



MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-10-1

Effective Date: 11/01/92

Subject: Preamble

Revised Date:

Title: Using the Guidelines

Attorneys in the Missouri State Public Defender System are expected to provide able and effective representation to our clients. These guidelines set forth specifically what is expected of the attorney at each stage of the proceedings. They should be used by attorneys in evaluating and improving their own performance and will be used by supervising attorneys in evaluating staff performance. However, attorneys are also expected to use their individual professional judgment in representing clients. If that judgment mandates a departure from the guidelines, the attorney should be aware of and able to articulate the reasons which led to the judgment that a departure from the guidelines was in the client's best interest.

Policy Administration:

Approval Information:



Policy Approved

Approved By: Marty Robinson

Approval Date: 11/09/2001



For New Employees



Policy Under Construction



MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-20-1

Effective Date: 11/01/92

Subject: General Principles of Representation

Revised Date:

Title: Role of the Public Defender

The Public Defender's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced, independent of any opinion the Public Defender might hold as to the client's guilt. The client's financial status is of no significance. Public Defender clients are entitled to the same zealous representation as are clients capable of paying an attorney.

Policy Administration:

Approval Information:



Policy Approved

Approved By: Marty Robinson

Approval Date: 11/09/2001



For New Employees



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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-20-20

Effective Date: 11/01/92

Subject: General Principles of Representation

Revised Date:

Title: Ethical Obligations of the Public Defender

The Public Defender, as any attorney, must know and adhere to all applicable ethical rules, opinions and standards. Where appropriate, the Public Defender may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about the ethical issues in a case, the Public Defender should seek guidance from other experienced counsel, but shall interpret any good faith ambiguities in a light most favorable to the client.

Policy Administration:

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Approved By: Marty Robinson

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For New Employees



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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-20-40

Effective Date: 11/01/92

Subject: General Principles of Representation

Revised Date:

Title: Education, Training and Experience of Public Defenders

- (a) To provide competent representation, the Public Defender must be familiar with Missouri law and criminal procedure, including changes and developments in the law. Where appropriate, a Public Defender should participate in skills training and education programs. To do this, a Public Defender must develop and follow a program of self study, no less than one hour per month, devoted to keeping abreast of changes in Missouri case and statutory law. A Public Defender must also participate in no less than fifteen hours of continuing legal education programs, exclusive of self study, each year.
- (b) Prior to undertaking the defense of one accused of a crime, a Public Defender should have sufficient experience to provide competent representation for that case. A Public Defender should handle the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, a Public Defender should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-20-60

Effective Date: 11/01/92

Subject: General Principles of Representation

Revised Date:

Title: General Duties of Public Defenders

- (a) A Public Defender's primary and most fundamental responsibility is to promote and protect the best interests of the client. This begins with respecting the client at all times.
- (b) The Public Defender, as any attorney, has a duty of confidentiality as concerns any attorney-client communications.
- (c) A Public Defender must be alert to, and avoid where appropriate, all potential and actual conflicts of interests under the law that would impair the Public Defender's ability to represent a client.
- (d) A Public Defender should make every effort to arrange for prompt and timely consultation with the client in an appropriate and private setting. Such consultation should occur within a week after representation of the client is undertaken, and must occur prior to the conduct of any preliminary hearing in the case. The Public Defender should maintain frequent contact with the client and keep the client apprised concerning developments in the case. At a minimum, the Public Defender must have contact with the client once per month during the pendency of the representation.
- (e) A Public Defender has an obligation to keep and maintain a thorough, organized and current file on each client. Insofar as pertinent, the file must contain
 1. A copy of the charging document,
 2. The date the client was arrested and charged,
 3. The client's custody status,
 4. The client's application,
 5. A client initial interview form, with the date of initial interview,
 6. The date of the initial conference with an attorney,
 7. The nature, substance and dates of subsequent client contacts,
 8. Motions, hearings and conferences regarding the client's bail,
 9. The nature, substance and dates of discussions and negotiations with opposing counsel or the Court,
 10. Investigations or requests for investigation and the dates thereof,
 11. Request for discovery, and the date thereof,
 12. Discovery and the date received,
 13. Legal research,
 14. Pretrial motions,
 15. Notes of trial preparation.

