

## **IV. Performance Standards and Complaint Procedures**

### **A. CRIMINAL DISTRICT COURT JURISDICTION, SUPERIOR COURT JURISDICTION, AND MURDER CASES**

#### **1. COMMITTEE FOR PUBLIC COUNSEL SERVICES PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF INDIGENTS IN CRIMINAL CASES**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

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# 1. GENERAL PRINCIPLES OF REPRESENTATION

## 1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

## 1.2 Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

## 1.3 General Duties of Defense Counsel

- a. Counsel's primary and most fundamental responsibility is to promote and protect the client's interest. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
- b. In order to properly prepare the client's case and to apprise the client of the progress of the case, counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g. in jail, house of correction, prison or other place of commitment for alcohol/drug or mental health evaluation), counsel should visit the client within three business days of receiving the assignment. Visiting the client means going to the client's place of confinement. Meeting with the client at the courthouse is not a substitute for a visit to the place of confinement, which is necessary to establish the attorney client relationship and to provide the same zealous representation as that provided to paying clients.

In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; and (2) if appropriate, provide the client with a copy of discovery received in the case. Under no circumstances should an initial visit to a new in-custody client be delayed more than one week from the date of assignment. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case.

In order to advise the client about decisions to assert or waive rights to prepare the client to testify at any hearing, and to apprise the client of the progress of the case, counsel must meet with the client as needed and at reasonable intervals in private at counsel's office or at the client's place of confinement throughout the pendency of the case, and until the representation has concluded.

- c. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must 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).
- d. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a “running sheet” or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client’s background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer; lobby conferences or conversations with a judge; conversations with police officers or commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.
  - e. Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
  - f. The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.
  - g. The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney’s decision-making role in this regard is consideration of the client’s input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney’s ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.
  - h. Counsel’s obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client’s entire case file, including work product.
  - i. Counsel should be aware of and protect the client’s right to a speedy trial, unless strategic considerations warrant otherwise.
  - j. Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
  - k. Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client’s case, e.g., motions to change venue, etc.
  - l. Where counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to fully explain the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation as well as in-court proceedings.
  - m. Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client’s competence.
  - n. Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize the inconvenience to others.

## **II. PRELIMINARY PROCEEDINGS & PREPARATION**

### **2.1 Arraignment**

- a. Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c.276, §58) as well as the procedure for appeal of the court’s decision. If the nature of the offense and/or the client’s record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, should review the police report(s) and should review the client’s probation record paying particular attention to any convictions, incarcerations, defaults, pending cases, open probation matters and open

restraining orders.

- b. Counsel should be familiar with the law regarding pre-trial detention on the grounds of “dangerousness” (G.L. c. 276, §58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.<sup>1</sup>
- c. In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, §58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client’s bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing §58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.
- d. Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.
  1. A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c.111 (e), mediation, or a continuance without a finding. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which may be considered a conviction for immigration purposes.
  2. Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or probable cause hearing as soon as practicable within thirty days (G.L. c.276, §35).
- e. Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c.123, §§15a and 15b; Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client’s statutory and constitutional rights with respect to such competency examinations. Counsel who is appointed to represent the client for bail only should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client’s arraignment.
- f. The assigned criminal defense trial counsel should represent the client at any competency hearing arising in the case.

## 2.2 Initial Interview and Preparation for Bail Hearing

- a. The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough interview conducted in private.
- b. Counsel should observe and consider arranging for the documentation of any marks or wounds pertinent to the case, and secure and document any transient physical evidence.
- c. Counsel should prevent the destruction of exculpatory evidence by the prompt filing of a Motion to Preserve Evidence, including preparation for the Court of an order with instructions that the prosecutor immediately inform its agents of the order.
- d. If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- e. If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information

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<sup>1</sup> If counsel is not eligible to handle the case-in-chief, s/he should seek assignment to eligible counsel prior to the detention hearing.

should generally include:

1. client's residence and length of time at that residence;
  2. family (names, addresses and phone numbers);
  3. client's health (mental and physical);
  4. educational and/or employment background;
  5. explanation of any court defaults and any other information on the record;
  6. probation/parole status;
  7. possible sources of bail money;
  8. the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
  9. client's reputation in the community;
  10. whether the client's family, friends, or employer are present in the courtroom.
- f. Such information should be verified whenever possible.
- g. Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including family members, friends and fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

### 2.3 Bail or Detention Hearing

- a. Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- b. Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client.
- c. Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings under G.L. c. 276, §58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, §58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- d. Counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pre-trial probation G.L. c.276, §87, such as electronic monitoring, stay away orders, curfews, mental health treatment, substance abuse treatment, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- e. Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c.276, §§58, 58A and the advantages and disadvantages of doing so. Counsel should facilitate the bail appeal procedure, including, where appropriate, pressing for the right to be heard on the same day. Counsel should, whenever possible, be prepared to represent the client at the hearing. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.
- f. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and the sheriff to any special needs of the client, e.g. medical problems, and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are

being addressed.

#### 2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. “911” or turret tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client’s rights governing the prosecution’s efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

#### 2.5 Special Concerns

- a. Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- b. Where appropriate, counsel should consider advantages and disadvantages of seeking cross-complaints.
- c. Counsel should consider obtaining funds at arraignment for an interpreter if the client does not speak English; an investigator, if immediate investigation of the allegations is necessary; and/or an expert (e.g. psychologist) if immediate psychological/psychiatric evaluation of the client is warranted. Otherwise, these motions may be filed at the pre-trial hearing date.
- d. Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of prosecution witnesses should be “witnessed” by another person (e.g. another defense attorney) to avoid later problems with proving an impeaching statement at trial.

### III. PROBABLE CAUSE HEARING

#### 3.1 Declination Hearing

Where, because of concurrent jurisdiction, a case may be heard in the District Court Department as either a trial or a probable cause hearing, counsel should consider which alternative is in the client’s best interest and be prepared to argue that position persuasively to the court and prosecutor.

#### 3.2 Probable Cause Hearing (Many of the standards in Sections V and VI apply also to this section.)

- a. Counsel should always seek to obtain a probable cause hearing and avoid a direct indictment unless good reasons exist for a different strategy.
- b. Where the client is entitled to a hearing, the attorney should insure that it is scheduled within thirty days, unless more time is needed to prepare, and delay will not increase the likelihood of direct indictment. Counsel should not waive this right without good reason.
- c. In order to prepare for the hearing, counsel must know the elements of all charges against the client and must investigate as fully as possible the facts underlying the charges.
- d. The probable cause hearing has a twofold purpose: to test the adequacy of the prosecution’s case for binding over and to discover its strengths and weaknesses.
- e. Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution’s showing of probable cause on each essential or aggravating element. Counsel should take advantage of the potential for discovery offered by a hearing by filing appropriate motions, using compulsory process, and sequestering witnesses. Counsel should not present evidence, especially the client’s testimony, except in extraordinary circumstances where there is a sound tactical

reason that overcomes the inadvisability of disclosing the defense case at this stage.

- f. Where appropriate, counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.
- g. As soon as practicable after the hearing, counsel should request a copy of the tape recording of the proceedings for possible use as impeachment at the trial and for trial preparation. It is counsel's responsibility to arrange for transcription of the tape.

#### IV. PRETRIAL PREPARATION

##### 4.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Counsel should consider obtaining funds for an investigator to interview witness, while being aware of his/her reciprocal discovery obligations. Counsel should go to the scene of the alleged crime in a timely manner - prior to the pre-trial hearing, when necessary - or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

##### 4.2 Probation Surrender Hearings

Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: conduct an in-person interview with the probationer; discover and review the Probation Department file; discover and review records of the probationer's participation in mandated programs; obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g. urinalysis results); identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.

