

Oregon State Bar

# Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

**April 25, 2014**

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and a new set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

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# **Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases**

## **Summary and Background**

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, the two separate task forces began meeting to work on significant revisions to the standards in criminal delinquency and dependency cases. One group focused on juvenile dependency standards, and the other on adult criminal and juvenile delinquency standards.

On the following pages the criminal task force has provided updated standards which are recommended to replace what is currently published on the OSB website as the specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.” These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon), will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant modifications.

The task force determined that the variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject.<sup>1</sup> Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should Oregon recognize five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has also dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure, the task force maintained a format of a short statement of a standard followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides

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<sup>1</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

## Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders<sup>2</sup> and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.<sup>3</sup> Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings<sup>4</sup> and expanding the obligations of lawyers to advise clients concerning the collateral consequences of guilty pleas.<sup>5</sup> The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards (2012)*, which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the *American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*. Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

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<sup>2</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>3</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

<sup>4</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

<sup>5</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.



# Specific Standards for Representation in Criminal and Juvenile Delinquency Cases

## STANDARD 1.1 – ROLE OF DEFENSE COUNSEL

The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.

### Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center's *National Juvenile Defense Standards (2012)*.
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client's definition of his or her interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client's parents that the lawyer may not substitute either his or her own view of the client's best interests or a parent's interests or view of the client's best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should consult with the client on the strategy and means by which the client's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation.

Commentary:

The paramount obligation of a lawyer is to advocate for a client's cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer's role as an "officer of the court" should temper a lawyer's commitment to a client's cause. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client's] counselor and advocate with courage and devotion and to render effective, quality representation."<sup>6</sup> Indeed, a former Oregon State Bar General Counsel and Executive Director has argued convincingly that "the notion that [lawyers] have ethical duties to courts and judges as 'officers of the court' is erroneous and confusing."<sup>7</sup>

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a "vigorous advocacy of the client's cause," guided by "a duty of loyalty" and the employment of the skill and knowledge necessary for a reliable adversarial system of justice.<sup>8</sup> As a matter of professional responsibility, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>9</sup>

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. "At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's 'best interest' as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge."<sup>10</sup> Likewise, "[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians," nor in service of what counsel

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<sup>6</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>7</sup> *Officers of the Court: What does it mean?* George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

<sup>8</sup> *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984).

<sup>9</sup> *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

<sup>10</sup> *The Role of Juvenile Defense Counsel in Delinquency Court*, p. 7, National Juvenile Defender Center (2009).

or others consider the client’s “best interest.”<sup>11</sup> Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.”<sup>12</sup>

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.”<sup>13</sup> In both circumstances, however, decisions by either the client or lawyer should be made after full consultation. The ABA standards identify decisions for the client as what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf and whether to appeal. The ABA standards likewise identify strategic and tactical decisions made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases.<sup>14</sup> However, in delinquency cases, a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.”<sup>15</sup>

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.”<sup>16</sup> Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.”<sup>17</sup> Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

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<sup>11</sup> *Id.* p. 12.

<sup>12</sup> *Id.* p. 10.

<sup>13</sup> *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3d ed. 1993).

<sup>14</sup> See, *National Juvenile Defense Standards, Standard 2.2, Explain the Attorney-Client Relationship*, National Juvenile Defender Center (2012).

<sup>15</sup> *Id.*

<sup>16</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>17</sup> *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

Previous versions of these standards often repeated verbatim are applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

## **STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL**

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**
  
- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

### **Implementation:**

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts and the Oregon State Legislature.
  
2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.
  
3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.
  
4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At

least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.

5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, county Juvenile Departments, private treatment facilities and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount

of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients.<sup>18</sup> Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, the National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for best practices in Oregon.

### **STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD**

**Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a**

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<sup>18</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L Ed 2d 284 (2010).

**delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.**

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar (OSB) Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it addresses appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

**STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE**

**At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.**

### Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
  - a. Right to remain silent under State and Federal Constitutions;
  - b. Right to counsel under State and Federal Constitutions;
  - c. Right to file challenges to the charging instrument or petition;
  - d. Right to file challenges to the evidence;
  - e. Right to file notices of affirmative defenses; and
  - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.



8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) as well as those preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules.<sup>19</sup>

## **STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION**

**A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense and to respond to requests from the client for information or assistance concerning the case.**

Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should

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<sup>19</sup> *State v. Owens*, 68 Or. App. 343 (1984).

elicit the client's point of view and encourage the client's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting, the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings, the lawyer should:
  - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
  - b. Obtain copies of any relevant documents that are available including any charging documents, recommendations and reports made by agencies concerning pretrial release and law enforcement reports that might be available;
  - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
  - d. If a client is in custody, 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 in a juvenile proceeding be prepared to discuss the process of ongoing detention review.
6. During an initial interview with the client, a lawyer should:
  - a. Obtain information concerning:
    - 1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;

- 2) The client's history of service in the military, if any;
  - 3) The client's physical and mental health, educational and military services records;
  - 4) The client's immediate medical needs;
  - 5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
  - 6) The ability of the client to meet any financial conditions of release;
  - 7) The names of individuals, or other sources, that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;
- b. Provide to the client information including but not limited to:
- 1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
  - 2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
  - 3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
  - 4) The charges and the potential penalties, as well as potential collateral consequences, of any conviction and sentence;
  - 5) A general procedural overview of the progression of the case, where possible;
  - 6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.
7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:
- a. The facts surrounding the charges against the client;
  - b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

**STANDARD 2.3 – RELEASE OF CLIENT**

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**
- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

### Implementation:

1. If the client is in custody or detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. In all cases where detention continues, the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings, the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing, the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.
3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

### **STANDARD 3 - INVESTIGATION**

**A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

## Implementation:

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
  - a. The necessary elements of the charged offenses;
  - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
  - c. Whether the court's jurisdiction can be challenged;
  - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
  - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in [Standard 2.2](#). The interview should be used to identify:
  - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;
  - b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
  - c. Information relevant to the court's jurisdiction;
  - d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
  - e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.
4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing.

When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.
6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.
7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the

admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.<sup>20</sup>

## **STANDARD 4.1 – DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.**

### **Implementation:**

1. A lawyer should be familiar with all applicable statutes, rules and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:
  - a. Potentially exculpatory, impeaching and mitigating information;
  - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
  - c. Written communications, including emails, between prosecution, law enforcement and/or witnesses;
  - d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records and their relevant digital, electronic and social media postings;

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<sup>20</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).



- e. Oral or written statements by the client and the circumstances under which those statements were made;
  - f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
  - g. Copies of, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
  - h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
  - i. Statements and reports of experts and the data and documents on which they are based; and
  - j. Statements of co-defendants.
4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

## **STANDARD 4.2 – THEORY OF THE CASE**

**A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.**

### **Implementation:**

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus the investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

### **Commentary:**

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and

foremost a factual narrative that presents the client’s story in straightforward common sense terms that support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client’s version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

## **STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES**

**A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.**

### Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. The pretrial custody of the accused;
  - b. The competency or fitness to proceed the accused (see Standard 5.3);
  - c. The constitutionality of relevant statutes;
  - d. Potential defects in the charging process or instrument;
  - e. The sufficiency of the charging document;
  - f. The severance of charges and/or co-defendants for trial;
  - g. Change of venue;
  - h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
  - i. The discovery obligations of both the prosecution and the defense, including:

- 1) Motions for protective orders;
  - 2) *Brady v. Maryland*<sup>21</sup> motions; and
  - 3) Motions to compel discovery.
- j. Violations of federal and/or state constitutional or statutory provisions, including:
- 1) Illegal searches and/or seizures;
  - 2) Involuntary statements or confessions;
  - 3) Statements obtained in violation of the right to counsel or privilege against self-incrimination;
  - 4) Unreliable identification evidence;
  - 5) Speedy trial rights; and
  - 6) Double jeopardy protections.
- k. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:
- 1) Interpreters;
  - 2) Mental Health Experts;
  - 3) Investigative services; and
  - 4) Forensic services.
- l. The right to a continuance in order to adequately prepare and present a defense or to respond to prosecution motions;
- m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
- 1) The competency or admissibility of particular witnesses, including experts and children;
  - 2) The use of prior convictions for impeachment purposes;
  - 3) The use of prior or subsequent bad acts;
  - 4) The use of reputation or other character evidence; and
  - 5) The use of evidence subject to “rape shield” protections.
- n. Notices of affirmative defenses and other required notices to present particular evidence;
- o. The dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice and the general equitable powers of the court.
3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:

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<sup>21</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

- a. The burden of proof, the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client's detriment;
- b. Whether a pretrial motion may be necessary to protect the client's rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. The effect the filing of a motion may have upon the client's speedy trial rights; and
- d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

## **STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS**

**A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.**

### **Implementation:**

1. Motions should be timely filed, comport with the formal requirements of the court and succinctly inform the court of the authority relied upon.
2. When a hearing on a motion requires taking evidence, a lawyer's preparation should include:
  - a. Investigation, discovery and research relevant to the claims advanced;
  - b. Subpoenaing all helpful evidence and witnesses;
  - c. Preparing witnesses to testify; and
  - d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.
4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal and renewing the motion or objection during trial in order to preserve the matter for appeal.

## **STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED**

**A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.**

### Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
  - a. His or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
  - b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.

6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.
7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed and in order to preserve the matter for appeal.

#### **STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES**

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

##### Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably, these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and arguments on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the [National Juvenile Defense Standards](#), which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should

be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.<sup>22</sup>

## **STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL**

**A lawyer has the duty to explore with the client the possibility, advisability and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices and consequences concerning dispositions without trial.**

### Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.

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<sup>22</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.8, at 81-82.

4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.
5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
  - a. The types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
  - b. Whether agreements between the client and the prosecution would be binding on the court or on the prison, juvenile, parole and probation, and immigration authorities; and
  - c. The practices and policies of the particular prosecuting authorities, juvenile authorities and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
  - a. Rights that the client would waive when entering a plea or admission disposing of the case without trial;



- b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs and credit for pretrial detention;
- c. The likely disposition given sentencing guidelines;
- d. The minimum and maximum fines and assessments, court costs that may be ordered and the restitution that is being requested by the victim(s);
- e. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victim(s), and asset forfeiture, and the availability of work programs to pay restitution and perform community service;
- f. Consequences relating to previous offenses;
- g. The availability and possible conditions of protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave and earned release time;
- h. The availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions and diversion agreements;
- i. For non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
- j. For non-citizen clients, the possibility of adverse immigration consequences;
- k. For non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. The possibility of other consequences of conviction, such as:
  - 1) Requirements for sex offender registration, relief and set-aside;
  - 2) DNA sampling, AIDS and STD testing;
  - 3) Loss of civil liberties such as voting and jury service privileges;
  - 4) Effect on driver's or professional licenses and on firearms possession;
  - 5) Loss of public benefits;
  - 6) Loss of housing, education, financial aid, career, employment, vocational or military service opportunities; and
  - 7) Risk of enhanced sentences for future convictions.
- m. The possible place and manner of confinement, placement, or commitment;
- n. The availability of pre-and post-adjudication diversion programs and treatment programs;
- o. Standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. Concessions that the client might offer to the prosecution, including an agreement:
  - 1) Not to contest jurisdiction;
  - 2) Not to dispute the merits of some or all of the charges;
  - 3) Not to assert or litigate certain rights or issues;
  - 4) To fulfill conditions of restitution, rehabilitation, treatment or community service; and
  - 5) To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
- b. Benefits to the client, including an agreement:
  - 1) That the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
  - 2) That the prosecution will not oppose release pending sentence, disposition or appeal;
  - 3) That the client may reserve the right to contest certain issues;
  - 4) To dismiss or reduce charges immediately or upon completion of certain conditions;
  - 5) That the client will not be subject to further investigation for uncharged conduct;
  - 6) That the client will receive, subject to the court's agreement, a specified set or range of sanctions;
  - 7) That the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
  - 8) That the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