- (f) As soon as received by the Public Defender, he/she shall provide to the client a copy of the charging document, the discovery provided by the State, and any pretrial Motions filed by the Public Defender.
- (g) The Public Defender shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and whether to alter such a plea, whether to be tried by a jury or a court, whether to testify at trial, and whether to appeal.
- (h) The Public Defender should explain to the client that, after full consultation with the client, and after investigation of the applicable facts and law, the final decisions concerning trial strategy are ultimately to be made by the Public Defender. This explanation should include making the client aware that the Public Defender is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, what objections to make, and what other evidence to present. The Public Defender should fully disclose to the client all the factors considered by the Public Defender in making the decisions. The Public Defender should inform the client of the Public Defender's ethical obligation to not present matters which the Public Defender, in the exercise of informed professional judgment, believes to be frivolous, unfounded or false. In making trial strategy decisions, the Public Defender should consider the client's input.
- (i) Where the Public Defender is unable to communicate with the client because of either language or mental disability, the Public Defender shall take whatever steps are necessary to insure that the Public Defender is able to communicate with the client and that the client understands the proceedings. Such steps would include obtaining, where necessary, experts to assist with the matter.
- (j) The Public Defender should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take the steps necessary to inform the appropriate client, court or party, and minimize the inconvenience to others.
- (k) The Public Defender's obligation to the client continues throughout the pendency of the client's case, or until and unless another attorney is assigned to the case or files an appearance in the case. The Public Defender should fully cooperate with any successor counsel.

Policy Administration:

Approval Information:
 Policy Approved

Approved By: Marty Robinson

Approval Date: 11/09/2001

For New Employees

Policy Under Construction



MEMO to POLICY

Guidelines for Representation

Category Trial

Effective Date: 12/10/2005

Subject: General Principles of Representation

Revised Date:

Topic/Title: General Duties of Public Defenders

Memo Title: MSPD Policy re Client Mental Examinations and NGRI Defenses

Created By: Peter Sterling



MSPD Policy Re mental disease or defect.pdf



The documents shown as attached have been inserted following this page.

Approval Information:



Policy Approved

Approved By: Peter Sterling

Approval Date: 03/02/2006 02:30:44 PM



Policy Under Construction

MSPD POLICY
MENTAL HEALTH EVALUATIONS FOR PUBLIC
DEFENDER CLIENTS

When an attorney believes a client may have a legally significant mental disease or defect, the attorney shall submit an E Request for a private/independent evaluation, and if approved, hire a private mental health professional, rather than requesting a Court Ordered evaluation under RSMo. 552.020, 552.015.2(8) and/or 552.030. If there are circumstances unique to an individual case, such that the attorney wants the first evaluation to be a court ordered evaluation pursuant to RSMo. 552 Et. Seq., rather than a private evaluation, the attorney must first discuss this with the District Defender, and Division Director, Ellen Blau, before filing a request for an evaluation with the court. For further discussion of this policy, please see the attached Memorandum dated March 10, 2000.

MSPD POLICY
MENTAL DISEASE OR DEFECT EXCLUDING
RESPONSIBILITY A/K/A "NGRI" DEFENSES

Before an attorney may pursue an NGRI defense on a case in which the charge is lower than a B felony, the attorney must first discuss this with his/her District Defender and Division Director, Ellen Blau. This NGRI policy does not include cases in which the attorney is pursuing only a diminished capacity defense, mental disease or defect excluding a culpable mental state defense, where the client will not be committed to DMH if the defense is successful. This NGRI policy does not include situations in which the attorney is pursuing the question of competence only as opposed to responsibility for the crime. For further discussion of this policy, please see the attached Memorandum dated March 10, 2000.

Memorandum

To: Trial District Defenders
From: Ellen A. Blau
cc: Marty Robinson, Dan Gralike and Peter Sterling
Date: Friday, March 10, 2000
Subject: Psychological/psychiatric evaluations

The purpose of this Memorandum is to address the issue of the use of defense requested court ordered evaluations to investigate the availability of competency, rights waiver, sentencing and responsibility issues under RSMo. 552 Et. seq.

As we discussed at the District Defender meeting on Nov. 19, 1999, it is the policy of the public defender system that attorneys in the trial division follow the following procedure if representing a client whom the attorney believes may suffer from a legally significant mental disease or defect:

- 1 Conduct some triage by gathering and reviewing school, medical, psychological and psychiatric records before requesting an evaluation and/or filing notice of intent to rely on a mental disease or defect defense. Local investigators should be able to develop procedures for getting the records. At first, however, if the local investigator is unaware of how to do this, he/she should contact the mitigation specialists in capital and/or alternative sentencing who may have suggestions for the investigator regarding getting the records as timely as possible. These records will help the attorney get a better idea of whether there is a problem and what the problem is. This preliminary understanding should assist the attorney in selecting an appropriate expert. These records may also be relevant to a mental health professional who works on the case;
- 2 Request some assistance from alternative sentencing very early in the process to help the attorney ascertain whether the client may have some mental disease or defect issues;
- 3 After the triage, if the attorney believes that the client may have a mental disease or defect affecting competence, responsibility, rights waivers or some other legally significant issue, the attorney should contact an appropriate expert to determine whether he/she would be willing to conduct an evaluation as well as any other services that would be needed in connection with the case and to ascertain the projected cost;
- 4 The attorney should then complete a professional expense request form and submit it to his/her District Defender. The attorney should not enter into any agreement with the expert unless and until the District Defender and Deputy Director approve the expense request. If the expense request is approved, the attorney should make the limit of fees clear to the expert and let the expert know that prior to conducting any work that would go beyond the fee for which there is approval, the attorney would need to get additional approval for the amount over the initial request. One suggestion, rather than writing a letter to the expert documenting the agreement, which is likely to be used against the client, is to document the agreement by way of a memorandum to the client's case file.
- 5 The attorney should also discuss with the expert before hiring him/her, the expectation that if the expert conducts the evaluation, that the expert and attorney will consult before the expert writes a report and if the attorney determines that the expert's opinion will not help to defend the client, that the expert will not write a report. If, following consultation, the attorney does believe that a report is indicated, the expert will