Per District Court Rules for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

##### 4.3 Pre-trial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity it provides the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as waiver of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

##### 4.4 Pre-trial Conference Reports

If a pretrial conference is ordered, counsel should be cognizant of the requirements of Mass.R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

#### 4.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

- a. details of all identification procedures, including examination of any photographs shown and selected;
- b. written and oral statements of defendant/co-defendant(s);
- c. copies of statements by potential witnesses;
- d. copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
- e. inspection of physical evidence;
- f. list of potential witnesses and addresses;
- g. names and addresses of any witnesses, including proposed police officer experts, expected to offer expert opinions and the substance of their anticipated testimony (including their curriculum vitae/resume, materials used or relied upon in reaching their opinion and the factual and scientific basis for their opinion);
- h. probation records of all potential witnesses;
- i. copies of Grand Jury minutes;
- j. exculpatory evidence, identified as specifically as possible, and including promises, rewards, inducements made to witnesses;
- k. any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.).
- l. notice of prior or subsequent bad act evidence;
- m. notice of excited utterance evidence.

#### 4.6 Reciprocal Discovery

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14(a)(3)).

#### 4.7 Substantive Pretrial Motions

Among the motions that counsel should consider filing are:

- a. non-suggestive identification procedures (e.g., motion in opposition to a lineup or its equivalent, motion for testimony with client out of view, etc.);
- b. dismissal for unconstitutionality of the statute;
- c. dismissal for insufficiency of the complaint or indictment;
- d. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury;
- e. request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
- f. severance or joinder of defendants or charges;
- g. suppression of evidence obtained in violation of federal and Massachusetts law, i.e.
  - (1) illegally seized evidence, (2) statements not preceded by Miranda warnings or otherwise involuntary statements, (3) unrecorded confessions, (4) identifications procured by impermissibly suggestive procedures
- h. funds for experts, investigators, interpreters, etc., under G.L. c.261, §§27A-D. Counsel

- should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be familiar with and ready to use the special appellate remedies provided for in these statutes.
- i. any other issues that are appropriate.

#### 4.8 Trial Motions

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions in limine and motions to sequester.

#### 4.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should include:

- a. investigation and discovery necessary to advance the claim, including visits to any scenes relevant to the subject matter of the motion;
- b. careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
- c. subpoenas for pertinent evidence and witnesses;
- d. full understanding of the burdens of proof and evidentiary rules;
- e. careful consideration of the benefits/costs of having the client testify;
- f. careful preparation of any witnesses who are called, especially the defendant;
- g. submission of a memorandum of law may be required, and in most cases is advisable.

#### 4.10 Discovery compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply.

#### 4.11 Interlocutory Relief

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals-Private Counsel Division to determine whether assistance by appellate counsel is warranted.

#### 4.12 Sentencing

Counsel should begin gathering information relative to possible sentencing.

### **V. DISPOSITIONS BY PLEA OR ADMISSION**

#### 5.1 Plea Negotiations

- a. After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- b. Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do

so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.

- c. The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- d. Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The attorney shall keep the client informed of the status of the plea negotiations.

## 5.2 Client Decisions

- a. Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client that he/she will defend the client vigorously.
- b. Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial.
- c. Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were to proceed to trial on the merits.

## 5.3 Preparation

- a. When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any, including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- b. Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- c. Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

## 5.4 Consequences of Conviction

Counsel must also advise the client, prior to any change of plea, of the consequences of a conviction, including:

- a. the maximum possible sentence of all offenses;
- b. mandatory minimum sentences where applicable;
- c. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- d. potential liability for enhanced punishment after subsequent arrest (Counsel should be familiar with potentially applicable enhanced punishment statutes e.g. habitual offender, armed career criminal,

- second and subsequent offenses);
- e. possible Federal charges or penalty enhancements;
- f. conviction consequences for non-citizens (G.L. c.278, s. 29D);
- g. Sex Offender Registration Act (G.L., c. 6, ss. 178C et seq.) and DNA Seizure and Dissemination Act (G.L., c. 22E) requirements;
- h. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
- i. potential civil liabilities;
- j. possible loss or suspension of driver's license;
- k. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law;
- l. potential risk of life time community parole;
- m. potential adverse consequences on the client's employment or education;
- o. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States.