## **STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION**

**A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client’s acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.**

### Implementation:

1. A lawyer has the duty to explain to the client the advantages, disadvantages and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.
2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.
3. At the hearing, a lawyer has the duty to assist the client and to ensure that :
  - a. Any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
  - b. The court, on the record using any applicable model colloquy, inquires into whether the client’s decision is knowing, voluntary, and intelligent;
  - c. The court enters the plea or admission only after finding that the client’s decision was knowing, voluntary and intelligent; and
  - d. The judicial record is legible, clear, accurate and contains the full contents and conditions of the client’s plea or admission.

4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

### **STANDARD 7.1 – GENERAL TRIAL PREPARATION**

- A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state’s case and, where appropriate, presentation of a defense case.**
- B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.**
- C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.**

#### **Implementation:**

1. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators;
  - c. Voir dire questions;
  - d. Outline or draft of opening statement;
  - e. Cross-examination plans for all possible prosecution witnesses;
  - f. Direct examination plans for all prospective defense witnesses;
  - g. Copies of defense subpoenas;
  - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
  - i. Prior statements of all defense witnesses;
  - j. Reports from experts;
  - k. A list of all exhibits and the witnesses through whom they will be introduced;
  - l. Originals and copies of all documentary exhibits;
  - m. Proposed jury instructions with supporting authority;
  - n. Copies of all relevant statutes and cases;
  - o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
  - p. Outline or draft of closing argument; and

- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.
2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.
3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.
4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.
5. Throughout the trial process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.
8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

### Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins, the lawyer has the necessary exhibits, witnesses, trial materials and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate, to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected, the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include, where appropriate, a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

### **STANDARD 7.2 – VOIR DIRE AND JURY SELECTION**

- A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.**
  
- B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.**

## Implementation:

### *Preparation:*

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial and tailor voir dire questions to the specific case. Among the purposes, voir dire questions should be designed to serve the following:
  - a. To elicit information about the attitudes of individual jurors which will provide the basis for peremptory strikes and challenges for cause;
  - b. To convey to the panel certain legal principles which are critical to the defense case;
  - c. To preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
  - d. To present the client and the defense case in a favorable light, without prematurely disclosing information and the defense case to the prosecutor; and
  - e. To establish a relationship with the jury.
5. A lawyer 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.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.

8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed.<sup>23</sup> But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations and a well-crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

### **STANDARD 7.3 – OPENING STATEMENT**

**An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.**

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<sup>23</sup> *State v. Williams*, 123 Or. App. 546 (1993).



Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer's objective in making an opening statement may include the following:
  - a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
  - b. Identify the weaknesses of the prosecution's case;
  - c. Emphasize the prosecution's burden of proof;
  - d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
  - e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
  - f. Clarify the jurors' responsibilities;
  - g. State the ultimate inferences which the lawyer wishes the jury to draw; and
  - h. Humanize the client.
3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
  - 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;
  - c. Whether there are any rulings made by the judge against objecting during the other attorney's opening argument.

6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral, then the lawyer should give an opening.

Commentary:

The opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of an opening statement. In general, the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state, but that may have significant prejudice and may be inadmissible, should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases, effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

## **STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE**

**The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.**

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment, or to discover documents subject to disclosure, a lawyer 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, a lawyer 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;
  - c. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. Consider a cross-examination plan for each of the anticipated witnesses;
  - e. Consider an impeachment plan for any witnesses who may be impeachable;
  - f. Be alert to inconsistencies in a witness testimony;
  - g. Be alert to possible variations in witness testimony;
  - h. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - i. If available, review investigation reports of interviews and other information developed about the witnesses;
  - j. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
  - k. Be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution’s case, and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion in order for the lawyer may make an informed decision about whether to present a defense case.

Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might “open the door” to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer’s interview of defendant—an interview that was cut short by the defendant’s invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation.<sup>24</sup>

Cross-examination should be conducted purposefully to cast doubt on the state’s evidence or discredit a state’s witness and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness’s direct examination is at best tedious and at worst strengthens the prosecution’s case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

**STANDARD 7.5 – PRESENTING THE DEFENSE CASE**

**A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the client.**

Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client’s interests are best served by not putting on a defense case and instead rely on the prosecution’s

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<sup>24</sup> *State v. Guritz*, 134 Or. App. 262 (1995).

failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.
4. In preparing for presentation of a defense case, a lawyer should:
  - a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
  - b. Determine the implications that the order of witnesses may have on the defense case;
  - c. Consider the possible use of character witnesses;
  - d. Consider the need for expert witnesses; and
  - e. Consider whether to present a defense based on mental disease, defect, diminished capacity or partial responsibility and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
7. A lawyer should conduct redirect examination as appropriate.
8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause or whether the client is best served by not presenting evidence.

**STANDARD 7.6 – CLOSING ARGUMENT**

**A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.**

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
  - a. Highlighting weaknesses in the prosecution's case;
  - b. Describing favorable inferences to be drawn from the evidence;
  - c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
  - d. Incorporating into the argument:
    - 1) Helpful testimony from direct and cross-examinations;
    - 2) Verbatim instructions drawn from the jury charge; and
    - 3) Responses to anticipated prosecution arguments.

4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial or seek cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is an argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

**STANDARD 7.7 – JURY INSTRUCTIONS**

**A lawyer should ensure that instructions to the jury correctly state the law and seek special instructions that provide support for the defense theory of the case.**

Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, a lawyer should provide case law in support of the proposed instructions.

3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

**STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION**

**A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.**

Implementation:

1. In every criminal or delinquency case, a lawyer should:



- a. Be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- b. Be aware of the client's relevant history and circumstances, including prior military service, physical and mental health needs, educational needs and be sensitive to the client's sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- c. Understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including servicemember status);
- d. Understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including: group homes, foster care, residential treatment programs or mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client's time in custody or in out of home placement;
- f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the client;
- g. Develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client;
- h. Where appropriate, obtain assessments or evaluations that support the client's plan;

- i. Investigate and prepare to present to a prosecutor, when engaged in plea negotiations or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
  - j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
  - k. Be aware of and prepare to address, express or implicit bias that impacts sentencing or disposition; and
  - l. Review the accuracy of any temporary or final sentencing or disposition order or judgments of the court and move the court to correct any errors that disadvantage the client.
2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:
  - a. Be familiar with the law and any applicable administrative rules governing the length of sentence or disposition, including the Oregon Sentencing Guidelines as well as laws that establish specific sentences for certain offenses or for repeat offenders and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
  - b. Be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
  - c. Be familiar with the operation of indeterminate dispositions and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
  - d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition such as the circumstances in which consecutive or concurrent sentences may be imposed or when offenses should merge for the purpose of conviction and sentencing;
  - f. Establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
  - g. In cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
  - h. Determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
  - i. Advance other available legal arguments that support the least restrictive and burdensome sentence.
3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:
- a. Determine the effect that plea negotiations may have on the sentencing discretion of the court;
  - b. Determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
  - c. Consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
  - d. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
  - e. Determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information harmful to the client is deleted from it. Determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. Determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
  - g. Undertake other available avenues to present legal and factual information to a court or jury that might benefit the client and challenge information harmful to the client.
- 4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:
  - a. Inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations and the methods of collection;
  - b. Maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
  - c. Obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what, if any, relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status and sources through which the information can be corroborated;
  - d. Determine with the client whether to obtain a psychiatric, psychological, educational, neurological or other evaluation for sentencing or dispositional purposes;
  - e. If the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
  - f. Prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
  - g. Be familiar with and, where appropriate, challenge the validity and/or reliability of any risk assessment tools;