submit it only to the attorney who will review it, discuss any concerns with the expert and then make appropriate disclosures based on discovery rules;

6 The attorney should then work with the expert to ensure he/she has all relevant material including, but not limited to the following: statutes and jury instructions on the crime charged and lesser included offenses, statutes and jury instructions on diminished capacity, NGRI, limitations on expert testimony and the definition of a mental disease or defect; specific instructions regarding what the attorney needs to know, for example, whether as a result of the mental disease or defect suffered by the client he/she was unable and/or failed to make a knowing, intelligent and voluntary waiver of his/her 5th and 6th Amendment rights prior to making a statement; prior psychiatric and psychological records; school records and medical records, following the attorney's review to ensure that they do not contain information that will harm the client if disclosed to the state; all relevant discovery; all statements of the client known to the state; any other information that on balance will do more good to the client than harm if the information is withheld from the expert;

7 The attorney should also work with the client before the expert meets with him/her to let the client know the parameters and purpose of the evaluation and to ensure that the client does not mangle or give a factual account of the crime that will make the situation worse.

8 Following the evaluation by the private, independent expert, the attorney should have a consultation with him/her to determine whether any type of mental disease or defect evidence will be used in the case. It is at this point, assuming that the expert provides information that the attorney will want to use, that the attorney should endorse the expert, and if appropriate, provide notice to the State and Court of the intent to rely on a mental disease or defect defense. It is important to get an appropriate expert on board early in the case so that the evaluation and decision regarding notice can be timely.

The attorney should not file this notice until this point or ask for the Court to order an evaluation pursuant to 552 until the private/independent evaluation occurs, because any exam ordered by the Court pursuant to 552 goes to the State and the Court. If, therefore, the defense requests such an evaluation or files notice of intent to rely on a mental disease or defect defense, the State can get one on its motion and all of the information obtained by the court appointed expert gets disclosed before the defense is in a position to know whether there is a legally significant mental disease or defect. If we do a private evaluation first, and decide not to use mental disease or defect evidence, to rely on a mental disease or defect defense and/or to raise the issue of competence, then the State does not have this information, which even if we do not use it, they can use it in formulating trial strategy and if the client testifies, they may be able to use any statements he/she made to a mental health professional as impeachment. See, State v. Grubbs, 724 S.W.2d 494, 500 (Mo.banc 1987).

Psychological evaluations that are shared among the Court and the parties implicate a defendant's Fifth and Sixth Amendment rights against self incrimination and to counsel. See, Estelle v. Smith, 101 S.Ct. 1866; Powell v. Texas, 109 S.Ct. 3146 (1989); Satterwhite v. Texas, 108 S.Ct. 1792 (1988). A waiver of these rights, should, therefore, be knowing, intelligent and voluntary. Counsel cannot appropriately advise the client regarding waiving these rights until an independent and private mental health expert evaluates the case and client and gives counsel the information needed to know whether the client should provide notice that he/she should waive these rights and provide notice of a mental disease or defect defense, thereby giving rise to the State getting the report of the

defense expert and having the ability to get an evaluation ordered by the Court pursuant to RSMo. 552 Et. seq.

Additionally, the Eastern District held that it is not the purpose of RSMo. 552 to aid the defense in determining whether a mental disease or defect defense exists. The Court then refused to grant a writ when the trial court refused to order an evaluation under RSMo. 552 with a report to be disclosed only to the defense. State ex. rel. Jordan v. Mehan, 597 S.W.2d 724 (Mo.App. E.D. 1980). The statute is not intended to help the defense investigate the availability of a defense. By invoking the defense, the defendant subjects himself/herself to the statutory proceeding and thereby waives certain constitutional rights. The Court expressly reserved ruling on whether and under what circumstances an indigent defendant can seek expert assistance in ascertaining the availability of a defense. Id., at 726. Five years later, the United States Supreme Court held that when a defendant's mental condition is seriously in question he/she is entitled to a mental health expert to conduct an examination to help determine whether the insanity defense is viable, to present testimony and to assist in preparing the cross of the State's mental health expert witnesses. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). We are very fortunate here in MO, because we have the funds for defense experts built into the budget, and thus, in most all circumstance we do our "Ake motions" to the District Defender and Deputy Director rather than the Court.

