in an appellate or post-conviction posture.

D. Entering the Negotiated Plea before the Court

1. Notwithstanding any earlier discussions with the client, prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

a. 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;

b. make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions and collateral consequences the client will be exposed to by entering a plea;

- c. 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;
 - d. make certain that if the plea is a non-negotiated plea, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court;
 - e. ensure that the client is mentally competent and psychologically capable of making a decision to enter a plea of guilty;
 - f. be satisfied that the client admits guilt or believes there is a substantial likelihood of conviction at trial, and believes that it is in his or her best interests to plead guilty under the plea agreement rather than risk the consequence of conviction after trial; and
 - g. be satisfied that the state would likely be able to prove the charge(s) against the client at trial.
2. When entering the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.
 3. Subsequent to the acceptance of the plea, counsel should review and explain the plea proceedings to the client, and respond to any questions or concerns the client may have.

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HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1911. Performance Standard 5: Pre-Trial Litigation

A. Obligations regarding court hearings

1. Counsel should prepare for and attend all court proceedings involving the client and/or the client's case. Counsel should be present, alert and focused on client's best interests during all stages of the court proceedings.
2. As soon as possible after entry of counsel into the case, counsel should provide general advice to the client on how court proceedings will be conducted, how the client should conduct himself in court settings, how the client should communicate with counsel and others in the court setting and how the client should react to events in court. Counsel should advise the client on appropriate demeanor and presentation in court and take reasonable steps to assist the client in maintaining an appropriate demeanor and presentation.
3. Prior to any court hearing, counsel should meet with and explain to the client the purpose and procedure to be followed at the hearing. Where the client may be directly addressed by the court or asked to speak on the record, counsel should warn the client in advance and advise the client on how to proceed. Counsel should advise the client that he has the right to confer with counsel before answering any question, even if it means interrupting the proceedings.
4. Counsel should take all necessary steps to overcome any barriers to communication or understanding by the client during court proceedings, including the use of interpreters, slowing the rate of proceedings, taking adequate breaks, using appropriate language and explaining proceedings to the client during the hearing.
5. Counsel should document in the client's file a summary of all pertinent information arising from each court hearing and take particular care to memorialize communications and events that will not appear in the court record or transcript.
6. Counsel should ensure that the court minutes and any transcript accurately reflect the orders, statements and events occurring in court and that all exhibits have been marked, identified and placed into the record.

B. Obligations of Counsel Following Arrest

1. Counsel or a representative of counsel have an obligation to meet with incarcerated clients for an initial interview within 24 hours of counsel's initial entry into the case, barring exceptional circumstances, and shall take other prompt action necessary to provide high quality legal representation including:
 - a. invoking the protections of appropriate constitutional provisions, federal and state laws, statutory provisions, and court rules on behalf of a client, and revoking any waivers of these protections purportedly given by the client, as soon as practicable by correspondence and a notice of appearance or other pleading filed with the State and court. More specifically, counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate and assert the client's right to counsel at any post-arrest procedure such as a line-up, medical evaluation, psychological evaluation, physical testing or the taking of a forensic sample.

b. where possible, ensuring that capitally certified counsel shall represent the client at the first appearance hearing conducted under La. C. Cr. P. art. 230.1 in order to contest probable cause for a client arrested without an arrest warrant, to seek bail on favorable terms (after taking into consideration the adverse impact, if any, such efforts may have upon exercising the client's right to a full bond hearing at a later date), to invoke constitutional and statutory protections on behalf of the client, and otherwise advocate for the interests of the client.

2. Prior to indictment, counsel should take steps to secure the pretrial release of the client where such steps will not jeopardize the client's ability to defend against any later indictment. Where the client is unable to obtain pretrial release, counsel should take all reasonable steps to identify and ensure that the client's medical, mental health and security needs are being met.

3. While counsel should only seek to submit evidence for the client to the grand jury in exceptional cases, counsel should consider in each particular case whether such an application is appropriate in the circumstances.

4. Where counsel is assigned to the case of a capital defendant arrested outside of Louisiana, counsel should immediately contact any attorney representing the client in the jurisdiction of arrest to share information as appropriate and coordinate the representation of the client. Where the client is not represented in the jurisdiction of arrest, counsel should take all reasonable steps to arrange effective representation for him. Ordinarily, counsel should travel to the jurisdiction of arrest to consult with and provide legal advice to the client with respect to the capital case and the ramifications for the capital case of waiving or contesting extradition. Counsel should conduct the initial interviews with the client, the assertion and protection of the client's rights and the investigation of the case, including the circumstances of the arrest, in accordance with these Standards, regardless of whether the client is being held in the jurisdiction of arrest or has been extradited to Louisiana. Counsel should not wait for the client to be extradited before commencing active representation of the client.

C. Counsel's Duties at the Preliminary Hearing

1. In the absence of exceptional circumstances, counsel should move for a preliminary hearing in all pre-indictment cases. Counsel should move for and attempt to secure a preliminary hearing in a timely fashion having regard to prosecution practices in the particular jurisdiction and the likely timing of any indictment.

2. While the primary function of the preliminary hearing is to ensure that probable cause exists to hold the client in custody or under bond obligation, the hearing may provide collateral advantages for the client by: creating a transcript of cross-examination of state's witnesses for use as an impeachment tool; preserving testimony favorable to the client of a witness who may not appear at trial; providing discovery of the state's case; allowing for more effective and earlier preparation of a defense; and, persuading the prosecution to refuse the charges or accept lesser charges for prosecution.

3. Counsel should conduct as thorough an investigation of the case as is possible in the time allowed before the preliminary hearing to best inform strategic decisions regarding the subpoenaing of witnesses and the scope and nature of cross-examination. Counsel should fully exercise the rights to subpoena and cross-examine witnesses to seek a favorable outcome at the preliminary hearing and maximize the collateral advantages to the client of the proceedings.

4. In preparing for the preliminary hearing, the attorney should be familiar with:

a. the elements of each of the offenses alleged;

b. the requirements for establishing probable cause;

c. factual information which is available concerning the existence of or lack of probable cause;

d. the tactics of full or partial cross-examination, including the potential impact on the admissibility of any witness' testimony if they are later unavailable for trial and how to respond to any objection on discovery grounds by showing how the question is relevant to probable cause;

e. additional factual information and impeachment evidence that could be discovered by counsel during the hearing; and

f. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings.

5. Counsel should not present defense evidence, especially the client's testimony, except in unusual circumstances where there is a sound tactical reason that overcomes the inadvisability of disclosing the defense case at this stage.

D. Counsel's Duties at Arraignment

1. Where possible, capably certified counsel should be assigned prior to arraignment and should represent the client at arraignment.
2. Counsel should preserve the client's rights by entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so.
3. If not already done, counsel should assert the client's Fifth and Sixth Amendment rights to silence and to counsel and should review with the client the need to remain silent.
4. If not already done, counsel should take all reasonable steps to identify and ensure that the client's medical, mental health and security needs are being met.

E. Counsel's Duty in Pretrial Release Proceedings

1. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release pursuant to C.Cr.P. Art. 331, and, where appropriate, to make a proposal concerning conditions of release. Client's charged with capital crimes remain eligible to be admitted to bail even after indictment and counsel should consider and, where appropriate, pursue an application to have the client admitted to bail.
2. Counsel should carefully consider the strategic benefits or risks of making an application for bail, including the timing of any application and any collateral benefits or risks that may be associated with a bail application.
3. Where 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.
4. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

F. Formal and Informal Discovery

1. Counsel
2. Unless
 - a. the precise statutory provision relied upon for the charge or indictment, including any aggravating factors that may be relied upon by the prosecution to establish first degree murder under La. R.S. 14:30;
 - b. any aggravating circumstances that may be relied upon by the prosecution in the penalty phase pursuant to La. C. Cr. P. art. 905.4.;
 - c. any written, recorded or oral statement, confession or response to interrogation made by or attributed to the client. Such discovery should, where possible, include a copy of any such confession or statement, the substance of any oral confession or statement and details as to when, where and to whom the confession or statement was made;
 - d. any record of the client's arrests and convictions and those of potential witnesses;
 - e. any information, document or tangible thing favorable to the client on the issues of guilt or punishment, including information relevant for impeachment purposes;
 - f. any documents or tangible evidence the state intends to use as evidence at trial, including but not limited to: all books, papers, documents, data, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
 - g. any documents or tangible evidence obtained from or belonging to the client, including a list of all items seized from the client or from any place under the client's dominion;
 - h. any results or reports and underlying data of relevant physical or mental examinations, including medical records of the victim where relevant, and of scientific tests, experiments and comparisons, or copies thereof, intended for use at trial or favorable to the client on the issues of guilt or punishment;
 - i. one half of any DNA sample taken from the client;
 - j. any successful or unsuccessful out-of-court identification procedures undertaken or attempted;
 - k. any search warrant applications, including any affidavit in support, search warrant and return on search warrant;
 - l. any other crimes, wrongs or acts that may be relied upon by the prosecution in the guilt phase;

- m. any other adjudicated or unadjudicated conduct that may be relied upon by the prosecution in the penalty phase;
 - n. any victim impact information that may be relied upon by the prosecution in the penalty phase, including any information favorable to the client regarding the victim or victim impact;
 - o. any statements of prosecution witnesses, though counsel should be particularly sensitive to the effect of any reciprocal discovery obligation triggered by such discovery;
 - p. any statements of co-conspirators;
 - q. any confessions and inculpatory statements of co-defendant(s) intended to be used at trial, and any exculpatory statements; and
 - r. any understanding or agreement, implicit or explicit, between any state actor and any witness as to consideration or potential favors in exchange for testimony, including any memorandum of understanding with a prisoner who may seek a sentence reduction.
3. Counsel should ensure that discovery requests extend to information and material in the possession of others acting on the government's behalf in the case, including law enforcement. This is particularly important where the investigation involved more than one law enforcement agency or law enforcement personnel from multiple jurisdictions.
 4. Counsel should take all available steps to ensure that prosecutors comply with their ethical obligations to disclose favorable information contained in Rule 3.8(d) of the Louisiana Rules of Professional Conduct.
 5. Counsel should ensure that discovery requests extend to any discoverable material contained in memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective witnesses, other than the client, to the district attorney, or to agents of the state.
 6. Counsel should not limit discovery requests to those matters the law clearly requires the prosecution to disclose but should also request and seek to obtain other relevant information and material.
 7. When appropriate, counsel should request open file discovery. Where open file discovery is granted, counsel should ensure that the full nature, extent and limitations of the open file discovery policy are placed on the court record. Where inspection of prosecution or law enforcement files is permitted, counsel should make a detailed and complete list of the materials reviewed and file this list into the court record.
 8. Counsel should seek the timely production and preservation of discoverable information, documents or tangible things likely to become unavailable unless special measures are taken. If counsel believes the state may destroy or consume in testing evidence that is significant to the case (e.g., rough notes of law enforcement interviews, 911 tapes, drugs, or biological or forensic evidence like blood or urine samples), counsel should also file a motion to preserve evidence in the event that it is or may become discoverable.
 9. Counsel should establish a thorough and reliable system of documenting all requests for discovery and all items provided in discovery, including the date of request and the date of receipt. This system should allow counsel to identify and prove, if necessary, the source of all information, documents and material received in discovery, when they were provided and under what circumstances. This system should allow counsel to identify and prove, where necessary, that any particular piece of information, document or material had not previously been provided in discovery.
 10. Counsel should scrupulously examine all material received as soon as possible to identify and document the material received, to identify any materials that may be missing, illegible or unusable and to determine further areas of investigation or discovery. Where access is given to documents, objects or other materials counsel should promptly and scrupulously conduct an inspection of these items and carefully document the condition and contents of the items, using photographic or audio-visual means when appropriate. Expert assistance should be utilized where appropriate to ensure that a full and informed inspection of the items is conducted. Where a reproduction of an original document or item is provided (including photocopies, transcripts, photographs, audio or video depictions) counsel should promptly and scrupulously inspect and document the original items in order to ensure the accuracy of the reproduction provided and to identify any additional information available from inspection of the original that may not be available from the reproduction.
 11. Counsel should file with the court an inventory of all materials received or inspected in discovery. This inventory should be sufficiently detailed to identify precisely each piece of information, document or thing received including, for example, how many pages a document contained and any pages that may have been missing.

12. Unless strong strategic considerations dictate otherwise, counsel should ensure that all discovery requests are made in a form that will allow counsel to enforce the requests to the extent possible and to seek the imposition of sanctions for non-compliance. Counsel should seek prompt compliance with discovery demands.

13. Where the state asserts that requested information is not discoverable, counsel should, where appropriate, request an in camera inspection of the material and seek to have the withheld material preserved in the record under seal. Counsel should recognize that a judge undertaking in camera review may not have sufficient understanding of the possible basis for disclosure, especially the ways in which information may be favorable to defense in the particular case. Where in camera review is undertaken, counsel should take all available steps to ensure that the judge is sufficiently informed to make an accurate assessment of the information, including through the use of ex parte and under seal proffer, where appropriate and permissible.

14. Counsel should timely comply with requirements governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Counsel also should be aware of the possible sanctions for failure to comply with those requirements. Unless justified by strategic considerations, counsel should not disclose any matter or thing not required by law and should seek to limit both the scope and timing of any defense discovery. Counsel should take all reasonable steps to prevent the prosecution from obtaining private or confidential information concerning the client, including matters such as medical, mental health, social services, juvenile court, educational and financial information.

15. Counsel should understand the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars, lineups, photo show-ups, voice identifications, and physical specimens like blood, semen, and urine), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the required preservation of the record. Counsel should raise appropriate objections to requests for non-testimonial evidence and should insist on appropriate safeguards when these procedures are to occur. Counsel should also prepare the client for participation in such procedures. Counsel should accompany the client, insist that the police not require the client to answer any questions and, if necessary, return to court before complying with the order.

G. The Duty to File Pretrial Motions

1. Counsel at every stage of the case, exercising professional judgment in accordance with these Standards should consider all legal and factual claims potentially available, including all good faith arguments for an extension, modification or reversal of existing law. Counsel should thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted.

2. Counsel should give consideration to the full range of motions and other pleadings available and pertinent to a capital case when determining the motions to be filed in the particular case, including motions to proceed ex parte. Counsel should file motions tailored to the individual case that provide the court with all necessary information, rather than pro forma or boilerplate motions. The requirement that counsel file motions tailored to the individual case is not a prohibition against also filing motions that raise previously identified legal issues, nor is it a prohibition on the filing of boilerplate motions where no tailoring of the motion is necessary or appropriate in the case.

3. The decision to file pretrial motions and memoranda should be made after considering the applicable law in light of the circumstances of each case. Each potential claim should be evaluated in light of:

- a. the unique characteristics of death penalty law and practice;
- b. the potential impact of any pretrial motion or ruling on the strategy for the penalty phase;
- c. the near certainty that all available avenues of appellate and post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;
- d. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited;
- e. the significant limitations placed upon factual development of claims in subsequent stages of the case; and
- f. any other professionally appropriate costs and benefits to the assertion of the claim.