- h. Investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. Inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial or trial on other matters;
- j. Ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence that will be submitted to the court at sentencing or disposition;
- k. Prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. Be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. As supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. In a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. In a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. When the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;
- q. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. Take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and

- s. Advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate, counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is education so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases, the court has broad discretion and will receive reports from the Juvenile Court Counselor and the Department of Human Services caseworker or Oregon Youth Authority parole officer if the Department of Human Services or the Oregon Youth Authority are involved. These reports can be cookie cutter and often view the delinquent

from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence-based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client’s parents that the youth controls decisions concerning disposition options, to the extent appropriate and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth’s choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth’s strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

### **STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL**

**In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the client of, the consequences of a plea of guilty, an admission to juvenile court jurisdiction or a plea of no contest on the client’s ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in an appellate proceedings.**

#### Implementation:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

#### Commentary:

A plea of guilty or no contest severely limits the scope of a client’s direct appeal. A defendant who has pleaded guilty or no contest must identify a “colorable claim of error” simply in order to file a notice of appeal.<sup>25</sup> Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by

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<sup>25</sup> ORS 138.050 (2001).



statute to reviewing only the sentence imposed by the court.<sup>26</sup> Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that “a colorable claim of error” be identified, as a practical matter the client’s admission to facts constituting jurisdiction greatly limits the scope of appeal.

## **STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

**A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.**

### Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

### Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client’s position in order to preserve the issue for appellate review.<sup>27</sup>

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<sup>26</sup> ORS 138.050 (2001). See, *State v. Anderson*, 113 Or. App. 416, 419, 833 P2d 321 (1992) (“[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements.”)

<sup>27</sup> *State v. Wyatt*, 331 Or. 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been so that appellate courts can determine the merits of the legal issue and the harm of the exclusion.<sup>28</sup>

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) “with particularity” and to except after jury instructions have been delivered.

A lawyer’s most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client’s case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed.<sup>29</sup>

### **STANDARD 9.3 -UNDERTAKING AN APPEAL**

**A lawyer must be knowledgeable about the various types of appeals and their application to the client’s case and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed and that the client receives information about obtaining appellate counsel.**

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<sup>28</sup> OEC 103(1)(b)(“Error may not be predicated upon a ruling which \* \* \* excludes evidence unless a substantial right of a party is affected” and “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”); *State v. Bowen*, 340 Or. 487, 500, 135 P3d 272 (2006) (“[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony.”); see also *State v. Wirfs*, 250 Or. App. 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof “because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.”).

<sup>29</sup> *State ex rel Juv Dep. V. J.H.-O.*, 223 Or. App. 412 (2008).

### Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.
4. If a lawyer is representing a client who is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

### Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition that are available to the client, including rehearing, direct appeal, post-conviction relief and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal.<sup>30</sup> A lawyer should explain both the meaning and consequences of the court's decision and provide the client with the lawyer's professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client's right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client's right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client's success. That is particularly true of communication between a client's trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

## **STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES**

**A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client's interests and choices and be prepared to zealously advocate for the client.**

### Implementation:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians or custodians.

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<sup>30</sup> *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. ed. 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”)

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.
3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls.<sup>31</sup> It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order.<sup>32</sup> The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal and seek such relief where appropriate.

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<sup>31</sup> See *State v. Swain/Goldsmith*, 267 Or. 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or. App. 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or. App. 385, 388, 706 P2d 203 (1985).

<sup>32</sup> ORS 419C.610 (2001).

## **STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION**

- A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.**
- B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.**

### **Implementation:**

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.
2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

### **Commentary:**

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical and psychological services.

If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the youth.