### 5.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty or admit to sufficient facts unless the client either admits guilt to counsel, or admits guilt to the court in a colloquy or tenders an Alford plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

### 5.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, release pending sentencing or appeal.

## **VI. TRIAL PROCEEDINGS**

### 6.1 General Trial Preparation

- a. Counsel should consider all steps necessary to complete 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. This preparation should include consideration of:
  - 1. summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable (Mass. R. Crim. P. 17);
  - 2. summoning all potentially helpful physical or documentary evidence;
  - 3. arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
  - 4. obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;
  - 5. obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case, and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- b. Where appropriate, counsel should have the following materials organized and accessible at the time of trial:

1. copies of all relevant documents in the case;
  2. relevant documents prepared by investigators;
  3. proposed voir dire questions;
  4. motions in limine;
  5. outline of opening statement;
  6. cross-examination plans for all possible prosecution witnesses;
  7. motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
  8. direct examination plans for all prospective defense witnesses;
  9. copies of defense subpoenas;
  10. prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);
  11. prior statements of all defense witnesses;
  12. reports from defense experts;
  13. a list of all defense exhibits, and the witnesses through whom each will be introduced;
  14. proposed jury instructions with supporting case citations;
  15. copies of all relevant statutes and cases, including any potential lesser-included offenses;
  16. outline or draft of closing argument.
- c. Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- d. If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions in limine and memoranda for such advance rulings.
- e. Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practices regarding:
1. preservation of each type of objection at every stage of the proceedings;
  2. offers of proof regarding evidence ruled inadmissible;
  3. recording of trial proceedings. Counsel should be aware that tape recordings of district court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, §27(c);c.218, §27A.

## 6.2 Sequestration

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police) for trial (Mass. R. Crim. P. 21).

## 6.3 Bench Trial or Jury Trial

- a. The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section V., Dispositions by Plea or Admission; Section I., General Principles of Representation.
- b. Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

## 6.4 Voir Dire and Jury Selection

### a. Preparation

1. Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
4. Counsel should develop and file written voir dire questions tailored to the particular case in advance of trial.
5. Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.
6. Counsel should consider asking for extra peremptory challenges.
7. Counsel should be familiar with varied practices in this area (e.g. use of juror questionnaires and attorney-conducted voir dire) and should attempt to employ these where appropriate.

### b. Examining Prospective Jurors

1. Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, insanity defenses.
2. Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
3. When appropriate, counsel should request individual juror voir dire if the proposed voir dire questions may elicit sensitive information or expose prejudices. Counsel should be familiar with case law supporting such requests.
4. Counsel should be familiar with case law regarding the client's right to be present during individual voir dire. Counsel should fully discuss the risks and benefits of asserting this right with the client.

### c. Challenges

1. Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
2. When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

## 6.5 Opening Statement

- a. Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement.
- b. Counsel should be familiar with the law governing opening statements, particularly in a case where

counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.

- c. Counsel's objectives in making an opening statement may include the following:
  1. to provide an overview of the theory of the defense case;
  2. to summarize the testimony of witnesses and the role of each in relationship to the entire case;
  3. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  4. to identify the weaknesses of the prosecution's case;
  5. to remind the jury of the prosecution's burden of proof;
  6. to clarify the jurors' responsibilities;
  7. to personalize the client and counsel to the jury.
- d. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.
- e. Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

## 6.6 Confronting the Prosecution's Case

- a. Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- b. Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- c. In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- d. In preparing for and carrying out cross-examination, counsel should also:
  - I. develop a coherent and sensible theory of the case, along with the framework of the closing argument;
  2. anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
  3. integrate into cross-examination the theory of the defense and closing argument;
  4. consider whether cross-examination of each witness is necessary or likely to generate helpful information;
  5. review and organize all prior statements and testimony of each witness;
  6. be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
  7. be alert to significant omissions or deficiencies in the testimony of any witness;
  8. consider using certified copies of prior convictions or pending cases of witnesses
  9. be alert to all issues relating to witness competency or credibility, including bias or motive for testifying;
  10. be alert to potential 5<sup>th</sup> Amendment issues that apply to any witness;
  11. elicit all facts to build and support the theory of defense.
- e. If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
- f. Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
- g. Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should