4. Among the issues that counsel should consider addressing in pretrial motions practice are:

- a. Matters potentially developed in early stages of investigation, including:
 - i. the pretrial custody of the accused;
 - ii. the need for appropriate, ongoing and confidential access to the client by counsel, investigators, mitigation specialists and experts;

- iii. the need for a preliminary hearing, including a post-indictment preliminary hearing;
 - iv. the statutory, constitutional and ethical discovery obligations including the reciprocal discovery obligations of the defense;
 - v. the need for and adequacy of a bill of particulars;
 - vi. the need for and adequacy of notice of other crimes or bad acts to be admitted in the guilt or penalty phase of trial;
 - vii. the need for and adequacy of notice of any victim impact evidence;
 - viii. the preservation of and provision of unimpeded access to evidence and witnesses;
 - ix. the use of compulsory process to complete an adequate investigation, including the possible use of special process servers;
 - x. the prevention or modification of any investigative or procedural step proposed by the state that violates any right, duty or privilege arising out of federal state or local law or is contrary to the interests of the client;
 - xi. access to experts or resources which may be denied to an accused because of his indigence;
 - xii. the defendant's right to a speedy trial;
 - xiii. the defendant's right to a continuance in order to adequately prepare his or her case;
 - xiv. the need for a change of venue;
 - xv. the need to obtain a gag order;
 - xvi. the need to receive notice of and be present at hearings involving co-defendants and to receive copies of pleadings filed by any co-defendant;
 - xvii. the dismissal of a charge on double jeopardy grounds;
 - xviii. the recusal of the trial judge, the prosecutor and/or prosecutor's office;
 - xix. competency of the client;
 - xx. intellectual disability;
 - xxi. the nature, scope and circumstances of any testing or assessment of the client;
 - xxii. extension of any motions filing deadline or the entitlement to file motions after the expiration of a motions deadline; and
 - xxiii. requiring the state to respond to motions in writing.
- b. Matters likely to be more fully developed after comprehensive discovery, including:
- i. the constitutionality of the implicated statute or statutes, including the constitutionality of the death penalty or the proposed method of execution;
 - ii. the potential defects in the grand jury composition, the charging process or the allotment,
 - iii. the sufficiency of the charging document under all applicable statutory and constitutional provisions, as well as other defects in the charging document such as surplusage in the document which may be prejudicial;
 - iv. any basis upon which the indictment may be quashed;
 - v. the adequacy and constitutionality of any aggravating factors or circumstances;
 - vi. the propriety and prejudice of any joinder of charges or defendants in the charging document;
 - vii. the permissible scope and nature of evidence that may be offered by the prosecution in aggravation of penalty or by the defense in mitigation of penalty;
 - viii. the constitutionality of the death penalty both generally and as applied in Louisiana;
 - ix. abuse of prosecutorial discretion in seeking the death penalty;
 - x. the suppression of evidence or statements gathered or presented in violation of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding state constitutional and statutory provisions;

- xi. suppression of evidence or statements gathered in violation of any right, duty or privilege arising out of state or local law;
 - xii. the admissibility of evidence other crimes, wrongs or acts that may be relied upon by the prosecution in the guilt phase;
 - xiii. the admissibility of any unrelated criminal conduct that may be relied upon by the prosecution in the penalty phase;
 - xiv. the suppression of a prior conviction obtained in violation of the defendant's right to counsel;
 - xv. notices of affirmative defenses with all required information included; and
 - xvi. notices necessary to entitle the client to present particular forms of evidence at trial, such as alibi notice and notice of intention to rely upon mental health evidence.
- c. Matters likely arising later in pretrial litigation and in anticipation of trial, including:
- i. *in limine* motions to exclude evidence that is inadmissible as a result of a lack of relevance, probative force being outweighed by prejudicial effect, the lack of a necessary foundation, failure to satisfy the threshold for expert evidence or for other reasons;
 - ii. the constitutionality of the scope of and any limitations placed upon any affirmative defense or the use of a particular form of favorable evidence;
 - iii. the competency of a particular witness or class of witnesses;
 - iv. the nature and scope of victim impact evidence;
 - v. *in limine* motions to prevent prosecutorial misconduct or motions to halt or mitigate the effects of prosecutorial misconduct;
 - vi. matters of trial evidence or procedure at either phase of the trial which may be appropriately litigated by means of a pretrial motion *in limine*;
 - vii. matters of trial or courtroom procedure, including: recordation of all proceedings, including bench and chambers conferences; timing and duration of hearings; prohibition of ex parte communications; manner of objections; ensuring the client's presence at hearings; medication of the client; avoiding prejudice arising from any security measures;
 - viii. challenges to the process of establishing the jury venire;
 - ix. the use of a jury questionnaire;
 - x. the manner and scope of voir dire, the use of cause and peremptory challenges and the management of sequestration;
 - xi. the desirability and circumstances of the jury viewing any scene; and
 - xii. the instructions to be delivered at guilt and penalty phase.
5. Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights, including later claims of waiver or procedural default. In making this decision, counsel should remember that a motion has many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
- a. the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
 - b. changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted; and
 - c. later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.
6. Counsel should timely file motions according to the applicable rules and caselaw, provide notice of an intention to file more motions where appropriate, reserve the right to supplement motions once discovery has been completed, offer good cause and seek to file appropriate motions out of time and seek to file necessary and appropriate motions out of time even where good cause for delay is not available. If counsel needs more time to file a motion, counsel should request more time.

7. Counsel should give careful consideration before joining in co-defendants' motions and should avoid any possibility that the client will be deemed to have joined in a co-defendant's motions without a knowing, affirmative adoption of the motions by counsel.

8. As a part of the strategic plan for the case, counsel should maintain a document describing the litigation theory in the case, including a list of all motions considered for filing and the reason for filing or not filing each motion considered. The litigation theory document should also detail the timing and disposition of all motions. The current litigation theory document and any prior drafts of the document should be maintained in the client's file. The capital case supervisor should be given access to the litigation theory document and any prior drafts to assist in the supervision and support of the defense team.

H. Preparing, Filing, and Arguing Pretrial Motions

1. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. Counsel should seek an evidentiary hearing for any motion in which factual findings or the presentation of evidence would be in the client's interests. Where an evidentiary hearing is denied, counsel should make a proffer of the proposed evidence.

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

- a. factual investigation and discovery as well as careful research of appropriate case law relevant to the claim advanced;
- b. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
- c. full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and potential consequences of having the client and other defense witnesses testify;
- d. familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial;
- e. obtaining the assistance of expert witnesses where appropriate and necessary;
- f. careful preparation of any witnesses who are called, especially the client;
- g. careful preparation for and conduct of examination or cross-examination of any witness, having particular regard to the possibility that the state may later seek to rely upon the transcript of the evidence should the witness become unavailable;
- h. consideration of any collateral benefits or disadvantages that may arise from the evidentiary hearing;
- i. obtaining stipulation of facts by and between counsel, where appropriate; and
- j. preparation and submission of a memorandum of law where appropriate.

3. When asserting a legal claim, counsel should present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction. Counsel should pursue good faith arguments for an extension, modification or reversal of existing law.

4. Counsel should ensure that a full record is made of all legal proceedings in connection with the claim. If a hearing on a pretrial motion is held in advance of trial, counsel should obtain the transcript of the hearing where it may be of assistance in preparation for or use at trial.

5. In filing, scheduling, contesting or consenting to any pretrial motion, including scheduling orders, counsel should be aware of the effect it might have upon the client's statutory and constitutional speedy trial rights.

I. Continuing Duty to File Motions

1. Counsel at all stages of the case should be prepared to raise during subsequent proceedings any issue which is appropriately raised at an earlier time or stage, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available.

2. Further, counsel should be prepared to renew a motion or supplement claims previously made with additional factual or legal information if new supporting information is disclosed or made available in later proceedings, discovery or investigation.

3. Where counsel has failed to timely provide a required notice or file a motion, counsel should seek to file the motion or notice out of time regardless of whether good cause exists for the earlier failure to file and be prepared to present any argument for good cause that is available. Where a court bars a notice or motion as untimely, counsel

should ensure that a copy of the notice or motion is maintained in the record and available for any subsequent review.

4. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

5. Counsel shall have the discretion to assist incarcerated clients seeking redress of institutional grievances or responding to institutional proceedings and should do so where the resolution of the grievance or proceeding is likely to be of significance in the capital proceeding.

J. Duty to File and Respond to Supervisory Writ Applications

1. Where appropriate, counsel should make application for supervisory writs in the Circuit Court of Appeal or the Louisiana Supreme Court following an adverse district court ruling or failure to rule. Counsel should give specific consideration to: the extent to which relief is more likely in an interlocutory posture or after a final decision on the merits of the case; the extent of prejudice from the ruling of the district court and the likely ability to demonstrate that prejudice following a final decision on the merits of the case; the impact of the district court's current ruling on the conduct of the defense in the absence of intervention by a reviewing court; the impact of a ruling by a reviewing court in a writ posture on any subsequent review on direct appeal; the adequacy of the record created in the district court and whether the record for review may be improved through further district court proceedings.

2. Counsel should seek expedited consideration or a stay where appropriate and consider the simultaneous filing of writ applications in the Court of Appeal and Supreme Court in emergency circumstances.

3. Counsel should take great care to ensure that all filings in the Courts of Appeal and the Louisiana Supreme Court comply with the requirement of the relevant Rules of Court, including any local rules.

4. Counsel should ensure that an adequate record is created in the district court to justify and encourage the exercise of the supervisory jurisdiction of the Courts of Appeal or Louisiana Supreme Court.

5. Counsel should seek to respond to any state application for supervisory writs except where exceptional circumstances justify the choice not to respond.

6. A lack of adequate time, resources or expertise is not an adequate reason for failing to make application for supervisory writs or failing to respond to a state application. Where counsel lacks adequate time, resources or expertise, counsel should take all available steps to ensure that the defense team has sufficient time, resources and expertise, including advising the capital case supervisor of the situation and seeking assignment of additional counsel. Counsel shall ensure that the role of lack of time or resources upon the decision to file a writ application is reflected in the record.

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HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1913. Performance Standard 6: Special Circumstances

A. Duties of Counsel at Re-trial

1. The standards for trial level representation apply fully to counsel assigned to represent a client at a re-trial of the guilt or penalty phase. Counsel should be careful to clarify on the record the status of prior rulings made and orders issued in the proceedings. Where appropriate, counsel should seek to renew and re-litigate pre-trial claims, and to raise any new claims which have developed or been discovered since the first trial. Counsel should not rely on the investigation or presentation of evidence from the first trial, but rather should start anew and seek to develop and present all available evidence, with the knowledge gained from the results of the first trial. Except in circumstances where counsel has substantial reason to believe the results will be different or no other witnesses are available, counsel should not present witnesses who provided unhelpful testimony earlier in the case.

B. Continuing Responsibility to Raise Issue of Client's Incompetence

1. Competence is far more likely to be present as an issue in a capital case than a non-capital case due to the high prevalence of mental illness and impaired reasoning in the population of capital clients and the increased likelihood of incompetence due to the nature of the charge, the complexity of the case and the gravity of the decisions with which the client is faced. As a result, counsel should proceed with increased sensitivity to the question of competency and ensure that the defense team has members with sufficient skill and experience to identify and respond to issues relating to competency.

2. Counsel should be sensitive to the increased risk in a capital case that given the nature of the charge, the complexity of capital cases and the life and death stakes of the case a client may not sufficiently understand and

appreciate: the nature of the charge and its seriousness; the defenses available at guilt and penalty phase and how each affects the other; the consequences of each available plea on both guilt and penalty phase; and, the range of possible verdicts and the consequences of those verdicts at guilt and penalty phase.

3. In considering the client's ability to assist counsel in a capital case, counsel should have particular regard to the requirement that the client be able to assist counsel not only as to the guilt phase but in the development of the mitigation case and the presentation of the penalty phase case; a process that will include an exhaustive investigation of the client's character, history, record, the offense and other factors which may provide a basis for a sentence less than death. The possibility of a death sentence and the necessity to prepare for and present a penalty phase case greatly increase the complexity and weight of the demands placed upon the client in assisting counsel, including considerations of whether the client: is able to recall and relate facts pertaining to his actions and whereabouts at certain times; is able to maintain a consistent defense; is able to listen to the testimony of witnesses and inform counsel of any distortions or misstatements; has the ability to make simple decisions in response to well explained alternatives; is capable of testifying in his own defense; and, is apt to suffer a deterioration of his mental condition under the stress of trial or at a later stage of the case.

4. Counsel involved in a capital case at stages following the trial should be alert to additional concerns regarding the client's mental state, functioning and ability including existing issues that could be exacerbated by the reality that a death sentence has been imposed, that an execution date is approaching, as well as by the effects of confinement, particularly prolonged confinement, on death row, such as the development or progression of depression or other mental illnesses. Similarly, counsel at later stages should have particular regard to issues such as the client's ability to establish relationships with new counsel at later stages in the case, especially where earlier relationships were difficult for the client, and the client's ability to assist counsel with tasks such as investigations taking place years after the trial when deficiencies such as memory loss may become more pervasive.

5. In every capital case, counsel should conduct a thorough, sensitive and ongoing inquiry into the competence of the client. Where concerns exist about a client's competence, counsel should ensure that the defense team documents in the client's file observations and interactions relevant to the client's competence.

6. Recognizing that raising competency may expose the client himself and otherwise confidential information to state actors, counsel should not raise competency unless satisfied that: a sufficient investigation has been conducted to make a reliable strategic decision in this regard; the client is likely not competent; and, the benefits to the client of raising competency outweigh the negatives. Counsel should consider the possibility that any information disclosed in competency proceedings will become admissible at trial as a result of the client's mental health being placed in issue.

7. In considering whether to raise competence, counsel should take into account all relevant circumstances, including: the likely outcome of an assessment by a sanity commission; the likely outcome of an assessment by a state expert; any negative findings, including malingering findings, that may arise from an assessment of the client; any negative information that may be divulged to the state from a review of records; any waiver of confidentiality arising from raising competence; the impact upon counsel's relationship with the client and his family of raising competence; the impact of raising competence before or during trial on any subsequent guilt or penalty phase presentation; and, the effect on any subsequently available claim that the client was incompetent.

8. The delay caused by raising a question of competence with the court is not a proper reason for raising competence. Seeking to defray defense costs by having a court appointed mental health examination is not a proper reason for raising competence.

9. Prior to raising competence with the court, counsel should consult with a defense mental health expert, including having the expert review the available information and records relating to the client and, where appropriate, assessing the client.

10. Counsel should fully advise the client concerning the procedures for mental examinations, the reasons competence is in question, the possibility of hospitalization, and the consequences of an incompetency determination.

11. Where the court or the state raises the issue of competency, counsel should consider whether it is appropriate to resist any competency examination or advise the client not to cooperate with any such examination.

12. Where a sanity commission is appointed, counsel should ensure that the members of the sanity commission are independent and appropriately qualified. Counsel should ensure that the scope of any examination is limited to the proper purposes for which it has been ordered. Counsel should consider seeking to be present, have a defense expert present or have recorded any examination of the client. Counsel should consider which records and witnesses, if any, should be identified and made available to the sanity commission.

13. Where the state seeks an examination of the client by a physician or mental health expert of the state's choice, counsel should consider opposing or seeking to limit such an examination and should also consider whether to advise the client not to cooperate with any such examination. Counsel should ensure that the scope of any

examination is limited to the proper purposes for which it has been ordered. Counsel should consider seeking to be present, have a defense expert present or have recorded any examination of the client. Counsel should consider which records and witnesses, if any, should be identified and made available to the state's expert.

14. Counsel should obtain copies of: each examiner's report, all underlying notes and test materials; and, all records and materials reviewed. Where the client is hospitalized or otherwise placed under observation, counsel should obtain copies of all records of the hospitalization or observation.

15. Counsel should not stipulate to the client's competence where there appears a reasonable possibility that the client is not competent. Counsel is not obligated to develop frivolous arguments in favor of incompetency but must investigate and advocate in a way that ensures that there is meaningful adversarial testing where there is a good faith basis to doubt the client's competency.

16. At the competency hearing, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the sanity commissioners and the state's witnesses, calling witnesses on behalf of the client including experts, and making appropriate evidentiary objections. Counsel should make sure that the inquiry does not stray beyond the appropriate boundaries. Counsel should consider the advantages and disadvantages to the client's whole case when determining how to conduct the competency hearing.

17. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the confidential or privileged information.

18. If a client is found to be incompetent, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment.

19. Where competency is at issue, or where the client has been found incompetent, counsel has a continuing duty to investigate and prepare the case. Where a client has been found irrestorably incompetent, counsel should continue to investigate and prepare the case sufficiently to ensure that the client will not be prejudiced by any delay or hiatus in the preparation of the case should he subsequently be returned to competence and the prosecution resumed.

20. Where a capital client is found incompetent or irrestorably incompetent, capitally certified counsel should remain responsible for all competency reviews.

21. A previously competent client may become incompetent over the course of a case and particularly under the stress of hearings and trial. Counsel should be vigilant and constantly reassess the client's competence and be prepared to raise the matter when appropriate. It is never untimely to raise a question concerning a client's competence.

22. Some clients object strenuously to taking psychotropic medication and counsel may be called upon to advocate for protection of the client's qualified right to refuse medication.

C. Duties of Counsel When Client Attempts to Waive Right to Counsel, and Duties of Standby and Hybrid Counsel

1. When a client expresses a desire to waive the right to counsel, counsel should take steps to protect the client's interests, to avoid conflicts and to ensure that the client makes a knowing, voluntary and intelligent decision in exercise of his rights under the Sixth Amendment and La. Const. Art. I, § 13. In particular, counsel should:

a. meet with the client as soon as possible to discuss the reasons the client wishes to proceed pro se and to advise the client of the many disadvantages of proceeding pro se. Such advice should include: the full nature of the charges; the range of punishments; the possible defenses; the role of mitigation prior to and at trial; the complexities involved and the rights and interests at stake; and the client's capacity to perform the role of defense attorney. Such advice should also include an explanation of the stages of appellate, post-conviction and habeas corpus review of any conviction or sentence, the effect of failing to effectively preserve issues for review and the impact of waiver of counsel on any possible ineffective assistance of counsel claim.

b. if the client maintains an intention or inclination to waive counsel, counsel should immediately inform the Capital Case Coordinator of the client's desire and should request that the Capital Case Coordinator assign independent counsel to advise the client. The Capital Case Coordinator shall immediately assign at least one attorney certified as lead counsel to consult with the defendant and provide independent advice on the exercise of his Sixth Amendment rights. The role of independent counsel in this situation is not to represent the client in the exercise of his Sixth Amendment rights but instead to ensure that the client receives full and independent legal advice before choosing whether to waive his right to counsel.

c. in addition to seeking the assignment of independent counsel, counsel assigned to represent the defendant should immediately commence a thorough investigation into the question of the defendant's competence to waive counsel and whether, in the circumstances, any such waiver would be knowing, voluntary and intelligent. Such an investigation should not be limited to information obtained from interaction with the client but should include a detailed examination of available collateral sources (including documents and witnesses) as well as consultation with relevant experts.

2. Where a client asserts his right to self-representation counsel has an obligation both to investigate the question of the client's competence and the quality of the purported waiver and to bring before the court evidence raising doubts about these matters. Counsel should submit the case for the client's competent, knowing, voluntary and intelligent waiver to full adversarial testing. Counsel is not obligated to develop frivolous arguments in favor of incompetency but must investigate and advocate in a way that ensures that there is meaningful adversarial testing of the question of the waiver of representation by counsel. Counsel remains responsible for the representation of the client until such a time as the court grants the client's motion to proceed pro se and must continue to perform in compliance with the Capital Guidelines and Performance Standards. Where appropriate, counsel should object to a court's ruling accepting a waiver of counsel, should ensure that the issue is preserved for appellate review and should seek interlocutory review of the decision.

3. Where a capital defendant has been permitted to proceed pro se, counsel should move for the appointment of standby counsel and should seek to persuade the defendant to accept the services of standby counsel. The court may appoint stand by counsel over the defendant's objection and counsel should ordinarily accept such an appointment. The court may place constraints on the role of standby counsel and standby counsel should object to any constraints beyond those required by the Sixth Amendment. Where the quality of the defendant's relationship with counsel assigned to represent the defendant is such that his or her ability to serve as standby counsel would be significantly impaired, the Capital Coordinator may assign additional counsel and urge the court to appoint such additional counsel as are assigned to the role of standby counsel.

4. Attorneys acting as standby counsel shall comply with the Guidelines and Performance Standards for capital defense to the extent possible within the limitations of their role as standby counsel. Counsel shall not accept appointment as standby counsel unless certified as lead trial counsel or certified as associate trial counsel where certified lead trial counsel is also appointed. Counsel appointed as standby counsel shall be entitled to be remunerated and to have their expenses met in the same manner and to the same extent as they would if assigned to represent a defendant who was not proceeding pro se.

5. With the defendant's consent, and subject to any prohibition imposed by the court, standby counsel may perform any role in the case that counsel would ordinarily perform whether in front of or in the absence of the jury.

6. In the absence of his consent to do otherwise, a pro se defendant must be allowed to preserve actual control over the case he chooses to present to the jury and is entitled to ensure that the jury's perception that he is representing himself is preserved. Accordingly, a defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

7. Where the defendant does not consent to the actions of standby counsel, the permissible conduct of standby counsel is different depending on whether the jury is present, the issue is raised solely before a judge or the action is taken entirely out of court.

a. Where the defendant does not consent to the actions of standby counsel, counsel must not in the presence of the jury make or substantially interfere with any significant tactical decisions, control the questioning of witnesses or speak instead of the defendant on any matter of importance. Participation by counsel to steer a defendant through the basic procedures of trial is, however, permissible. Standby counsel should assist the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Counsel should also assist to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.

b. Counsel's participation outside the presence of the jury is far less constrained. Even without the consent of the defendant, counsel may proactively participate in proceedings outside of the presence of the jury as long as the pro se defendant is allowed to address the court freely on his own behalf and disagreements between counsel and the pro se defendant are resolved by the judge in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel. Counsel should, in the absence of the jury, take such actions in the case as are consistent with the best interests of the client, including making any objections, and motions as would be consistent with high quality representation of the defendant.

8. Where it appears to standby counsel during the course of the proceedings that the decision to permit the defendant to proceed pro se or any decision to constrain the role of standby counsel should be revisited, counsel should move for reconsideration of those decisions.

9. Without interfering with the defendant's right to present his case in his own way, standby counsel should continue to fully prepare the case in order to be ready to assume responsibility for the representation of the defendant should the court or the defendant reverse the waiver of counsel. Where standby counsel is given or resumes responsibility for the representation of the defendant, counsel should move for all necessary time to prepare a defense for both the guilt and penalty phases of the trial, as appropriate. Where there is reason to believe that the client may re-invoke his right to counsel, the capital coordinator should ensure that a full defense team remains assigned and available to assume the representation.

D. Counsel's Additional Responsibilities when Representing a Foreign National:

1. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals. Unless predecessor counsel has already done so, counsel representing a foreign national should:

- a. immediately explain the benefits that the client may obtain through consular assistance;
- b. immediately notify the client of the right to correspond with and have access to consular officers from his or her country of nationality via the nearest Consulate;
- c. with the permission of the client, contact the nearest Consulate, and inform the relevant consular officials about the client's arrest and/or detention. In cases where counsel is unable to secure informed permission, professional judgment should be exercised to determine whether it is nevertheless appropriate to inform the Consulate;
- d. where contact is made with the relevant Consulate, counsel should discuss what specific assistance the Consulate may be able to provide to the client in the particular case;
- e. research, consider and preserve any legal rights the client may have on account of foreign nationality status; and
- f. consider whether the client's foreign accent, dialect or knowledge of English is such that the client requires an interpreter and, if so, take steps to secure one without delay for the duration of proceedings.

2. Where counsel has reason to believe that the client may be a foreign national, counsel should advise the capital case supervisor. Counsel should ensure that the defense team includes adequate expertise and experience in dealing with the defense of foreign nationals in capital cases and where this is not the case should advise the capital case supervisor and seek additional support, including the assigning of additional counsel.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1915. Performance Standard 7: Trial

A. Counsel's Duty of Trial Preparation

1. Throughout preparation and trial, counsel should consider the defense case theory and ensure that counsel's decisions and actions are consistent with that theory. Where counsel's decisions or actions are inconsistent with the theory, counsel should assess and understand why this is the case and then either change the conduct or change the theory to accommodate the new approach.

2. Counsel should complete the investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. Ordinarily, this process should be sufficiently advanced at least 180 days before trial to ensure that issues related to funding, expert witnesses, witness availability, securing witness attendance and accommodation, witness preparation and other trial preparation can proceed in an orderly and well planned fashion.

3. Counsel should not forgo investigation and preparation of a defense on the basis that the prosecution case appears weak or counsel believes that no penalty phase will be required.

4. Preparation for trial should include:

a. causing subpoenas to be issued for all potentially helpful witnesses, and all potentially helpful physical or documentary evidence;

i. counsel should ensure that all subpoenaed witnesses are aware of the correct date and time to appear in court, the action they should take when they appear in response to the subpoena and how to contact counsel if necessary;

- ii. counsel should consider utilizing ex parte procedures for the subpoena of persons, documents or things when available;
 - iii. counsel should follow up on all subpoenas and follow procedures for informing the court of non-compliance and seeking enforcement;
 - iv. counsel may refrain from issuing subpoenas for particular witnesses based on strong tactical considerations and in the awareness of the waiver of the defendant's rights to compulsory process that this may entail.
- b. arranging for defense experts to consult and/or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);
- i. adequate arrangements for the funding, scheduling and, where necessary, transport and accommodation of expert witnesses should be made.
 - ii. counsel should prepare with the experts and should be fully aware of the experts' opinions on all relevant matters, including relevant prior testimony, before deciding whether or not to present them at trial.
 - iii. counsel should determine the extent to which evidence to be addressed by an expert witness may be presented through lay witnesses.
- c. ensuring that counsel has obtained, read and incorporated into the defense theory all discovery, results of defense investigation, transcripts from prior or related proceedings and notices, motions and rulings in the case;
- d. obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information which may assist the fact finder in understanding the defense.
- e. ensuring that the facilities at the courthouse will be adequate to meet the needs of the trial and the defense team.
5. Counsel should have available at the time of trial all material relevant to both the guilt and penalty phases that may be necessary or of assistance at trial, including:
- a. copies of all relevant documents filed in the case;
 - b. relevant documents prepared or obtained by investigators;
 - c. *voir dire* questions, topics or plans;
 - d. outline or draft of opening statements for both guilt and penalty phases;
 - e. cross-examination plans for all possible prosecution witnesses;
 - f. direct examination plans for all prospective defense witnesses;
 - g. copies of defense subpoenas and proof of service;
 - h. prior statements and testimony of all prosecution witnesses (e.g., transcripts, police reports) and counsel should have prepared transcripts of any audio or video taped witness statements. Counsel should also be prepared to prove the prior statements if required;
 - i. prior statements of all defense witnesses;
 - j. reports from defense experts;
 - k. a list of all defense exhibits, and the witnesses through whom they will be introduced (as well as a contingency plan for having necessary exhibits admitted if, for example, a witness fails to appear);
 - l. exhibits, including originals and copies of all documentary exhibits;
 - m. demonstrative materials, charts, overheads, computer presentations or other similar materials intended for use at trial;
 - n. proposed jury instructions with supporting case citations, and where appropriate, consider and list the evidence necessary to support the defense requests for jury instructions; and,
 - o. relevant statutes and cases.
6. Counsel should be fully informed as to the rules of evidence, court rules, 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. During case preparation and throughout trial, counsel should identify potential legal issues and the

corresponding objections or motions. Counsel should consider when and how to raise those objections or motions. Counsel should also consider how best to respond to objections or motions that could be raised by the prosecution.

7. Counsel should anticipate state objections and possible adverse court rulings that may impact the defense case theory, be prepared to address any such issues and have contingency plans should counsel's efforts be unsuccessful. Counsel should consider in advance of trial and prepare for the possibility of any emergency writ applications which may be filed by either party as well as making arrangements to ensure that the defense team is able to efficiently and effectively litigate any unanticipated emergency writ applications.

8. 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, admissibility of particular items of evidence) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

9. Counsel should advise the client as to suitable courtroom dress and demeanor. Counsel should ensure that the client has appropriate clothing and the court personnel follow appropriate procedures so as not to reveal to jurors that the client is incarcerated. Counsel should ensure that the client is not seen by the jury in any form of physical restraint. Counsel should ensure that steps are taken to avoid prejudice arising from any security measures in the court and object to the use of both visible restraints on the client and any concealed restraints that adversely impact the client physically or psychologically or impair the client's ability to consult freely with counsel.

10. Counsel should plan with the defense team the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences and all required court appearances.

11. Counsel should plan with the defense team for contingencies arising from the absence or unavailability of any team member and the procedure for accessing additional resources for the team whenever required. Lead counsel should ensure that additional resources, including legal, investigative and support personnel, are available and utilized as appropriate immediately prior to and during trial. Lead counsel should ensure that all members of the defense team are fully aware of their role and responsibilities at trial.

12. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon the mitigation presentation and any verdict at the penalty phase if there is a finding of guilt.

13. Counsel shall take necessary steps to ensure full, official recordation of all aspects of the court proceeding including motions, bench conferences in chambers or at sidebar, opening statements, closing arguments, and jury instructions. If something transpires during the trial that is relevant and significant and has not been made a part of the record (for instance, communications out of the presence of the court-reporter or non-verbal conduct), counsel should ensure that the record reflects what occurred.

14. Counsel should make a written request for a continuance if he or she determines that the defense is not adequately prepared for trial or otherwise not able to present a high quality defense on the scheduled trial date. Counsel should be prepared to proffer a full justification for the continuance, explaining the incomplete preparation, unavailable witness, prejudice from late disclosure by the state or other reason for the continuance. Counsel should be prepared to demonstrate reasonable diligence in preparing for trial but should request any necessary continuance even where counsel has not shown reasonable diligence. Counsel should avoid prematurely exposing the defense case theory by seeking to make any proffer of the reasons for the continuance on an ex parte and under seal basis.

15. Counsel should take all necessary steps to secure conditions of trial that allow for the provision of high quality representation, that allow the client to participate meaningfully in his own defense and that make adequate accommodations for any special needs the client may have. Such conditions may include the hours of court, the number and length of breaks, particular technological resources, the use of interpreters or other assistants to the client's understanding and communication, the pace of questioning and argument, medical assistance for the client and adequate space in the courtroom for the client's family and supporters.