RSMo. 552 Et. Seq. does require that the client enter plea of not guilty by reason of mental disease or defect at the time he/she enters a plea to the charge; or within 10 days following the entry of a plea, to provide written notice of his/her intent to rely on the defense, **or** to provide written notice at such later date as the court may for good cause permit. The new procedure where we investigate the availability of the defense before noticing up intent to rely on it may cause some friction with some judges for which we will need to be prepared. The argument is that noticing up the defense, gives the State the opportunity to get information from the client that they may use, which would otherwise be privileged, and also involves waivers of the client's 5th and 6th Amendment rights to remain silent and to counsel. As the defense lawyer, we are not in a position to assist the client in making a knowing, intelligent and voluntary waiver of these rights and privileges until our independent evaluation/investigation reveals the availability of the defense. This will be our good cause argument for permitting the defense and/or evidence even though it is not very realistic in most cases to provide the notice and assist the client in making an informed decision within ten days of arraignment. But, we will need to be very vigilant about getting started on these cases quickly and documenting in the file our efforts up to the point we file the notice so we can show that we were not being dilatory in filing the notice after the ten days.

In short, get a private/independent evaluation as soon as the E request is approved and then, if the expert provides information the defense wants to use following the evaluation, provide appropriate notice of intent to use the mental disease or defect evidence and/or defense and endorse the expert.

If there is some unique circumstance in the case so that the attorney believes a defense requested Court ordered evaluation pursuant to 552 is in the client's best interest, the attorney should discuss the situation with his/her district defender and Ellen Blau or Peter Sterling, prior to asking the Court to order the evaluation.

9. Following the consultation with the expert, assuming the expert provides information and opinions the defense wants to use, the defense should then request that the expert

write a report. The defense should then review a draft of the report and if it is complete and accurate, disclose it to the State.

10. The State on its motion or the Court on its own motion may be able to get an evaluation pursuant to 552.020 on the issue of competency before the defense notices up any intent to rely on mental disease or defect issues. Such an evaluation, however, must be limited to the issue of competency. Neither the Court nor the State is entitled to an evaluation on the issue of responsibility (552.030 and/or 552.015(2)(8)). unless and until the defense notices up its intent to rely on a mental disease or defect defense, which is required in order to use such a defense at trial. If the Court or State is requesting a 552.020 evaluation before the defense has noticed up intent to rely on a mental disease or defect defense and/or before the defense has raised the issue of competence, the Court and/or State are supposed have good cause for ordering these evaluations and the defense attorney should make certain that the evaluation, if one is to be ordered, be limited to competency. If possible, it is probably in the client's best interest not to have a 552.020 evaluation before the defense knows whether it will rely on any kind of mental disease or defect strategy, and therefore, one might want to request a hearing on the issue of good cause challenging the State or Court request for the 552.020 evaluation before the defense has investigated the issue. If the Court is going to order the 552.020 evaluation before our expert has completed his/her evaluation or when the defense will not be relying on a mental disease or defect defense, the defense attorney will probably want the order to make clear that the Court appointed expert does not discuss the facts of the case with the client and should take time with the client so he/she knows not to discuss the case fact. The defense attorney should also attempt to get the court to allow the defense attorney to be present, and possibly, to tape the RSMo. 552.020 evaluation.

11. The defense attorney has an ongoing obligation to provide the defense expert with relevant information discovered after the expert writes the report. The defense attorney should keep in mind that any information he/she gives to an expert will probably need to be disclosed to the State.

12. As a general rule, an NGRI defense should not be used in cases where the client is not facing significant prison time. The average time spent in the Department of Mental Health following an NGRI finding is much longer for comparable cases than one would spend in DOC except in homicide cases. For this reason, no one should pursue an NGRI defense on anything less than a B felony without first discussing the situation with the District Defender and Ellen Blau or Peter Sterling. This is different than a diminished capacity defense (mental disease or defect negating a culpable mental state), where one uses the mental disease or defect to try to get a lesser offense or an acquittal (the law is unsettled as to whether one can use this defense for a total acquittal as opposed to a conviction on a lesser charge). With the diminished capacity defense, the client is not committed to DMH. If successful he/she would be convicted of the lesser or acquitted and would be sentenced to DOC as anyone would based on the range of punishment for the crime that applied.



MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-20-80

Effective Date: 11/01/92

Subject: General Principles of Representation

Revised Date:

Title: Pre-charge Intervention

An eligible person is entitled to Defender services at any time the right to counsel attaches. The right to counsel is independent of any court action. The Public Defender should be alert to identify an eligible person under investigation, to notify such person of his or her right to counsel and the peril in proceeding without counsel, and to provide counsel for such person when requested by that person or someone on his or her behalf.

Policy Administration:

Approval Information:



Policy Approved

Approved By: Marty Robinson

Approval Date: 11/09/2001



For New Employees



Policy Under Construction



MEMO to POLICY

Guidelines for Representation

Category Trial

Effective Date: 03/02/2006

Subject: General Principles of Representation

Revised Date:

Topic/Title: Pre-charge Intervention

Memo Title: Ethical Opinion re initiating contact with potential clients

Created By: Peter N. Sterling



Rule 4-7_3 advisory.pdf

The document shown as attached has been inserted following this page.

Approval Information:



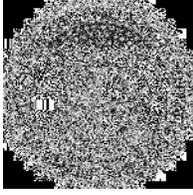
Policy Approved

Approved By: Peter Sterling

Approval Date: 03/02/2006 02:32:10 PM



Policy Under Construction



MISSOURI STATE PUBLIC DEFENDER SYSTEM

Area 16 – Kansas City Trial Office

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December 23, 2005

John C. Dods
Chair of the Missouri Supreme Court Advisory Committee
217 E. McCarty
Jefferson City, Mo 65101

Re: request for formal opinion regarding Missouri Supreme Court Rule 4-7.3

Dear Mr. Dods:

Pursuant to Missouri Supreme Court Rule 5.30(a), I am requesting a formal opinion as to the interpretation of the changes in Missouri Supreme Court Rule 4-7.3 (Direct Contact with Prospective Clients) that take effect January 1, 2006 – specifically whether in-person contact with prospective clients by, or under the direction of, attorneys with the Missouri State Public Defender System will now violate that general prohibition against solicitation of clients. This matter is of general importance because the changes could drastically affect the current day-to-day statewide practice of the courts and the Missouri State Public Defender.

I am the managing attorney for District 16 (the Kansas City Trial office) of the Missouri State Public Defender System. Under my direction and supervision, my staff currently initiates in-person contact with prospective clients. With the changes to Rule 4-7.3 effective January 1, I concluded that we no longer will be able to engage in that practice and it was my intent to end it. However, our Trial Division Director (my supervisor) disagrees and has directed me to continue with the practice.

On December 12, 2005, I advised our Trial Division Director as follows:

The Kansas City Trial office of the Missouri State Public Defender System, under my direction and supervision, currently initiates personal contact with prospective clients in order to proactively identify our clients prior to court. We do not wait for the prospective client to seek us out nor do we wait for an order or request

from the court. We do so by initiating personal contact with incarcerated defendants at the jail and at court and with non-custody defendants at court.

At the time we initiate contact, we inquire whether they have counsel. If they do not, we inquire whether they want to make application for public defender services. If so, we have them complete an application and then make a determination of whether or not they qualify for our services. If they qualify, we commence representation. If we know the defendant already is represented by retained counsel, we do not initiate such contact. This process, allowing for the earliest possible identification of our clients, enhances the effectiveness of our representation and expedites our handling of and the disposition of cases.

Current Missouri Supreme Court Rule 4-7.3(b) allows a lawyer to "initiate personal contact including telephone contact with a prospective client for the purpose of obtaining professional employment" only in certain, specific circumstances. One of those circumstances, Rule 4-7.3(b)(2), allows such initiation of personal contact "under the auspices of a public or charitable legal services organization." Thus current Rule 4-7.3(b)(2) exempts us from the general rule against direct solicitation of clients. In my opinion, it is only Rule 4-7.3(b)(2) of the current rule that allows for our current practice of initiating personal contact with prospective clients for the purpose of them obtaining legal representation by the Missouri State Public Defender System.

However, as a result of changes to Rule 4-7.3 that take effect January 1, 2006, my staff no longer will initiate such personal contact of defendants ("other than with an existing or former client, lawyer, close friend or relative") in order to identify our clients because, in my opinion, the Rule will no longer except us out of the general prohibition against solicitation of clients. In my opinion, for us to continue our current practice would put us in violation of new Rule 4-7.3.