research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

## 6.7 Presenting the Defense Case

- a. Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- b. Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- c. Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- d. In preparing for presentation of a defense case, counsel should, where appropriate:
  1. consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
  2. after discussion with the client, make the decision whether to call any witnesses;
  3. develop a plan for direct examination of each potential defense witness;
  4. determine the implications that the order of witnesses may have on the defense case;
  5. consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  6. consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
  7. consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  8. attempt to obtain the prior records of all defense witnesses.
- e. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- f. Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- g. 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.
- h. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- i. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
- j. Counsel should guard against improper cross-examination by the prosecutor.
- k. Counsel should conduct re-direct examination as appropriate.
- l. At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each count charged and/or aggravating element.
- m. Counsel should keep a record of all exhibits identified or admitted.

## 6.8 Closing Argument

- a. Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- b. Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- c. In developing closing argument, counsel should review the proceedings to determine what aspects can be

used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:

1. highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
  2. favorable inferences to be drawn from the evidence;
  3. incorporating into the argument:
    - a. helpful testimony from direct and cross-examinations;
    - b. verbatim instructions drawn from the expected jury charge;
    - c. responses to anticipated prosecution arguments;
  4. the effects of the defense argument on the prosecutor's possible rebuttal argument.
- d. counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.
- e. Whenever the prosecutor exceeds the scope of permissible argument, counsel must object (either immediately or at the conclusion of the argument), consider requesting a mistrial, or consider seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object during or after the prosecutor's closing argument.

## 6.9 Jury Instructions

- a. Counsel must file proposed or requested jury instructions before closing argument.
- b. Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.
- c. Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- d. Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- g. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

## 6.10 Taking Verdicts

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

# VII. SENTENCING

## 7.1 Preparation

Defense counsel should be familiar with and consider:

- a. the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties;
- b. the official version of the client's prior record, if any;
- c. the position of the probation department with respect to the client;
- d. the sentencing recommendation and memorandum, if any, of the prosecutor's;
- e. seeking the assistance of an expert - either through community resources, G.L. c.261, §§27A-G, or the Committee for Public Counsel Services;
- f. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure, lifetime community parole, or civil forfeiture of property;
- g. the sentencing practices of the judge, to the extent they may be determined;
- h. the sentencing guidelines, as they would apply to the case;
- i. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing under G.L. c.123, §15(e);
- j. any victim impact statement to be presented to the court;
- k. any other report to be presented to the court in aid of sentencing;
  - l. seeking an evidentiary hearing, e.g., restitution amount;
- m. requesting a continuance for sentencing at a later date;
- n. any other information or proposals that may be helpful to the client.

## 7.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

## 7.3 Pre-sentence reports

- a. Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- b. Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct these before prejudice occurs.
- b. Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

## 7.4 Defense recommendations

- a. Counsel should carefully consider and discuss with the client any sentencing recommendation to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to incarceration, e.g., community services, rehabilitative programs, restitution.
- b. Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- c. At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially in an admission to sufficient facts if the client has no record. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses; e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- d. Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

## 7.5 Dispositions

- a. Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- b. Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- c. Counsel should fully explain the foreseeable consequences of the sentence, including any conditions of probation and the consequences of violating probation.
- d. Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- e. Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- f. Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

## 7.6 Sentence Appeals

- a. In Superior Court cases, trial counsel should advise the client of any right to appeal his/her state prison sentence to the Appellate Division of the Superior Court and should implement the client's decision.  
Trial counsel should represent the client at the hearing.

## **VIII. POST-TRIAL PROCEEDINGS**

(See CPCS Standards for Appellate Representation.)

### 8.1 Appellate Rights

- a. Counsel should advise the client, after sentencing, about the right to file a motion to revoke and revise the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- b. After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file in a timely fashion the appropriate notice and request either a tape or transcript of all prior court proceedings.
- c. Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

### 8.2 Continuing Duty to Represent

a. Trial counsel should file a Motion to Withdraw and a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Trial counsel should assure that these motions are acted upon by the court.

b. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility.

Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial

file.