16. Counsel should attempt to present as much mitigation evidence as possible during the guilt-innocence phase.

B. Jury Selection

1. Preparing for *Voir Dire*

a. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire, including the creation of the jury pool from which the venire is selected. Similarly, counsel should be familiar with the law concerning challenges for cause and peremptory challenges and be alert to any potential legal challenges to the law, practice or procedure applied. Counsel should undertake a factual as well as legal investigation of any potential challenges that may be made.

b. 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 practices and procedures including any disproportionate impact the practices and procedures may have on the gender or racial makeup of the jury.

c. Counsel should determine whether any special procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Counsel should be mindful that such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

d. Prior to jury selection, counsel should seek to obtain a prospective juror list and should develop a method for tracking juror seating and selection. Counsel should be aware of available juror information and, where appropriate, should submit a request for a jury questionnaire by a pretrial motion. In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

e. Counsel should develop *voir dire* questions in advance of trial. Counsel should tailor *voir dire* questions to the specific case. *Voir dire* should be integrated into and advance counsel's theory of the case for both guilt and penalty phase. Creative use of *voir dire* can foreshadow crucial, complex, expert, detrimental, or inflammatory evidence, and emphasize the need for impartiality notwithstanding the nature of the offense charged. Effective *voir dire* will lay much of the ground work for the opening statement.

f. *Voir dire* questions should be designed to elicit information about the attitudes and values of individual jurors, which will inform counsel and the client in the exercise of peremptory challenges and challenges for cause. Areas of inquiry should include:

i. attitude towards the death penalty and, in particular, each juror's willingness and capacity to return a verdict of death or life if selected as a juror in the case;

ii. attitudinal bias or prejudice (including those based on race, religion, political beliefs, and sexual preference);

iii. pretrial publicity (including the nature, extent and source of the juror's knowledge, and whether they have learned information that will not be admitted at trial; have discussed what they have read or heard; have heard, formed or expressed opinions on guilt or innocence; and can set such knowledge and opinions aside);

iv. feelings regarding the nature of the offense;

v. juror experience (or that of a close relative) similar to evidence in the case;

vi. experience (or that of a close relative) as a crime victim, witness, or defendant;

vii. amount of weight given to testimony of a police officer (including any experience in law enforcement or relationship with those in law enforcement);

viii. acquaintance with witness, counsel or defendant;

ix. attitudes toward defenses;

x. ability to understand principles of law and willingness to accept the law as given by the court;

xi. prior experience as a juror;

xii. formal qualifications to serve as a juror;

xiii. ability to render an impartial verdict according to the law and the evidence; and

xiv. other areas of inquiry particular to the juror, such as whether a bilingual juror is willing to abide by the translator's version of the testimony, or whether a hearing impaired juror will refrain from reading lips of parties having private conversations unintended for the jurors' perception.

g. Among the other purposes *voir dire* questions should be designed to serve are the following:

i. to convey to the panel legal principles which are important to the defense case and to determine the jurors' attitudes toward those legal principles (especially where there is some indication that particular legal principles may not be favored or understood by the population in general or where a principle is peculiarly based on specific facts of the case);

- ii. 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;
- iii. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and
- iv. to establish a relationship with the jury. Counsel should be aware that jurors will develop impressions of counsel and the defendant, and should recognize the importance of creating a favorable impression.
- h. 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.
- i. Counsel should be familiar with the law concerning challenges for cause and peremptory challenges. *Voir dire* should be responsive to this legal framework and designed to ensure that any basis for a cause challenge is adequately disclosed by the questions and answers.
- j. Counsel should be aware of the waiver of judicial review of any cause challenge denied by the trial court where the defense does not exhaust its peremptory challenges. Counsel should create an appropriate record in the trial court where peremptory challenges are exhausted without the defense successfully removing all jurors against whom an unsuccessful challenge for cause had been made.
- k. Where appropriate, counsel should consider seeking expert assistance in the jury selection process. Recognizing the scope of the task of adequately recording all relevant information during the *voir dire* process, lead counsel should ensure that the team has secured adequate resources, in the form of additional personnel or equipment, to adequately perform this task.

2. Examination of the Prospective Jurors

- a. Counsel should personally *voir dire* the panel
- b. If the court denies counsel's request to ask questions during *voir dire* that are significant or necessary to the defense of the case, counsel should take all steps necessary to protect the *voir dire* record for judicial review including, where appropriate, filing a copy of the proposed *voir dire* questions or reading proposed questions into the record.
- c. Counsel should consider requesting individual, sequestered *voir dire*, particularly in cases where the *voir dire* will canvas sensitive or potentially prejudicial subjects, for example, personal experiences of jurors of abuse, prior exposure to media coverage of the case and knowledge of the case. If particular *voir dire* questions may elicit sensitive or prejudicial answers, counsel should consider requesting that those parts of the questioning be conducted outside the presence of the other jurors. Counsel may also consider requesting that the court, rather than counsel, conduct the *voir dire* as to sensitive questions.
- d. In a group *voir dire*, counsel should take care when asking questions which may elicit responses capable of prejudicing other prospective jurors. Counsel should design both questions and questioning style in group *voir dire* to elicit responses in a way that will minimize any negative effect and maximize any favorable effect on other prospective jurors having regard to counsel's objectives in *voir dire*.
- e. When asking questions for the purpose of eliciting information from a juror, counsel should usually phrase questions in an open-ended fashion that elicits substantive responses, rather than allowing the juror to respond by silence or with a simple yes or no.
- f. Counsel should ensure that the record reflects all answers of all jurors to all questions asked. Counsel should ensure that the record clearly reflects which juror in a panel is being asked a particular question and which gives a particular answer. Where questions are asked of an entire panel or non-verbal responses are given, counsel should ensure that the record accurately reflects all of the responses given and which jurors gave those responses.
- g. Counsel should ensure that other members of the defense team are making detailed notes of the responses of individual jurors, the responses of venire panels to more generally directed questions and the demeanor and reactions of members of the venire.

3. Death Qualification

- a. Counsel should be intimately familiar with the constitutional, statutory and case law relating to questioning and challenging of potential jurors as they relate to "death qualification."
- b. Counsel should apply techniques of *voir dire* designed to overcome the tendency of the process of death qualification to undermine the presumption of innocence and increase the perception of death as the appropriate penalty.

- c. Counsel should ensure that an individual inquiry is made of each juror as to his or her views on the death penalty;
 - d. Counsel should apply techniques of *voir dire* designed to ensure that the view each juror expresses regarding the death penalty:
 - i. is pertinent to the situation the juror will face in penalty phase (e.g. after hearing all the evidence, full deliberation and a unanimous determination of guilt beyond reasonable doubt);
 - ii. is in the context of a finding of guilt of first degree murder having regard to the aggravator(s) in the case (e.g. specific intent to kill or cause great bodily harm to a child under 12); and
 - iii. is not obscured by consideration of any lawful defense or justification that will necessarily have been rejected by penalty phase (e.g. the killing was not in self-defense, he knew the difference between right and wrong, he was not in a sudden passion or heat of blood);
 - e. Counsel should determine the extent to which each juror could give meaningful consideration to mitigating circumstances, having particular regard to those circumstances defined as mitigating in the statute and the caselaw.
 - f. Counsel should determine the extent to which a juror's views on the death penalty or mitigation may substantially impair his or her ability to make an impartial decision at guilt or return a life verdict. Counsel may consider exploring factors such as the strength of the juror's views on the death penalty, the origin of those views, how long they have been held and whether the juror has discussed those views with others.
 - g. Counsel should apply techniques of *voir dire* designed to insulate jurors who are to be challenged for cause against rehabilitation based, in particular, upon their stated willingness to follow the law;
 - h. Counsel should mount a challenge for cause in all cases where there is a reasonable argument that the juror's views on the death penalty or mitigation would prevent or substantially impair the performance of the juror's duties in accordance with the instructions or the oath.
 - i. Counsel should apply techniques of *voir dire* designed to rehabilitate jurors who have expressed scruples against the infliction of capital punishment.
 - j. Counsel should apply techniques of *voir dire* designed to ensure that each prospective juror understands and accepts:
 - i. that each juror is entitled to their own opinion and vote and so each juror must individually decide whether the client is sentenced to life or death following a penalty phase;
 - ii. that while the juror must deliberate, the juror's opinion is not subject to negotiation or compromise and is free from criticism by or explanation to the judge, the prosecutor or others;
 - iii. that each juror can give life for whatever reason he or she wishes;
 - iv. that each juror is entitled to the assistance of the court in having his or her opinion respected; and
 - v. the procedures for bringing penalty phase deliberations to an end and the effect of a hung jury at penalty phase.
 - k. Counsel should consider exercising peremptory challenges solely or principally on the assessment of each juror's attitude to the death penalty and mitigation.
 - l. Counsel should document and, where appropriate litigate the effect of death qualification on the representativeness of the qualified jury venire.
4. Other challenges for Cause and Peremptory Challenges
- a. Counsel should challenge for cause all prospective jurors against whom a legitimate challenge can be made when it is likely to benefit the client.
 - b. When a challenge for cause is denied, counsel should consider exercising a peremptory challenge to remove the juror.
 - c. In exercising challenges for cause and peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available to the state and the defense. In making this decision counsel should be mindful of the law requiring counsel to use one of his or her remaining peremptory challenges curatively to remove a juror upon whom counsel was denied a cause challenge or waive the complaint on appeal, even where counsel ultimately exhausts all peremptory challenges.

- d. Counsel should timely object to and preserve for appellate review all issues relating to the unconstitutional exclusion of jurors by the prosecutor or the court.
- e. Counsel should request additional peremptory challenges where appropriate in the circumstances present in the case.

5. Unconstitutional Exclusion of Jurors

a. In preparation for trial, during *voir dire* and at jury selection, the defense team should gather and record all information relevant to a challenge to the state's use of peremptory strikes based in part or in whole on race, gender or any other impermissible consideration. This will include: the race and gender of the venire, the panel, the petit jury and the jurors struck for cause and peremptorily; any disparity in questioning style between jurors; a comparative analysis of the treatment of similarly placed jurors; non-verbal conduct of potential jurors; historical evidence of policy, practice or a pattern of discriminatory strikes; and, other evidence of discriminatory intent. Such material should be advanced in support of any challenge to the exercise of a state peremptory strike where available and appropriate in the circumstances. Counsel should ensure that the record reflects the racial and gender composition of the jury pool, the venire, each panel, the peremptory challenges made by both parties, and of the petit jury. The record should also reflect the race and gender of the defendant, the victim(s) and potential witnesses, and any motivation the state may have to have regard to race or gender in exercising peremptory challenges. Counsel should also ensure that, where necessary the record reflects non-verbal conduct by jurors such as demeanor, tone and appearance.

b. Where evidence of the discriminatory use of peremptory strikes, including evidence of the presence of a motive for discriminatory use of peremptory strikes emerges after the jury is sworn, counsel should make or reurge any earlier objection to the state's strikes.

c. Counsel should not exercise a peremptory strike on the basis of race, gender or any other impermissible consideration and should maintain sufficient contemporaneous notes to allow reasons for particular peremptory strikes to be proffered if required by the court.

6. *Voir Dire* After the Jury has been Impanelled

a. Counsel should consider requesting additional *voir dire* whenever potentially prejudicial events occur, for instance, when jurors are exposed to publicity during the trial, jurors have had conversations with counsel or court officials, jurors learn inadmissible evidence, it is revealed that jurors responded incorrectly during *voir dire*, or jurors otherwise violated the court's instructions.

b. Counsel should be diligent and creative in framing questions that not only probe the particular issue, but also avoid creating or increasing any prejudice. Counsel should consider requesting curative instructions, seating alternate jurors, a mistrial, or other corrective measures.

c. If the verdict has already been rendered, counsel should request a post-trial hearing and an opportunity to examine jurors within the scope permitted by law.

C. Objection to Error and Preservation of Issues for Post Judgment Review

1. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence and argument through objections, cross-examination of witnesses, presentation of impeachment evidence and rebuttal. Counsel should be alert for, object to, and make sure the record adequately reflects instances of prosecutorial misconduct.

2. Counsel should make timely objections whenever a claim for relief exists under the law at present or under a good faith argument for the extension, modification or reversal of existing law unless sound tactical reasons exist for not doing so. There should be a strong presumption in favor of making all available objections and any decision not to object should be made in the full awareness that this may constitute an irrevocable waiver of the client's rights.

3. Where appropriate, objections should include motions for mistrial and/or admonishments to ignore or limit the effect of evidence. Counsel should seek an evidentiary hearing where further development of the record in support of an objection would advance the client's interests. Areas in which counsel should be prepared to object include:

a. the admissibility or exclusion of evidence and the use to which evidence may be put;

b. the form or content of prosecution questioning, including during *voir dire*;

c. improper exercises of prosecutorial or judicial authority, such as racially motivated peremptory challenges or judicial questioning of witnesses that passes beyond the neutral judicial role and places the judge in the role of advocate;

- d. the form or content of prosecution argument, including the scope of rebuttal argument;
- e. jury instructions and verdict forms; and
- f. any structural defects.

4. Counsel should ensure that all objections are made on the record and comply with the formal requirements applicable in the circumstances for making an effective objection and preserving a claim for subsequent review. These formal requirements may relate to a range of considerations, including: timing of the objection; whether an objection is oral or written; the need to proffer excluded testimony or questions; requesting admonishment of the jury; requesting a mistrial; exhausting peremptory challenges; providing notice to the Attorney-General; and, the specific content of the objection. In addition to the objection itself, counsel should ensure that information relevant to potential review is preserved in the record, i.e., that the transcript, the court file, or the exhibits preserved for review include all the information about the events in the trial court that a reviewing court might need to rule in the client's favor.

5. Before trial, counsel should ascertain the particular judge's procedures for objections. If the judge orders that counsel not state the grounds for the objection in the jury's presence, or if the reasons for the objection require explanation or risk prejudicing the jury, counsel should request permission to make the objection out of the hearing of the jury, for example, by approaching the bench. Counsel should ensure that any objection and ruling is made on the record and where this is not possible at a bench conference, should request another procedure for making objections, such as having objections handled in chambers in the presence of the court reporter. Where, despite counsel's efforts, objections are made or rulings announced in the absence of the court reporter, counsel should ensure that those objections and rulings are subsequently placed on the record in as full a detail as possible

6. Where an objection is made, counsel should state the specific grounds of objection and be prepared to fully explain and argue all bases of the objection. Where a claim for relief exists based on constitutional grounds, counsel should ensure that the record reflects that the objection is brought on those constitutional grounds. Counsel should be particularly careful to ensure that the record reflects the federal nature of any objection based in federal constitutional law or any other federal law.

7. Counsel's arguments to the court should explain both why the law is in the client's favor and why the ruling matters. Arguments should be precise; objections should be timely, clear and specific. For example:

- a. if the court excludes evidence, counsel should proffer what the evidence would be, why it is important to the defense, and how its exclusion would harm the defense.
- b. if the court limits cross-examination, counsel should proffer what counsel was attempting to elicit and why it is important.
- c. if the court admits evidence over defense objection, counsel should, where appropriate, move for a limiting instruction.
- d. if the court rules inadmissible prejudicial evidence already placed before the jury, counsel should seek a mistrial and/or an admonishment, as appropriate.

8. Counsel should not refrain from making objections simply because they are unsure of the precise legal principle or case name to invoke. In these situations, counsel should explain the client's position in factual terms, explaining why a certain ruling under specified facts is prejudicial to the client.

9. Counsel should not rely on objections made by co-defendant's counsel unless the judge has made clear that an objection on behalf of one defendant counts as an objection for all defendants. Even in that situation, counsel may want to identify specific prejudice that would befall her client if the court ruled adversely.

10. Counsel should take care not to appear to acquiesce in adverse rulings, by, for example, ending the discussion with comments intended to reflect politeness (e.g. "Thank you, Your Honor") but which may appear in the transcript as an abandonment of counsel's earlier objection and agreement with the trial court's rationale. Accordingly, counsel should find ways to be polite while making clear that the objection has not been abandoned.

11. Counsel should insist on adequate methods for recording demonstrative evidence. For example, diagrams should be drawn on paper instead of blackboards, and demonstrations not amenable to verbal descriptions should be videotaped. Requests for preservation of exhibits and diagrams should be made in a timely manner. Counsel should make sure that all references to exhibits contain the exhibit number.

12. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and accurate and to supplement or correct it as appropriate.

13. If something transpires during the trial that is relevant and significant and has not been made a part of the record (for instance, communications out of the presence of the court-reporter or non-verbal conduct), counsel should ensure that the record reflects what occurred.

D. Opening Statement

1. Counsel should make an opening statement.

2. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, including law enforcement, unless a strategic reason exists for not doing so.

3. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's practice regarding the permissible content of an opening statement.

4. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement. For example, if the evidence that the defense might present depends on evidence to be introduced in the state's case, counsel should avoid making promises of what evidence it will present because counsel may decide not to present that evidence. Counsel should not discuss in the opening statement the defense strategy with the jury to the extent that later defense decisions, such as putting the client or particular defense witnesses on the stand can be interpreted as concessions of the prosecution meeting its burden, or of weakness of the defense case. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

5. Before the opening statement, counsel should be familiar with the names of all witnesses and the crucial dates, times and places, and should have mastered each witness's testimony so that favorable portions can be highlighted. If the complainant and defendant know each other, counsel should consider discussing their relationship and previous activities to create a context for the alleged offense. Counsel may wish to disclose defense witnesses' impeachable convictions, only if counsel is certain that the witnesses will testify. Where evidence is likely to be ruled inadmissible, counsel should refer to it only after obtaining a ruling from the court.

6. Counsel's objectives in making an opening statement may include the following:

a. to provide an overview of the defense case, introduce the theory of the defense, and explain the evidence the defense will present to minimize prejudice from the government case;

b. to identify the weaknesses of the prosecution's case, point out facts that are favorable to the defense that the government omitted in its opening, create immediate skepticism about the direct testimony of government witnesses and make the purpose of counsel's cross-examination more understandable;

c. to emphasize the prosecution's burden of proof;

d. to summarize the testimony of witnesses, and the role of each in relationship to the entire case and to present explanations for government witnesses' testimony, i.e. bias, lack of ability to observe, intoxication and *Giglio* evidence;

e. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

f. to clarify the jurors' responsibilities;

g. to point out alternative inferences from circumstantial evidence arising from either the government's case or evidence the defense will present, and to state the ultimate inferences which counsel wishes the jury to draw;

h. to establish counsel's credibility with the jury;

i. to personalize and humanize the client and counsel for the jury; and

j. to prepare the jury for the client's testimony or decision not to testify.

7. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement or the defense summation. Counsel should keep close account of what is proffered. Variances between the opening statement and the evidence may necessitate a mistrial, a cautionary instruction, or prove to be a fruitful ground for closing argument.

8. Whenever the prosecutor oversteps the bounds of proper opening statement (by, for example, referencing prejudicial material or other matters of questionable admissibility and assertions of fact that the government will not be able to prove), counsel should object, requesting a mistrial, or seeking cautionary instructions, unless clear tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

a. the significance of the prosecutor's error;

- b. the possibility that an objection might enhance the significance of the information in the jury's mind, or negatively impact the jury; and
- c. whether there are any rules made by the judge against objecting during the other attorney's opening argument.

9. Improper statements that counsel should consider objecting to may include:

- a. attempts to arouse undue sympathy for the victim of a crime or put the jurors in the shoes of the victim;
- b. appeals to the passions and prejudices of the jurors;
- c. evidence of other crimes;
- d. defendant's prior record;
- e. reciting evidence at great length or in undue detail;
- f. personal evaluation of the case or of any state's witness;
- g. argument on the merits of the case or the pertinent law; and
- h. defendant's possible failure to testify on present evidence.

E. Preparation for Challenging the Prosecution's Case

1. Counsel should attempt to anticipate weaknesses in the prosecution's proof. Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems and, where appropriate, challenge its admissibility and/or present other evidence that would controvert the state's evidence. Counsel should make all appropriate challenges to improper testimony. Counsel should challenge improper bolstering of state witnesses.

2. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case. If a fact or facts to be stipulated are harmful to the client but there is still an advantage to stipulating, counsel should make certain that the stipulation is true before consenting to a stipulation. While there may be strategic reasons to forgo cross-examination of particular witnesses or objections to evidence, counsel should make sure to subject the state's case to vigorous adversarial testing.

3. 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.

4. In preparing for cross-examination, counsel should:

- a. consider the need to integrate cross-examination, the theory of the defense and closing argument;
- b. consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary, might elicit responses harmful to the defense case or might open the door to damaging and otherwise improper redirect examination.
- c. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
- d. prepare a cross-examination plan for each of the anticipated witnesses;
- e. be alert to inconsistencies, variations and contradictions in a witness' testimony;
- f. be alert to possible inconsistencies, variations and contradictions between different witnesses' testimony;
- g. be alert to significant omission or deficiencies in the testimony of any witnesses;
- h. review and organize all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
- i. have prepared a transcript of all audio or video tape recorded statements made by the witness;
- j. where appropriate, review relevant statutes and local law enforcement policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining law enforcement witnesses;

k. be alert to and raise where appropriate issues relating to witness competency and credibility, including bias and motive for testifying, evidence of collaboration between witnesses, innate physical ability to perceive, external impediments to the witness' perception, psychological hindrances to accurate perception, and faulty memory;

l. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness;

m. be alert to potential Fifth Amendment and other privileges that may apply to any witness;

n. elicit all available evidence to support the theory of defense; and

o. prepare a memorandum of law in support of the propriety of any line of impeachment likely to be challenged.

5. Counsel should consider conducting a *voir dire* examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections. Counsel should not stipulate to the admission of expert testimony that counsel knows will be harmful to the defense where there exists a viable claim regarding its admissibility. Counsel should be alert to frequently encountered competency issues such as: age (chronological and developmental), taint of witness' ability to recall events by external factors such as suggestion, mental disability due to drug or alcohol abuse, and mental illness.

6. Before trial, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses to the extent required by the law. If disclosure was not properly made counsel should consider requesting relief as appropriate including:

a. adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a recess or continuance if necessary;

b. exclusion of the witness' testimony and all evidence affected by that testimony;

c. a mistrial;

d. dismissal of the case; and/or

e. any other sanctions counsel believes would remedy the violation.

7. Counsel should attempt to mitigate the prejudicial impact of physical evidence where possible by: attempting to stipulate to facts that the government seeks to establish through prejudicial evidence, moving to redact irrelevant and unduly prejudicial information from documents, recordings and transcripts, and/or asking the court to exclude part of the proposed evidence as unnecessarily cumulative. Where prejudicial physical evidence will be admitted, counsel should seek to lessen its prejudice by seeking restrictions on the form of the evidence (e.g. size of photographs, black and white, rather than color), the manner of presentation of the evidence and to bar undue emphasis or repetitive presentation of the evidence. Similarly, where necessary, counsel should object to the exclusion or redaction of exculpatory portions of evidence.

8. Counsel should become familiar with all areas in which expert evidence may be offered and should develop a strong knowledge of all forensic fields involved in the case with the assistance of experts as appropriate.

F. Presenting the Defendant's Case

1. Counsel should develop, in consultation with the client, an overall defense strategy. Counsel should prepare for the need to adapt the defense strategy during trial where necessary. In extreme cases where a defense theory is no longer tenable, counsel should abandon that theory rather than losing all credibility with the jury, and proceed to emphasize the available defense evidence which supports another theory of defense. 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. Even where no affirmative defense to guilt is mounted, counsel must be conscious of the potential for the case to proceed to penalty phase and should ensure that the guilt phase is conducted in a way that supports and extracts any available advantages in the guilt phase for the penalty phase presentation. Counsel should be conscious of the perils of a denial defense and the likely negative effect such a defense will have should the case proceed to penalty phase.

2. Counsel should not put on a non-viable defense but at the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

3. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the client's constitutional right to testify, his or her right to not testify, the nature of the defense, the client's likely effectiveness as a witness on direct and under cross-examination, the client's susceptibility to impeachment with prior convictions, bad acts, out-of-court statements or evidence that has been suppressed, the client's demeanor and temperament, and the availability of other defense or rebuttal evidence. Counsel should give special consideration to the likely impact of the client's testimony on any defenses and any possible mitigation presentation, particularly where questions of mental health and mental capacity are in issue. Counsel shall recommend the decision which counsel believes to be in the client's best interest. The ultimate decision whether to testify is the client's. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. The client should be called to testify in a capital case only in rare circumstances, however, counsel should prepare for the possibility that the client's testimony may become essential to the defense case. Therefore, the client should be thoroughly prepared for both direct and cross-examination before trial. Counsel should familiarize the client with all prior statements and exhibits, and review appropriate demeanor for taking the stand. Counsel should be respectful of the client when conducting the direct examination, eliciting testimony that will be helpful to the client's defense. Counsel should avoid unnecessary direct examination that opens the door to damaging cross examination.

4. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production. Counsel should be familiar with the notice requirements for affirmative defenses and introduction of expert testimony.

5. In preparing for presentation of a defense case, counsel should, where appropriate:

- a. consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
- b. after discussion with the client, make the decision whether to call any witnesses and, if calling witnesses, decide which witnesses will provide the most compelling evidence of the client's defense. In making this decision, counsel should consider that credibility issues with particular witnesses can be overcome when several witnesses testify to the same facts. Counsel should not call witnesses who will be damaging to the defense.
- c. develop a plan for direct examination of each potential defense witness;
- d. determine the implications that the order of witnesses may have on the defense case;
- e. determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
- f. consider the possible use and careful preparation of character witnesses, and any negative consequences that may flow from such testimony;
- g. consider the need for, and availability of, expert witnesses, especially to rebut any expert opinions offered by the prosecution, and what evidence must be submitted to lay the foundation for the expert's testimony;
- h. consider and prepare for the need to call a defense investigator as a witness;
- i. review all documentary evidence that must be presented;
- j. review all tangible evidence that must be presented;
- k. consider using demonstrative evidence (and the witnesses necessary to admit such evidence); and
- l. consider the order of exhibit presentation and, if appropriate, with leave of court prior to trial, label each exhibit.

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

7. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor, and procedures including sequestration.

8. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence. Counsel should plan for the contingency that particular items of evidence may be ruled inadmissible and prepare for alternative means by which the evidence, or similar evidence, can be offered. Similarly, counsel should have contingency plans for adjusting the defense case theory where important evidence may be ruled inadmissible. Counsel should not seek to have excluded prosecution evidence that is helpful to the defense.

9. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
10. If a prosecution objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.
11. Counsel should object to improper cross-examination by the prosecution.
12. Counsel should conduct redirect examination as appropriate.
13. At the close of the defense case, counsel should renew the motion for a directed verdict of acquittal on each charged count.
14. Counsel should keep a record of all exhibits identified or admitted.
15. If a witness does not appear, counsel should request a recess or continuance in order to give counsel a reasonable amount of time to locate and produce the witness. Counsel should request any available relief if the witness does not appear.
16. Understanding that capital jurors frequently determine the applicable punishment prior to penalty phase and that the jury in penalty phase will be permitted to rely upon all evidence introduced in the guilt phase, counsel should actively consider the benefits of presenting evidence admissible in the guilt phase that is also relevant in mitigation of punishment.

G. Preparation of the Closing Argument

1. Counsel should make a closing argument.
2. Counsel should be familiar with the substantive limits on both prosecution and defense summation.
3. Counsel should be familiar with the court rules, applicable statutes and law, and the individual judge's practice concerning limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
4. Well before trial, counsel should plan the themes, content, and organization of the summation. The basic argument should be formulated before the first juror is sworn, with accurate notes taken throughout the trial to permit incorporation of the developments at trial. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in pursuit of the defense theory of the case and, where appropriate, should consider:
 - a. highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
 - b. describing favorable inferences to be drawn from the evidence;
 - c. incorporating into the argument:
 - i. the theory of the defense case;
 - ii. helpful testimony from direct and cross-examinations;
 - iii. verbatim instructions drawn from the expected jury charge;
 - iv. responses to anticipated prosecution arguments;
 - v. the promises of proof the prosecutor made to the jury during the opening statement; and
 - vi. visual aids and exhibits;
 - d. the effect of the defense argument on the prosecutor's rebuttal argument.
5. Counsel should not demean or disparage or be openly hostile towards the client.
6. Whenever the prosecutor exceeds the scope of permissible argument or rebuttal, counsel should object, request a mistrial, or seek a cautionary instruction unless strong tactical considerations suggest otherwise.

H. Jury Instructions and Verdict

1. Counsel should be familiar with the Louisiana Rules of Court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

2. Counsel should always submit proposed jury instructions in writing.
3. Counsel should review the court's proposed jury charge and any special written charge proposed by the state and, where appropriate, counsel should submit special written charges which present the applicable law in the manner most favorable to the defense in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.
4. Where possible, counsel should provide citations to statute and case law in support of any proposed charge. Counsel should endeavor to ensure that all jury charge discussions are on the record or, at the very least, that all objections and rulings are reflected in the record.
5. Where appropriate, counsel should object to and argue against any improper charge proposed by the prosecution or the court.
6. If the court refuses to adopt a charge requested by counsel, or gives a charge over counsel's objection, counsel should take all steps necessary to preserve the record, including ensuring that a written copy of any proposed special written charge is included in the record.
7. 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 an additional or curative charge.
8. If there are grounds for objecting to any aspect of the charge, counsel should seek to object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.
9. If the court proposes giving a further or supplemental charge to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge provide a copy of the proposed charge to counsel before it is delivered to the jury. Counsel should be present for any further charge of the jury and should renew or make new objections as appropriate to any further charge given to the jurors after the jurors have begun their deliberations. Counsel should object to any charge which expressly or implicitly threatens to keep the jury sequestered indefinitely until a verdict is reached or is otherwise improperly coercive, for example, by omitting the caution to jurors that they should not abandon their deeply held beliefs.
10. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.
11. Upon a finding of guilt, counsel should be alert to any improprieties in the verdict and should request the court to poll the jury. In a multi-count indictment, defense counsel normally should request a poll as to each count on which the jury has convicted.

I. The Defense Case Concerning Penalty

1. Preparation for the sentencing phase should begin immediately upon counsel's entry into the case. Counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation, explains the offense, or rebuts the prosecution's case in aggravation. Counsel should not forgo investigating or presenting mitigation in favor of a strategy of relying only on residual doubt or sympathy and mercy. Counsel should exercise great caution in seeking to rely upon residual doubt as to the defendant's guilt.
2. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt phase.
3. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
4. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the jury, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.
5. As with the guilt phase, counsel should consider and discuss with the client, the advisability and possible consequences of the client testifying in the penalty phase.
6. Counsel should present to the jury all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence. Counsel should make every effort to find a way to successfully present all of the mitigating evidence rather than to abandon a piece or pieces of mitigating evidence due to potential negatives arising from the evidence. Counsel should not make agreements with the prosecution whereby the defense agrees to put on little or no mitigation evidence.
7. Counsel should present mitigating evidence in an organized and coherent fashion, especially when it is of a complex nature involving expert testimony. Counsel should seek to present a narrative of the client's life story that serves to humanize the client and offers a cohesive theory for life rather than presenting each mitigating

circumstance as separate and distinct from each other. Counsel should seek to illustrate the ways different pieces of mitigation evidence interrelate to ensure a comprehensive picture of the client's life and the mitigation case is produced. Counsel should consider the need to utilize an expert witness to synthesize or explain various and/or divergent elements of a mitigation presentation. However, counsel should be conscious of the desirability of presenting such evidence through lay witnesses, rather than relying too heavily upon expert testimony. Counsel should present all mitigating evidence in such a way that it maintains the defense theory of the case, and should avoid presenting or opening the door to evidence that undermines the defense theory.

8. In developing and advancing the defense theory of the case in the penalty phase, counsel should seek to integrate the defense theories at guilt and penalty phase into a complimentary whole or, where this is not possible, seek to minimize any discordance between the defense theories in guilt and penalty phase.

9. In deciding the defense theory in the penalty phase and which witnesses, evidence and arguments to prepare, counsel must exercise a high degree of skill and care as an advocate to determine the most persuasive course to adopt in the circumstances of each particular case. Counsel should consider evidence and arguments that would: be explanatory of the offense(s) for which the client is being sentenced; reduce the client's moral culpability for the offense; demonstrate the client's capacity for rehabilitation or adaptation to prison; demonstrate the client's remorse; rebut or explain evidence presented by the prosecutor; present positive aspects of the client and the client's life; humanize the client; engender sympathy or empathy in the jury; or would otherwise support a sentence less than death. Counsel should always consider and seek to address the likely concern the jury has regarding the possibility that the client will represent a future danger if sentenced to life imprisonment, rather than death.