The new Rule 7.3(a) states: "In-person solicitation. A lawyer may not initiate the in-person, telephone or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend or relative." It no longer will contain our exception found in Rule 4-7.3(b)(2). The new Comment does include this sentence: "Rule 7.3(a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries." So, while the new Comment could be interpreted to cover our current practice, the Rule itself clearly prohibits it. The Rule governs according to the final paragraph of the Preamble to the Rules of Professional Responsibility: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

In response, on December 19, he directed me to proceed as follows:

Thank you, Joel. I direct you to continue the current practice of initiating personal contact with potential public defender clients for the purpose taking an application for defender services on and after January 1, 2006 regardless of the changes to Rule 4-7.3. This rule applies to in-person and written "solicitation" for the purpose securing "professional employment." The Comments to the amended Rule 4-7.3 make it clear that the rule is not intended to prohibit a lawyer from participating in a constitutionally protected activity. As we are a public service organization created and funded by the General Assembly to insure that the indigent charged with a crime that may result in a deprivation of liberty interest is afforded the full panoply of constitutionally protected rights generated when the state begins the process to affect those liberty interests, the amended Rule 4-7.3 should not prohibit the contact of individuals to identify those indigents charged with crimes in this state, for which our individual lawyers received no pecuniary interest from the client pursuant to that contact and potential representation. Therefore, the activities you describe are not conducted for the purpose of soliciting professional employment to the pecuniary gain or advantage of our lawyers. The Office of Public Defender initiates personal contact for the purpose of informing potential clients of their right to counsel and the procedure for obtaining defender services in the event they are without the means to employ an attorney.

I believe his is a reasonable resolution of an arguable question of professional duty and therefore I believe I can follow it. Missouri Supreme Court Rule 4-5.2. But because I believe my interpretation also is a reasonable one, because of the general importance of this issue effecting how thousands of cases are processed statewide, and because I do not want to violate the Rules of Professional Conduct, I request a formal opinion regarding whether continuing my current practice of initiating in-person contact with prospective clients, as instructed by my supervisor, will violate Rule 4-7.3 as of January 1, 2006.

Sincerely,

Joel R. Elmer
District Defender

cc: Peter Sterling, Trial Division Director, Missouri State Public Defender System

LEGAL ETHICS COUNSEL

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MISSOURI SUPREME COURT ADVISORY COMMITTEE

February 27, 2006

Mr. Joel R. Elmer
Attorney at Law
Oak Tower, 20th Floor
324 E. 11th Street
Kansas City, MO 64106-2417

Dear Mr. Elmer:

This is in response to your request for a formal opinion dated December 23, 2005. Although you requested a formal opinion, the Supreme Court Advisory Committee determined that an informal advisory opinion would be more appropriate. However, because you requested a formal opinion, I have obtained the Missouri Supreme Court Advisory Committee's approval of this opinion before issuing this informal advisory opinion.

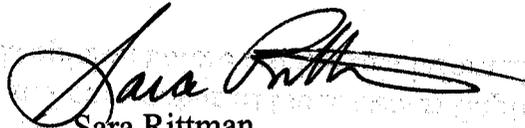
This is a non-binding, informal advisory opinion pursuant to Missouri Supreme Court Rule 5.30(c). This opinion is based only upon a review of Supreme Court Rule 4, the Rules of Professional Conduct, and relevant advisory opinions of which I am aware. It does not affect the authority of a judge or quasi-judicial officer to rule on any matter. It is based solely upon the facts you have presented in your letter. Additional or different facts, other than those presented in your letter, could result in a different conclusion.

Copies of correspondence related to this opinion request will be maintained for a minimum of five years after the date of this letter. After that, they may be destroyed.

I agree with the Trial Division Director that, in the unique circumstances of the Public Defender System, the contact would not be for the purpose of soliciting "professional employment" as that term is used in Rule 4-7.3.

I hope this information is of assistance to you.

Sincerely,



Sara Rittman
Legal Ethics Counsel



MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-30-1

Effective Date: 11/01/92

Subject: Initial Preparation and Preliminary Proceedings

Revised Date:

Title: Client Conferences

- (a) The scope and focus of the initial interview with the client will vary according to the circumstances under which it occurs.
- (b) The Public Defender needs to understand that it is important, at the outset, to establish rapport with the client, and that the best way to maintain that rapport is to treat the client with respect at all times.
- (c) From the outset, the Public Defender needs to explain to the client various aspects of the law. The Public Defender should explain the attorney-client privilege, that all confidential communications with the client will be maintained confidential by the Public Defender. The Public Defender should explain the client's right to remain silent protected by the Fifth Amendment to the Constitution of the United States and Article 1, Section 19 of the Constitution of the State of Missouri, and further needs to explain the crucial need that the client exercise these rights and not discuss his/her case with anyone but counsel unless counsel advises otherwise. The Public Defender needs also explain the nature of the charge or charges then pending against the client and the range of punishment.
- (d) If the client is detained, an important part of the initial interview and investigation will be to obtain information which will help the Public Defender in making application for the client's pretrial release under the most favorable conditions possible. In light of the dictates of Section 544.455.2 RSMo (1986), the information garnered by the Public Defender should include the following:
 - 1. Information about the client's residence and the client's length of stay at that residence;
 - 2. Information about the client's family including the names, addresses and phone numbers of family members;
 - 3. Information about the client's employment history and financial resources;
 - 4. Information about the client's mental health;
 - 5. Information about the client's record of prior criminal arrests and/or convictions, and present probation or parole status;
 - 6. Information about the client's record of appearances at Court proceedings, including explanation of any failures to appear; and
 - 7. Information about the general circumstances of the alleged offense which would allow the Public Defender to assess the weight of the evidence against the client.
- (e) The Public Defender should also obtain information from the client concerning the client's resources for posting a cash bond or property in lieu of a cash bond.
- (f) The Public Defender should be attentive to, and should investigate, any information which would call into question the ability of the client to understand the proceedings against the client and to assist in his/her defense. The Public Defender should be thoroughly familiar with the law regarding competence to stand trial and regarding criminal responsibility (Chapter 552 RSMo). The Public Defender should be also aware of and