10. The witnesses and evidence that counsel should prepare and consider for presentation in the penalty phase include:

a. witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death

b. expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor. Supporting documentation should be read, organized, evaluated and condensed to a form that is most conducive to explaining to the jury how and why this mitigation is relevant.;

c. Witnesses who can testify about the effect of a sentence of life imprisonment and/or the conditions under which a sentence of life imprisonment would be served;

d. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;

e. demonstrative evidence, such as photos, videos, physical objects and documents that humanize the client, portray him positively or add emphasis to an aspect of the testimony of a witness or witnesses.

f. witnesses drawn from the victim's family or intimates who are able to offer evidence that may support an argument for a sentence other than death.

11. Among topics counsel should consider presenting through evidence and argument are:

a. positive character evidence and evidence of specific positive acts, including evidence of positive relationships with others, contributions to individuals and the community, growth and progress over his life and since arrest, adaptation to incarceration, prospects for rehabilitation during a life sentence and reputation evidence.

b. family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

c. medical and mental health history (including hospitalizations, mental and physical illness or injury, trauma, intellectual impairment, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage). Evidence relating to medical and mental health matters should normally include the symptoms and effect of any illness rather than just solely presenting a formal diagnosis;

- d. educational history (including achievement, performance, behavior, and activities), special educational needs (including mental retardation, cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- e. military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- f. employment and training history (including skills and performance, and barriers to employability);
- g. record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses;
- h. prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services); and
- i. a prior relationship between the client and the victim(s) which might help to explain the offense.

12. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case could be damaging in and of itself or will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

13. Trial counsel should determine at the earliest possible time what aggravating circumstances the prosecution will rely upon in the penalty phase, any adjudicated or unadjudicated wrongful acts the prosecution intends to prove and the nature and scope of any victim impact evidence the prosecution may present. Counsel at all stages of the case should object to any non-compliance with the rules of discovery and applicable case law in this respect and challenge the adequacy of those rules.

14. Counsel at all stages of the case should carefully consider whether all or part of the evidence the state may seek to call in the penalty phase may appropriately be challenged as improper, unduly prejudicial, misleading or not legally admissible. Counsel should challenge the admissibility of evidence brought in support of an aggravating circumstance that cannot legally be established in the circumstances of the case. Counsel should investigate and present evidence that specifically undermines or mitigates the aggravating circumstances and any other adverse evidence to be presented by the prosecution.

15. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

- a. carefully consider
 - i. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and
 - ii. the legal and strategic issues implicated by the client's co-operation or non-cooperation;
- b. ensure that the client understands the significance of any statements made during such an interview, including the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing), and
- c. attend the interview, unless prevented by court order.

16. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client.

17. Counsel should make an opening statement.

18. In closing argument, counsel should be specific to the client and should, after outlining the compelling mitigating evidence, explain to the jury the significance of the mitigation presented. Counsel's closing argument should be more than a general attack on capital punishment and should not minimize the jury's verdict. Counsel should never ask, instruct, or give permission to the jury to return a death sentence, but rather should appeal to the jury for, and provide reasons for, a life sentence. Counsel's closing argument should not be contradictory. Counsel should not demean, disparage, be hostile towards, or make inappropriate comparisons regarding the client.

19. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

§1917. Performance Standard 8: Post-Verdict Motions and Formal Sentencing

A. Motion for a New Trial and Other Post-Verdict Motions

1. Counsel should be familiar with the procedures and availability of motions for new trial, for arrest of judgment and for a post-verdict judgment of acquittal, including the time period for filing such motions, the formal requirements of each motion, the evidentiary rules applicable to each motion and the grounds that can be raised.
2. A motion for new trial should be filed in each case where a death verdict is returned by the jury. A motion in arrest of judgment or for a post-verdict judgment of acquittal should be filed in each case in which there exists a colorable basis for the relief sought to be granted.
3. In preparing the motion for new trial, counsel should conduct an intensive and thorough investigation designed to identify and develop: evidence of prejudice arising from any adverse rulings of the trial court; evidence not discovered during the trial that would likely have changed the verdict at either guilt or penalty phase; evidence of prejudicial error or defect not discovered before the verdict or judgment; and, evidence that would otherwise support an argument that the ends of justice would be served by the granting of a new trial.
4. Counsel should utilize all of the investigative tools described in these standards in conducting the investigation, including the use of fact investigators, mitigation specialists, experts, record requests, discovery requests, compulsory process and motions practice.
5. Recognizing that the post-verdict litigation represents a critical stage of proceedings that requires extensive investigation and development of potentially dispositive claims:
 - a. counsel should seek a postponement of formal sentencing for a sufficient period to allow adequate investigation and development of the motion for new trial or other post-verdict motions; and
 - b. counsel should seek additional resources sufficient to allow adequate investigation and development of the motion for new trial or other post-verdict motions.
6. In preparing and presenting claims in post-verdict motions, counsel should have particular regard to the need to fully plead the claims and their factual basis in a manner that will preserve the claims for subsequent review. Counsel should request an evidentiary hearing on the motion for new trial in order to present new evidence and preserve claims for appeal.
7. Counsel should prepare post-verdict motions urging that the death penalty is not a legally permissible penalty in the circumstances of the case, including that the death penalty would be constitutionally excessive, where such an arguments are available under existing law, or under a good faith argument for the extension, modification, or reversal of existing law.
8. Counsel should review the court record and ensure that it is complete and that matters relevant to any future review of the case are contained in the record including, for instance, race and gender of jurors in the venire, juror questionnaires, jury questions during deliberations, and all defense proffers appropriate to preserve any defense objections for review.
9. Following formal sentencing, counsel shall continue to conduct an intensive investigation designed to identify and develop evidence not discovered during the trial that would likely have changed the verdict at either guilt or penalty phase in order that any available motion for new trial may be filed within one year of the verdict or judgment of the trial court.

B. Preparation for Formal Sentencing, the Sentence Investigation Report and the Uniform Capital Sentencing Report

1. In preparing for sentencing, counsel should:
 - a. inform the client of the sentencing procedure, its consequences and the next steps in the client's case, including any expected change in the client's representation;
 - b. maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
 - c. 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 statement may have upon the sentence to be imposed, any appeal or review, subsequent retrial or trial on other offenses;
 - d. become familiar with the procedures governing preparation, submission, and verification of the sentence investigation report and uniform capital sentencing report. In addition, counsel should:
 - i. consider providing to the report preparer information favorable to the client;

ii. consider whether the client should speak with the person preparing the report; if the decision is made that the client not speak to the report preparer, the client should be advised to exercise his rights to silence and the presence of counsel and the report preparer should be advised that the client is asserting his right not to participate in an interview. If the determination is made for the client to speak to the report preparer, counsel should discuss the interview in advance with the client and attend the interview.

iii. obtain a copy of the sentence investigation report and uniform capital sentencing report, once completed. Review the completed reports and discuss their contents with the client.

iv. File a written opposition to the factual contents of the reports where appropriate and seek a contradictory hearing.

C. Obligations of Counsel at Sentencing Hearing and Following Sentencing

1. Understanding that the formal imposition of a death sentence following a jury's death verdict is neither automatic, nor inevitable, counsel should actively advocate for a disposition other than the imposition of a death sentence. Such advocacy should include presenting to the court evidence and argument in favor of any categorical bar to the imposition of the death penalty and in support of an argument that the death penalty, in the circumstances of the particular case, is unconstitutionally excessive. Counsel's presentation should not be limited to existing law but should include all good faith arguments for an extension, modification or reversal of existing law.

2. Following the imposition of a death sentence, counsel should prepare and file a motion for reconsideration of sentence.

3. Upon denial of a motion for reconsideration, counsel should timely file a motion for appeal, including a comprehensive request for transcription of the proceedings and designation of the record as follows:

- a. The minutes of all of the proceedings connected with the case;
- b. The indictment and any and all proceedings concerning the appointment and/or selection of the grand jury;
- c. The transcript of arraignment;
- d. The transcript of all pre-trial proceedings regardless of whether defense counsel and the defendant were present;
- e. The transcript of any proceeding in which allotment of the case occurred.
- f. The transcript of any joint proceedings held with another defendant(s);
- g. The transcript of the entirety of voir dire, including the transcript of any communication made by the judge or the court staff whether within or outside the presence of defense counsel;
- h. The transcript of all bench conferences, in chambers hearings or charge conferences;
- i. The transcript of all argument and instruction;
- j. The transcript of all testimony, including testimony at the penalty phase of the trial;
- k. Any and all exhibits introduced in connection with the case;
- l. The jury questionnaires, verdict forms, polling slips, and verdicts imposed in the case.

4. In the period following the imposition of a sentence of death and the lodging of the appellate record, counsel should continue to actively represent the client's interests, including investigation and development of arguments relevant to a post-sentencing motion for new trial or defendant's sentence review memorandum. Counsel should take action to preserve the client's interests in his appeal, state post-conviction, federal habeas corpus and clemency proceedings pending the assignment of appellate counsel.

5. Where appropriate, counsel should timely file a post-sentencing motion for new trial.

6. Counsel shall continue to represent the client until successor counsel assumes responsibility for the representation. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other information pertinent to appellate and post-conviction proceedings. Counsel should notify the client when the case assignment is concluded.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

A. Duties of Appellate Counsel

1. Appellate counsel should comply with the Capital Guidelines, and these Performance Standards, except where clearly inapplicable to the representation of the client during the period of direct appeal, including the obligations to:
 - a. maintain close contact with the client regarding litigation developments;
 - b. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
 - c. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments;
 - d. take all steps that may be appropriate in the exercise of professional judgment in accordance with these Standards to achieve an agreed-upon disposition; and,
 - e. continue an aggressive investigation of all aspects of the case.
2. 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.
3. Appellate counsel should monitor and remain informed of legal developments that may be relevant to the persuasive presentation of claims on direct appeal and in any application for certiorari to the United States Supreme Court as well as the preservation of claims for subsequent review in federal habeas corpus proceedings and international legal fora.
 - a. Counsel should monitor relevant legal developments in and be aware of current legal claims pending in relevant cases in front of the Louisiana Supreme Court, the Fifth Circuit Court of Appeals and the United States Supreme Court.
 - b. Counsel should monitor relevant legal developments in Louisiana's Courts of Appeal including splits between the circuit courts of appeal.
 - c. Counsel should monitor relevant legal developments in the superior courts of other states, particularly in the interpretation and application of federal constitutional law.
 - d. Counsel should monitor relevant legal developments in the federal courts of appeal, including splits between circuit courts of appeal.
 - e. Counsel should monitor relevant developments in international law.
4. When identifying potential conflicts, appellate counsel should have particular regard to areas of potential conflict that may arise at this stage of proceedings, including:
 - a. when the defendant was represented at the trial level by appellate counsel or by an attorney in the same law office as the appellate counsel, and it is asserted by the client that trial counsel provided ineffective representation, or it appears to appellate counsel that trial counsel provided ineffective representation;
 - b. when it is necessary for the appellate attorney to interview or examine in a post-conviction evidentiary hearing another client of the attorney's office in an effort to substantiate information provided by the first client; and
 - c. when, in the pursuit of an appeal or post-conviction hearing, it is necessary to assert for the first time that another client of the office committed perjury at trial.
5. Counsel should explain to the client counsel's role, how counsel was appointed to the case, and the meaning and goals of the appeal, and counsel should encourage the client to participate in the appellate process.
6. Counsel shall consult with the client on the matters to be raised on appeal and give genuine consideration to any issue the client wishes to raise on appeal. What claims to raise on appeal, and how to raise them, are generally matters entrusted to the discretion of counsel. When counsel decides not to argue all of the issues that his or her client desires to be argued, counsel should inform the client of that decision, of the reasons for the decision, and of his or her right to file a pro se brief.
7. Appellate counsel should obtain and review a complete record of all proceedings relevant to the case including the appellate record, the district court file, any file in the court of appeal or supreme court, and the files in any other related or prior proceedings in the cause.

8. Appellate counsel should obtain and review all prior counsels' file(s). Appellate counsel should retain and preserve prior counsel's files as far as possible in the condition in which they were received until transmitted to successor counsel.
9. Appellate counsel should ensure that the record on appeal is complete. If any item is necessary to appellate review but is not included in the record, it is appellate counsel's responsibility to file a motion to supplement the record and to seek to have the briefing schedule stayed pending completion of the record.
10. Appellate counsel should interview the client and previous defense team members about the case, including any relevant matters that do not appear in the record. Appellate counsel should consider whether any potential off-record matters may have an impact on how the appeal is pursued, and what kind of an investigation of the matter is warranted.
11. Appellate counsel should seek to investigate and litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules and any good faith argument for the extension, modification or reversal of existing law. If an error warranting relief has not yet been presented, Counsel should present it and request error patent review.
12. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review. Claims raised should include federal constitutional claims which, in the event that relief is denied in the state appellate courts, could form the basis for a successful petition for writ of certiorari to the Supreme Court or for a writ of habeas corpus in the federal district court. Counsel should present all claims in a manner that will meet the exhaustion requirements applicable in federal habeas corpus proceedings. Where pending claims in another case may be resolved in a manner that would benefit the client, counsel should ensure that the relevant issues are preserved and presented for review in the client's case and, where appropriate, counsel should seek to keep the client's direct appeal open pending the determination of the other case.
13. Petitions and briefs shall conform to all Rules of Court and shall have a professional appearance, shall advance argument and cite legal authority in support of each contention and shall conform to Blue Book rules of citation. Regardless of the existence of local authority, federal authority should also be relied upon to present and preserve for later review any federal constitutional claims, particularly any applicable decision of the United States Supreme Court.
14. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the briefing and oral argument. All arguments on assignments of error should include references by page number, or by any more precise method of location, to the place(s) in the transcript which contains the alleged error.
15. Counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. If appropriate, counsel should move for the remand of the matter and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error or argument for excessiveness that is not adequately supported by the record.
16. Where counsel is considering seeking a remand for further hearing, counsel should undertake a full factual investigation of the issue for which the remand would be sought so that the decision as to whether to seek remand may be made in light of the evidence that might be adduced at such a hearing. Where counsel does seek remand for further hearing, counsel should ensure that adequate investigation and preparation has been undertaken to allow counsel to promptly litigate the matter if the case is remanded for further hearing.
17. The identification and selection of issues is the responsibility of lead counsel. Lead counsel shall adopt procedures for providing an "Issues Meeting" between the attorneys handling the case and other relevantly qualified attorneys, including at least one qualified as lead appellate counsel, at which the issues raised in the case and the defense theory on appeal can be discussed. The Issues Meeting will ordinarily be conducted in the course of a Case Review meeting under these Standards but where this is not possible, the Issues Meeting should be conducted independently of the Case Review.
18. Counsel should complete a full review of the records of relevant proceedings and trial counsels' files prior to completing a draft of the brief. Lead counsel shall adopt a procedure for screening the brief, which should include a careful review of the brief by an attorney not involved in drafting the pleading. The reviewing attorney should be qualified as lead appellate counsel.
19. The review of the records and files should be completed a sufficient time before the filing deadline to allow for the Issues Meeting, the drafting of the brief, the review of the brief and the finalization of the brief. If appellate counsel is unable to prepare the brief within the existing briefing schedule in a manner consistent with these standards and with high quality appellate representation, it is counsel's responsibility to file a motion to extend the briefing schedule.

20. Counsel shall be diligent in expediting the timely submission of the appeal and shall take all steps necessary to reduce delays and time necessary for the processing of appeals which adversely affect the client.
21. Where counsel is unable to provide high quality representation in appellate proceedings in a particular case, counsel must bring this deficiency to the attention of the capital case supervisor and the capital case coordinator. If the deficiency cannot be remedied then counsel must bring the matter to the attention of the court and seek the relief appropriate to protect the interests of the client. Counsel may be unable to provide high quality representation due to a range of factors: lack of resources, insufficient time, excessive workload, poor health or other personal considerations, inadequate skill or experience etc.
22. Following the filing of Appellee's brief and before filing a reply brief, a second Case Review meeting shall be conducted to discuss the defense theory on appeal in light of the issues raised in the Original brief, Appellee's brief and the issues to be addressed in reply and at oral argument.
23. Counsel should, no less than two weeks prior to oral argument, where possible, file a reply brief rebutting legal and factual arguments made by the state. The reply brief should not simply repeat the contents of the original brief but should respond directly to the contentions of the state and any issues arising from the state's brief. Where appropriate, counsel should file a supplemental brief on the merits, seeking leave to do so if the case has already been submitted.
24. Counsel should prepare and timely file a sentence review memorandum in each case. The sentence review memorandum shall address itself to the state's sentence review memorandum and to the question of whether the sentence is excessive, having regard to: the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The sentence review memorandum need not be limited to the matters contained in the record and shall furnish additional information relevant to the court's considerations under La. C. Cr. P. art. 905.9 and Supreme Court Rule XXVIII based upon the results of investigation undertaken pursuant to Performance Standard 9(25).
25. Counsel should undertake a detailed and intensive investigation of the matters relevant to the sentence review memorandum. Counsel shall not rely upon the contents of the state's sentence review memorandum without confirming the accuracy of that memorandum. The investigation should be commenced as soon as practicable after counsel is assigned to the case. Where additional favorable information is developed, counsel should seek a remand of the matter for the development of facts relating to whether the sentence is excessive.
26. Counsel should promptly review the Uniform Capital Sentence Report for accuracy and completeness. Where a response to the Uniform Capital Sentence Report has not previously been filed in the case, or where the response was incomplete or inaccurate, counsel should prepare and file an opposition to the Report in accordance with these standards.
27. Counsel shall promptly inform the client of the date, time and place scheduled for oral argument of the appeal as soon as counsel receives notice thereof from the appellate court. Counsel shall not waive oral argument.
28. To prepare for oral argument, counsel should review the record and the briefs of the parties, and should update legal research. If binding dispositive or contrary authority has been published since the filing of the brief, counsel shall disclose the information to the court. Counsel should be prepared to answer questions propounded by the court. In particular, counsel should be prepared to address whether and where the questions presented were preserved in the record, the applicable standards of review and the prejudice associated with the errors alleged.
29. Lead counsel shall adopt procedures, including at least two moot court arguments, to assist counsel in preparing to present argument. The moot court shall include at least one attorney qualified as lead appellate counsel who was not involved in drafting the brief. The moot will ordinarily be conducted in the course of a Case Review meeting under these Standards but where this is not possible, the moot should be conducted independently of the Case Review.
30. Counsel presenting oral argument should be the person best qualified to present oral argument taking into account experience, the complexity of the case and time to prepare. That person will ordinarily be lead counsel. However, after consultation with the case supervisor and defense team, lead counsel may designate other counsel to present argument, including outside counsel.
31. Where pertinent and significant authorities come to counsel's attention following oral argument, counsel should bring the authorities to the attention to the court by letter or, where appropriate, should seek leave to file a supplemental brief.
32. Counsel shall promptly inform the client of any decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision. Counsel should accurately inform the client of the courses of action which may be pursued as a result of the decision. If the case has been returned to a lower court on remand,

counsel should continue in his or her representation (unless and until other counsel has been assigned and formally enrolled) providing any necessary briefing to the court to continue to advocate for the client.

33. Counsel shall promptly inform the Capital Case Coordinator of the disposition in any capital appeal case.

34. Counsel shall timely prepare and file a motion for rehearing, raising all arguments for which a meritorious motion for rehearing can be advanced. Counsel should have particular regard to any changes or developments in the law since the case had been submitted and any errors of fact or law appearing in the decision that may be corrected by reference to the record.

35. The duties of the counsel representing the client on direct appeal ordinarily include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify the capital coordinator and the state public defender. In developing, drafting and filing a petition for certiorari, appellate counsel should consult with counsel with particular expertise and experience in litigating applications for certiorari before the United States Supreme Court.

36. In preparing and filing a petition for certiorari, counsel should consider the benefit to the client of the support of amici and seek appropriate support where it is in the client's interests.

37. Appellate counsel should be familiar with the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution. If an execution date is set, counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

38. In the event that the client's appeal to the Louisiana Supreme Court and application for certiorari to the United States Supreme Court are unsuccessful, appellate counsel shall advise the client of: his or her right to seek state post-conviction relief and federal habeas corpus relief; the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court; the procedure and effect of filing of a petition for post-conviction relief in the state trial court to raise new claims and to exhaust any federal constitutional issues for federal habeas review; and, the procedure for assignment of counsel to represent the client in post-conviction proceedings.

39. Appellate counsel shall, with the client's consent, continue to represent the client for the limited purpose of preserving the client's interests in his state post-conviction, federal habeas corpus and clemency proceedings pending the assignment of post-conviction counsel. Counsel shall carefully explain the limited scope of this representation to the client and provide advice of this limited scope in writing when obtaining the client's consent.

40. Counsel should be aware of the statute of limitations for filing a petition for writ of habeas corpus in federal court, and should file pleadings in state court so as to allow adequate time for preparation and filing of such a petition if state post-conviction relief is denied.

41. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, Capital Case Direct Appeal Review Form, and other information pertinent to post-conviction proceedings. Counsel should notify the client when the case assignment is concluded.

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§1921. Performance Standard 10: State Post-Conviction and Clemency

A. Duties of Post-Conviction Counsel

1. Post-conviction counsel should comply with the Capital Guidelines, and these Performance Standards, except where clearly inapplicable to the representation of the client in the post-conviction period of the case, including the obligations to:

- a. maintain close contact with the client regarding litigation developments;
- b. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
- c. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments;
- d. take all steps that may be appropriate in the exercise of professional judgment in accordance with these Standards to achieve an agreed-upon disposition; and
- e. continue an aggressive investigation of all aspects of the case.

2. Post-conviction 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.
3. Post-conviction counsel should monitor and remain informed of legal developments that may be relevant to the persuasive representation of claims in state post-conviction proceedings, in federal habeas corpus proceedings and in any application for certiorari to the United States Supreme Court as well as the preservation of claims for subsequent review in state and federal proceedings and international legal fora.
 - a. Counsel should monitor relevant legal developments in and be aware of current legal claims pending in relevant cases in front of the Louisiana Supreme Court, the Fifth Circuit Court of Appeals and the United States Supreme Court.
 - b. Counsel should monitor relevant legal developments in Louisiana's Courts of Appeal including splits between the circuit courts of appeal.
 - c. Counsel should monitor relevant legal developments in the superior courts of other states, particularly in the interpretation and application of federal constitutional law.
 - d. Counsel should monitor relevant legal developments in the federal courts of appeal, including splits between circuit courts of appeal.
 - e. Counsel should monitor relevant developments in international law.
4. Counsel should explain to the client counsel's role, how counsel was appointed to the case, and the meaning and goals of post-conviction and federal habeas corpus proceedings, and counsel should encourage the client to participate in the collateral review process.
5. Counsel shall consult with the client on the matters to be raised in any post-conviction petition or federal application for habeas corpus and give genuine consideration to any issue the client wishes to raise. What claims to raise, and how to raise them, are generally matters entrusted to the discretion of counsel. When counsel decides not to argue all of the issues that his or her client desires to be argued, counsel should inform the client of that decision, of the reasons for the decision, and of his or her right to file a *pro se* brief.
6. Post-conviction counsel should obtain and review a complete record of all proceedings relevant to the case including the appellate record, the district court file, any file in the court of appeal or supreme court, and the files in any other related or prior proceedings in the cause.
7. Post-conviction counsel should obtain and review all prior counsels' file(s). Post-conviction counsel should retain and preserve prior counsel's files as far as possible in the condition in which they were received until transmitted to successor counsel.
8. Post-conviction counsel should ensure that the record of proceedings available for review is complete. If any item is necessary to post-conviction review but is not included in the record of proceedings, it is post-conviction counsel's responsibility to ensure that the record available for review is supplemented.
9. Post-conviction counsel should interview the client and previous defense team members about the case, including any relevant matters that do not appear in the record. Post-conviction counsel should consider whether any potential off-record matters should have an impact on how post-conviction review is pursued, and what kind of an investigation of the matter is warranted.
10. Post-conviction counsel should seek to investigate and litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules and any good faith argument for the extension, modification or reversal of existing law. Counsel should undertake a high quality, independent, exhaustive investigation and should not assume that investigation of issues by prior counsel has been complete or adequate.
11. The investigation and litigation of claims should encompass all arguably available claims for relief, including those based upon the grounds that:
 - a. the defendant is in custody or the sentence was imposed in violation of the Constitution or laws or treaties of the United States;
 - b. the execution of the defendant would violate the Constitution, laws or treaties of the United States or the Constitution or laws of the state of Louisiana;
 - c. the conviction was obtained in violation of the constitution of the state of Louisiana;
 - d. the sentence was obtained in violation of the constitution of the state of Louisiana or is otherwise an illegal sentence;

- e. the court exceeded its jurisdiction;
- f. the conviction or sentence subjected the defendant to double jeopardy;
- g. the limitations on the institution of prosecution had expired;
- h. the statute creating the offense for which the defendant was convicted and sentenced is unconstitutional;
- i. the conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana;
- j. the results of DNA testing performed pursuant to an application granted under La. C. Cr. P. art. 926.1 proves that the petitioner is factually innocent of the crime for which he was convicted; or
- k. the defendant is otherwise shown to be factually innocent of the crime for which he was convicted or not eligible for the death penalty.

12. In conducting the investigation, counsel should have particular regard to the possibility that claims for relief may arise from matters not previously fully investigated or litigated, including:

- a. the possibility that the state failed to turn over evidence favorable to the defendant and material to his guilt or punishment;
- b. the possibility that the state knowingly used false testimony to secure the conviction or sentence;
- c. the possibility that the client received ineffective assistance of counsel as to either guilt or penalty in the course of his representation in the trial court or on appeal;
- d. the possibility that the jury's verdict is tainted by issues such as jury misconduct, improper separation of the jury, and false answers on voir dire examination; and,
- e. the possibility that the client is innocent of the offense charged or not eligible for the death penalty.

13. In investigating the possibility that the client received ineffective assistance of counsel, post-conviction counsel must review both the record in the case and also conduct a thorough investigation of the facts and circumstances beyond the record in order to determine whether a claim exists that counsel's performance was deficient. As these Standards are intended to reflect accepted minimum standards for performance in capital cases, in determining the scope of the investigation to be conducted, post-conviction counsel shall have regard to these Standards as they describe the responsibilities of trial and appellate counsel. Post-conviction counsel shall conduct a sufficiently thorough investigation to determine either that prior counsel's responsibilities were met or to determine the extent of any prejudice arising from the failure to meet those responsibilities.

14. In investigating and developing claims of ineffective assistance of counsel or the suppression of favorable evidence, counsel shall be conscious that evidence will be assessed for its cumulative impact and so should not limit the investigation to those matters that might, in and of themselves, justify relief. Instead, the investigation should extend to those matters which, in combination with others, may justify relief.

15. In investigating, preparing and submitting a petition, counsel should seek such pre-filing discovery, compulsory process, requests for admissions, depositions and other orders as are available and appropriate to a high quality, independent, exhaustive investigation. Counsel should investigate the possibility of and, where appropriate, file an application for DNA testing pursuant to La. C. Cr. P. art. 926.1.

16. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review. Claims raised should include federal constitutional claims which, in the event that relief is denied, could form the basis for a successful petition for writ of certiorari to the Supreme Court or for a writ of habeas corpus in the federal district court. Where pending claims in another case may be resolved in a manner that would benefit the client, counsel should ensure that the relevant issues are preserved and presented for review in the client's case and, where appropriate, counsel should seek to keep the client's post-conviction proceedings open pending the determination of the other case.

17. Petitions and supporting memoranda shall conform to all Rules of Court, including Supreme Court Rule XXVII and shall have a professional appearance, conform to acceptable rules of grammar, be free from typographical errors and misspellings, shall advance argument and cite legal authority in support of each contention. Counsel shall utilize out-of-state and federal authority in support of positions when no local authority exists or local authority is contrary to the weight of recent decisions from other jurisdictions. Regardless of the existence of local authority, federal authority should also be relied upon to present and preserve for later review any federal constitutional claims, particularly any applicable decision of the United States Supreme Court.

18. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies.

19. The post-conviction petition should clearly allege a factual basis for each claim which, if established, would entitle the petitioner to relief and clearly allege all facts supporting the claims in the petition. Counsel shall include with the petition all documents and exhibits that would establish or support the factual basis of the petitioner's claims, including but not limited to court records, transcripts, depositions, admissions of fact, affidavits, statements, reports and other records. In determining the scope of the material to be presented in state court, counsel shall have regard to the likelihood that federal review will be limited to the material presented in state court and so should not refrain from presenting any relevant material unless there are strong strategic reasons to do so.

20. Where counsel raises a claim that has previously been fully litigated in earlier appeal proceedings in the case, counsel shall fully investigate, prepare and submit an argument that the claim is nevertheless eligible for consideration in the interests of justice.

21. Where counsel raises a claim that was not raised in the proceedings leading to conviction or sentence, was not pursued on appeal or was not included in a prior post-conviction petition, counsel shall fully investigate, prepare and submit a claim that the failure to previously raise the claim is excusable.

22. The identification and selection of issues is the responsibility of lead counsel. Lead counsel shall adopt procedures for providing an "Issues Meeting" between the attorneys handling the case and other relevantly qualified attorneys, including at least one qualified as lead post-conviction counsel, at which the issues raised in the case and the defense theory in post-conviction can be discussed. The Issues Meeting will ordinarily be conducted in the course of a Case Review meeting under these Standards but where this is not possible, the Issues Meeting should be conducted independently of the Case Review.

23. Counsel should complete a full review of the records of relevant proceedings, trial counsels' files and the fruits of the post-conviction investigation prior to completing a draft of the petition. Lead counsel shall adopt a procedure for screening the petition, which should include a careful review of the brief by an attorney not involved in drafting the pleading. The reviewing attorney should be qualified as lead post-conviction counsel.

24. The review of the records and files should be completed a sufficient time before the filing deadline to allow for the Issues Meeting, the drafting of the petition, the review of the petition and the finalization of the petition. If post-conviction counsel is unable to complete the post-conviction investigation and prepare the petition within the existing briefing schedule in a manner consistent with these standards and with high quality post-conviction representation, it is counsel's responsibility to file a motion to extend the filing deadline.

25. Counsel shall be diligent in expediting the timely submission of the post-conviction petition and shall take all steps necessary to reduce delays and time necessary for the processing of petitions which adversely affect the client.

26. Where counsel is unable to provide high quality representation in post-conviction proceedings in a particular case, counsel must promptly bring this deficiency to the attention of the capital case supervisor and the capital case coordinator. If the deficiency cannot be remedied then counsel must bring the matter to the attention of the court and seek the relief appropriate to protect the interests of the client. Counsel may be unable to provide high quality representation due to a range of factors: lack of resources, insufficient time, excessive workload, poor health or other personal considerations, inadequate skill or experience etc.