protect the client's statutory and constitutional rights with respect to competency examinations.

- (g) Having conducted such an initial interview with the client, the Public Defender shall prepare a memo for the file detailing the contents of that discussion with the client. A copy of that memo shall be provided to the client.

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For New Employees

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-30-20

Effective Date: 11/01/92

Subject: Initial Preparation and Preliminary Proceedings

Revised Date:

Title: Initial Appearance in Felony Cases

- (a) The primary purposes of the initial appearance are for the court to inform the client of the nature of the charges, and to set the conditions of release.
- (b) The Public Defender should insure that the client does not waive any significant rights at initial appearance.
- (c) The Public Defender should be attentive to any opportunity for discovery which might present itself at that time.

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Guidelines for Representation

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Section #: 10-10-30-40

Effective Date: 11/01/92

Subject: Initial Preparation and Preliminary Proceedings

Revised Date:

Title: Bail Hearing

- (a) Unless the client directs otherwise, at the earliest opportunity, the Public Defender should attempt to secure the pretrial release of the client under conditions most favorable to the client. To facilitate this process, the Public Defender should be familiar with bail laws, including the legal standards which the court may consider in setting the amount of bail and the conditions of release (Section 544.455 RSMo[1986], V.A.M.R. 21.03, 33.01).
- (b) Counsel should be aware of the client's right to review under Supreme Court Rules 33.05, 33.06, and 33.09, and should consider the advantages and disadvantages of seeking such review. When resort to the bail appellate procedure is appropriate, counsel should make efforts to expedite that procedure.
- (c) When the client remains incarcerated unable to obtain pretrial release, counsel should alert the incarcerating authority, and where appropriate the court, concerning any special needs of the client (health related matters, etc.).

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Guidelines for Representation

Category: Trial

Section #: 10-10-30-60

Effective Date: 11/01/92

Subject: Initial Preparation and Preliminary Proceedings

Revised Date:

Title: Preliminary Discovery

The Public Defender should be aware that, while Supreme Court Rules do not require discovery until after arraignment in the trial court, many prosecuting authorities are willing, from the outset of the case, to make available to Public Defenders police reports and documents in their possession. The Public Defender should take advantage of any opportunity for the earliest possible discovery. The Public Defender should also examine and seek copies of all pertinent and available court papers. The Public Defender should seek preservation and/or discovery of any evidence likely to become unavailable unless special measures are taken. The Public Defender should also know and protect the client's rights governing prosecution efforts to require the client to submit to procedures for gathering non-testimonial evidence (lineups, identification procedures, handwriting exemplars, physical specimens, etc.).

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-40-1

Effective Date: 11/01/92

Subject: Preliminary Hearings

Revised Date:

Title: Purpose of the Preliminary Hearing

The Public Defender should realize that for the defense, the preliminary hearing provides two key opportunities: the opportunity to test the adequacy of the prosecution's case, and the opportunity to discover specific information about the prosecutor's case, including its strengths and weaknesses.

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Guidelines for Representation

Category: Trial

Section #: 10-10-40-20

Effective Date: 11/01/92

Subject: Preliminary Hearings

Revised Date:

Title: **Timing of the Preliminary Hearing**

The Public Defender should seek a prompt preliminary hearing unless good reasons exist for a different strategy. If the client is in custody, the Public Defender must make every effort to secure the preliminary hearing within 30 days, unless there are compelling, client oriented, reasons to do otherwise.

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Guidelines for Representation

Category: Trial

Section #: 10-10-40-40

Effective Date: 11/01/92

Subject: Preliminary Hearings

Revised Date:

Title: Preparation for the Preliminary Hearing

In preparing for the hearing, the Public Defender should research or already know the pertinent aspects of the law, particularly the elements of all charges pending against the client, should obtain all available information from the client and from prosecution authorities, and should investigate, as fully as possible, the facts underlying the charges.