27. Counsel should be aware of the statute of limitations for filing a petition for writ of habeas corpus in federal court, and should file pleadings in state court so as to allow adequate time for preparation and filing of such a petition if state post-conviction relief is denied.

28. Where the state files procedural objections or an answer on the merits, counsel should file a response rebutting legal and factual arguments made by the state. The response brief should not simply repeat the contents of the original petition but should respond directly to the contentions of the state and any issues arising from the state's filing. Where appropriate, counsel should file a supplemental petition or briefing, seeking leave to do so if required.

29. Counsel should seek such discovery, compulsory process, requests for admissions, depositions and other orders as are available and appropriate to the full development and presentation of all claims in the petition and should document the denial of any such attempts to secure facts in support of possible claims.

30. Counsel should request an evidentiary hearing for all claims in which the state does not clearly admit the factual allegations contained in the petition and seek to prove by admissible evidence those factual allegations that support or establish the client's claims for relief.

31. Where counsel is considering seeking an evidentiary hearing, counsel should undertake a full factual investigation of the issue for which the hearing would be sought so that the decision as to whether to seek a hearing may be made in light of the evidence that might be adduced at such a hearing. Where counsel does seek an

evidentiary hearing, counsel should ensure that adequate investigation and preparation has been undertaken to allow counsel to promptly litigate the matter if an evidentiary hearing is granted.

32. Following any evidentiary hearing, counsel should file supplemental briefing demonstrating the client's entitlement to relief based upon the petition filed and the evidence adduced at the hearing.

33. Counsel should timely make application for supervisory writs if the trial court dismisses the petition or otherwise denies relief on an application for post-conviction relief. Counsel should take great care to ensure that all writ applications comply with the requirements of the relevant Rules of Court and present all claims in a manner that will meet the exhaustion requirements applicable in federal habeas corpus proceedings. Counsel should ensure that an adequate record is created in the trial court to justify and encourage the exercise of the supervisory jurisdiction of the reviewing court. Counsel should respond to any state application for supervisory writs or appeal except where exceptional circumstances justify the choice not to respond.

34. A lack of adequate time, resources or expertise is not an adequate reason for failing to make application for supervisory writs or failing to respond to a state application. Where counsel lacks adequate time, resources or expertise, counsel should take all available steps to ensure that the defense team has sufficient time, resources and expertise, including advising the capital case supervisor of the situation and seeking assignment of additional counsel. Counsel shall ensure that the role of lack of time or resources upon the decision to file a writ application is reflected in the record.

35. Counsel shall promptly inform the client of the decision of the trial court and any reviewing court in the client's case and shall promptly transmit to the client a copy of the decision. Counsel should accurately inform the client of the courses of action which may be pursued as a result of the decision.

36. The duties of the counsel representing the client in state post-conviction proceedings include filing a petition for certiorari in the Supreme Court of the United States. If post-conviction counsel does not intend to file such a petition, he or she should immediately notify the capital coordinator and the state public defender.

37. In preparing and filing a petition for certiorari, counsel should consider the benefit to the client of the support of amici and seek appropriate support where it is in the client's interests.

38. Post-conviction counsel should be familiar with the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution. If an execution date is set, counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

39. In the event that the client's state post-conviction application is unsuccessful, post-conviction counsel shall advise the client of: his right to seek federal habeas corpus relief; the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court; and, the procedure for assignment of counsel to represent the client in federal habeas corpus proceedings. Having regard to tolling, counsel shall advise the client of the actual period of time that will be remaining for filing a federal petition upon finalization of the state post-conviction proceedings. Counsel shall provide such advice a sufficient period prior to the finalization of state post-conviction proceedings to allow the client to take adequate steps to protect his rights to federal review.

40. Counsel shall promptly inform the Capital Case Coordinator of the disposition in any capital post-conviction case.

41. Counsel shall take all necessary steps to preserve the client's right to federal review, including ensuring that the client is not time barred from seeking relief. Post-conviction counsel shall be responsible for protecting the client's interests in this regard, including ensuring that a federal petition is filed while state post-conviction proceedings remain pending where the time remaining for filing a federal petition following finalization of the state post-conviction proceedings will be inadequate to allow a timely filing at that time.

42. State post-conviction counsel may continue to represent the client in his federal habeas corpus proceedings only with the consent of the capital case coordinator and the informed consent of the client. Adequate representation in federal habeas corpus proceedings will include an investigation of whether state post-conviction counsel provided ineffective assistance in failing to adequately raise a meritorious claim of ineffective assistance of trial or appellate counsel. Just as trial counsel is poorly placed to investigate or litigate his or her own ineffectiveness, state post-conviction counsel may be similarly limited. In these circumstances, the capital case coordinator should not ordinarily consent to continuing representation by state post-conviction counsel in the absence of: informed consent from the client obtained through independent counsel; and, the assignment to the defense team of at least one attorney qualified and experienced in federal habeas corpus proceedings in capital cases who was not involved in the preparation and presentation of the state post-conviction petition.

43. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other information pertinent to post-conviction proceedings. Counsel should notify the client when the case assignment is concluded.

44. Counsel should closely monitor the client's competence in post-conviction proceedings, having regard to the requirement that the client be sufficiently competent to be lawfully executed and should investigate and litigate this issue where it is possible that the client does not meet the necessary degree of competence.

B. Duties of Clemency Counsel

1. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
2. Clemency counsel should conduct an investigation of matters relevant to clemency consistent with these standards and should not assume that the investigation conducted by prior counsel was complete or adequate.
3. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.
4. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.
5. Clemency counsel should fully discharge the ongoing obligations imposed by the Guidelines, and standards including the obligations to:
 - a. maintain close contact with the client regarding litigation developments;
 - b. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
 - c. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
 - d. continue an aggressive investigation of all aspects of the case.

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§1923. Performance Standard 11: Supervision, Review and Consultation

A. Supervision of the Defense Team

1. Primary responsibility for the supervision of the defense team and the team's compliance with these standards and the guidelines rests with lead counsel. Lead counsel shall establish a system for communication, feedback and supervision of the defense team that shall ensure that the team provides high quality representation and that any deficiencies in compliance with the guidelines or standards are promptly identified and remedied. Lead counsel should ensure that all team members are aware of their obligations under the guidelines and performance standards.
2. Primary responsibility for the supervision of experts rests with lead counsel, though this responsibility may be delegated to other counsel who are more directly responsible for working with a particular expert. Counsel supervising an expert shall ensure that appropriate funding is secured and maintained for the expert's services, that the expert performs the requested services in a timely fashion and to a high quality and that the expert's services are promptly invoiced and paid. By submitting an expert's invoice to the office of the state defender for payment, counsel certifies that the work performed was reasonably necessary and that it was completed to an appropriate standard.
3. The case supervisor is responsible for monitoring the correct, effective and appropriate implementation of the capital guidelines and performance standards in each case. In contrast to the responsibilities of lead counsel to make strategic decisions in the case, this is an administrative level of supervision designed to ensure that the team is assembled and is functioning in accordance with the guidelines and standards. The case supervisor shall be certified as lead counsel and shall have a comprehensive knowledge of the requirements of the capital guidelines and performance standards. The case supervisor shall not be a staff member in the same office as members of the defense team or district defender of the district responsible for the case.
4. The case supervisor for each case shall meet with the defense team no less than once every three months and provide a quarterly report to the capital case coordinator in the form provided, advising of the extent to which the team and its representation are in compliance with the guidelines and standards.
5. The case supervisor is a lawyer engaged to consult with counsel on the defense team within lawyer-client privilege to assist in ensuring that each client is receiving high quality representation in compliance with the capital guidelines and performance standards. The case supervisor does not, by virtue of being case supervisor, have the authority to act on behalf of the defendant or to direct members of the defense team to take any action or refrain

from taking any action. The case supervisor may make recommendations to the defense team, resolve workload questions pursuant to Guideline §919 and report non-compliance with the guidelines to the district public defender and state public defender. All members of the defense team shall cooperate with the case supervisor and provide access to the case file and case theory documents as requested.

6. The state state defender, district defender or director of a defender organization having an employment or contractual relationship with counsel on a defense team may exercise such supervisory and regulatory authority as is consistent with the Louisiana Rules of Professional Conduct and provided for within that employment or contractual relationship. However, it shall remain at all times the responsibility of individual counsel to ensure that representation is provided in accordance with the capital guidelines and performance standards.

7. The capital case coordinator shall have responsibility for monitoring the performance of counsel and defender organizations providing capital representation in the state and reporting to the state defender. In performing this supervisory role, the capital case coordinator shall have particular regard to: the capital guidelines and performance standards; applications for certification and re-certification of counsel; quarterly reports submitted by case supervisors; requests for expert assistance by counsel; briefings from counsel following the closure of cases; findings and recommendations of case review committees formed under Guideline §921(C); case observation; and other reliable sources of information.

8. Where the capital case coordinator becomes aware that a defense team is not providing representation consistent with these guidelines and associated performance standards, the capital case coordinator, shall take necessary action to protect the interests of the attorney's current and potential clients.

B. Case Review Meetings, Consulting Counsel and Practice Advisories

1. In order to ensure high quality legal representation in each case, identify any problems in the case in a timely fashion, develop the knowledge and skill of capital defenders and build the capacity of the indigent capital defense community in this state, representation in each case should include the use of case review meetings.

2. Case review meetings are meetings facilitated by a professional external to the team. Case review meetings will include the whole defense team, the facilitator and a diverse group of appropriately qualified professionals external to the team (both lawyers and non-lawyers). The case review meeting will involve a systematic and comprehensive review of the case and the representation appropriate to the stage of proceedings and preparation of the case. The case review meeting will involve a structured dialogue and critical thinking designed to empower the defense team and is not designed as a mechanism for assessing the performance of the defense team or its members. The case review meeting will produce a list of concrete commitments from the defense team arising from the discussions in the case review meeting.

3. The documents prepared for each case review meeting, the minutes of the case review meeting and the commitments arising from each case review meeting shall be maintained by counsel in the relevant case file and shall be available for review by the case supervisor.

4. At each stage of representation in a case (trial, appellate and post-conviction) there should ordinarily be a minimum of three case review meetings conducted. Case review meetings will ordinarily be conducted: early in the assignment of the case (to ensure the team has been properly assembled, is adequately resourced and has an appropriate plan for advancing representation in the case); once substantial work on the case has been commenced (to ensure that the work is proceeding appropriately, to provide feedback on the defense theory, to provide input on investigative and litigation planning and to respond to particular issues that have developed in the case); and, as the case is approaching the culmination of the work at the particular stage of representation (to ensure that the case is ready to proceed, to provide feedback on the planned execution of the case theory that has been developed and to troubleshoot any final issues that have arisen).

5. Facilitators for case reviews conducted pursuant to these standards shall be approved by the capital case coordinator.

6. In addition to counsel assigned as a part of the defense team and the case supervisor, counsel should consult with and take advantage of the skills and experience of other certified capital defenders. The state defender may require as a condition of provisional certification that counsel consult with other counsel designated by the state defender. Counsel may consult on a specific issue or issues, or may consult in an ongoing fashion with the defense team.

7. Counsel consulting on a case is acting within lawyer-client privilege and should maintain confidentiality accordingly.

8. Counsel consulting with a defense team should ensure that their work as a consulting counsel and any advice provided is fully documented. In order to ensure the accuracy of any advice provided, consulting counsel should seek to reduce that advice to writing, including a notation of the issue presented and the factual or legal assumptions that underpin the advice. This requirement is not intended to require consulting counsel to provide

briefing on the basis of any advice or otherwise increase the scope of the responsibility of counsel consulting on the case but instead to ensure that such advice as is given is reduced to writing to avoid the miscommunications inherent in oral communication.

9. In order to assist capital defenders in the performance of their duties, the capital case coordinator may from time to time issue practice advisories. These practice advisories shall not have the status or effect of rules promulgated by the Louisiana Public Defender Board. The practice advisories represent the opinion of the office of the state public defender as to best practices and are intended to provide a timely and flexible way to provide expert advice to the field on specific or emerging areas in capital defense.

10. Before a practice advisory may be issued, it must be approved by an advisory committee of no less than four members including counsel actively engaged in capital defense at trial, appellate and post-conviction level. No practice advisory shall be issued without the approval of the state public defender.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 40 :

Family Impact Statement

The proposed Rules have no known impact on family formation, stability or autonomy, as described in R.S. 49:972.

Poverty Impact Statement

The proposed Rules have no known impact on child, individual, or family poverty in relation to individual or community asset development as described in R.S. 49:973.

Provider Impact Statement

The proposed Rules have no impact on providers as defined in HCR 170 of 214.

Public Comments

Written comments may be addressed to James T. Dixon, Jr., State Public Defender, Louisiana Public Defender Board, 500 Laurel Street, Suite 300, Baton Rouge, Louisiana 70801 until 4:30 p.m. on October 29, 2014.

Public Hearing

A public hearing on these proposed Rules is scheduled for Tuesday, October 28, 2014 at 2:00 p.m., 500 Laurel Street, Suite 300, Baton Rouge, LA 70801. At that time, all interested persons will be afforded an opportunity to submit data, views or arguments either orally or in writing. The deadline for receipt of all written comments is 4:30 p.m. on the next business day following the public hearing.

James R. Dixon
State Public Defender

Fiscal and Economic Impact Statement

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

It is anticipated that the implementation of these proposed rules will result in state general fund programmatic costs of \$620,350 for FY 16, \$1,240,701 for FY 17, \$2,481,402 for FY 18, and \$3,101,752 for FY 19. It is estimated that a one-time expense of approximately \$5,900 will be incurred in FY 15 to promulgate and publish the proposed rules.

LPDB currently has funding for this rule in FY 15 due to a \$1.29M professional services contract with the Capital Appeals Project of Louisiana, a non-profit capital defense contract in the 1st Judicial District Court (Caddo), that is not being renewed. However, the funding source for FY 15 will not be recurring and funding for continued implementation of the proposed rules is contingent upon legislative appropriation. If monies are not appropriated for this rule, LPDB will disburse funds to districts on a discretionary basis to the extent that they become available within their enacted budget.

The performance standards implemented through the rule change for the defense of an indigent defendant in capital cases are intended to alert defense counsel to courses of action that are necessary, advisable, and appropriate. The standards are designed to assist attorneys in deciding upon the particular actions that should be taken in each case to ensure that the capital client receives high quality legal representation. The costs shown above provide for assembling the proper defense team for capital cases, which includes investigators and mitigation specialists. The district offices will employ the mitigation specialists and investigators that make up part of a proper defense team on either a full-time or contract basis. LPDB estimates that 18 full-time positions for mitigation specialists and 20 fact investigators will be necessary to adhere to the proposed standards.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

There is no anticipated impact on revenue collections of state or local governmental units as a result of the proposed administrative rules.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NON-GOVERNMENTAL GROUPS (Summary)

Indigent defendants who rely on the public defense system will benefit from the high standard of representation set in the proposed rules. Public defender attorneys will also benefit from the standards outlined in the proposed rules set out as guidelines for high quality representation. The extent of the economic benefit is indeterminable as it may extend beyond the scope of the representation to the family of the defendant.

However, due to the contract with the Capital Appeals Project of Louisiana ending, LPDB's ability to provide capital defense in the 1st Judicial District Court (Caddo) may be slowed as a result of having to provide counsel on a case-by-case basis. The practice of providing counsel on a case-by-case basis is more expensive than using a contractor. To the extent that indigent capital defense cases arise, LPDB may not be able to fund these expenditures due to diverting monies to fund the proposed standards.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

These proposed rules may have an impact on employment in the public sector in that the standards envision hiring mitigation specialists and investigators that are not currently a part of the public defense system. An estimate of the economic impact is indeterminable as it depends on the number of and salary for the qualified mitigation specialists and investigators.