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Guidelines for Representation

Category: Trial

Section #: 10-10-40-60

Effective Date: 11/01/92

Subject: Preliminary Hearings

Revised Date:

Title: Recording of the Preliminary Hearing

Generally, the Public Defender should assure that the proceedings are being adequately recorded. However, counsel should be aware that a transcript of the preliminary hearing testimony might be admissible against the client at trial should the witness not be available. Then, after the hearing, the Public Defender should insure that any record made will be preserved for possible use at trial (for impeachment purposes, etc.).

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Guidelines for Representation

Category: Trial

Section #: 10-10-40-80

Effective Date: 11/01/92

Subject: Preliminary Hearings

Revised Date:

Title: Conduct of the Preliminary Hearing

- (a) At the hearing, the Public Defender should take maximum discovery advantage, by securing the presence of witnesses thought important by the Public Defender, and by examining and cross-examining witnesses brought to hearing. Where appropriate, the Public Defender should seek sequestration of witnesses.
- (b) Normally, the Public Defender should not present affirmative proof at the preliminary hearing, and particularly should not present the client's testimony at that time, unless there is a sound tactical reason for doing so, a reason which overcomes the inadvisability of disclosing the defense case, and/or subjecting the defendant or other defense witnesses to cross-examination, at this stage.
- (c) In arguments to the court, the Public Defender should be prepared to challenge any inadequacy in the prosecution's showing of probable cause on any element. Where appropriate, counsel should consider arguing that the court should retain jurisdiction over the case positing that the evidence presented demonstrates only a lesser included misdemeanor offense.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-50-1

Effective Date: 11/01/92

Subject: Pretrial Preparation

Revised Date:

Title: Discovery

- (a) In every case, the Public Defender should request discovery pursuant to the dictates of Supreme Court Rule 25.03. This procedure should be followed even if prosecution authorities have already provided to the Public Defender discovery in fact, as such a procedure will safeguard against deliberate or accidental failures by prosecution authorities to give complete discovery. The Public Defender should be aware of all information which is obtainable pursuant to Supreme Court Rule 25.03.
- (b) Where necessary, the Public Defender should consider resort to the procedures set forth under Supreme Court Rule 25.04 to obtain discovery of information not covered under Supreme Court Rule 25.03.
- (c) The Public Defender must be aware of the duties of disclosure placed upon the defense pursuant to Supreme Court Rules 25.05, 25.06, 25.02, 25.07 and 25.08.
- (d) The Public Defender should consider seeking sanctions against prosecuting authorities pursuant to Supreme Court Rule 25.16 to the extent that prosecution authorities do not appropriately respond to discovery motions.

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Guidelines for Representation

Category: Trial

Section #: 10-10-50-20

Effective Date: 11/01/92

Subject: Pretrial Preparation

Revised Date:

Title: Investigation

Once the Public Defender has obtained information concerning the prosecution's version of the case and discussed the case with the client, the Public Defender should promptly conduct that investigation which he deems appropriate to allow for the fullest possible understanding of the facts, circumstances and merits of the case, as well as any penalty which might be imposed in the event of conviction.

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MEMO to POLICY

Guidelines for Representation

Category Trial

Effective Date: 11/29/2006

Subject: Pretrial Preparation

Revised Date:

Topic/Title: Investigation

Memo Title: Collecting Records, "Excused" Subpoena Duces Tecum Improper

Created By: Peter Sterling

Ellen Blau/Area071/MSPD

10/09/2003 10:56 AM

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Subject Re: Using subpoenas to get copies 📎

I thought I would provide a reminder of some alternative ways to get the records since we usually need them sufficiently in advance of deposition or a contested hearing in order to review them so that we do not want to see them for the first time at a deposition or contested hearing. Unfortunately, if we are not successful in getting the records as described in 1) below, the other ways take additional time and effort, but would probably be required if we are to have the records in time to review them adequately:

- 1) A signed release, containing all required language (this may need updating especially in light of HIPPA) from the party whose records we are requesting accompanied by a request that the records be delivered to us, either hand delivered or by mail;
- 2) A request to make an ex parte showing in support of a court order directing the records custodian to turn over the records to us. This request should be general and probably needs to be served on opposing counsel, and if the Court grants us the right to litigate this ex parte, then a more factually specific motion filed under seal and record made in camera requesting that the Court provide an order to the individual or organization directing them to turn over the records to us;
- 3) A motion requesting an ex parte hearing for the production of documents (this motion should be general and will probably need to be served on opposing counsel so they have the opportunity to object to an ex parte proceeding), and if granted, an ex parte hearing for the production of documents, to which we could then legitimately serve subpoenas duces tecum on the records custodians who would then appear at the ex parte proceeding and provide the records;
- 4) If the Court denies the request to allow us to litigate getting the records in an ex parte proceeding under 2) or 3), we can either do a writ or we give notice to opposing counsel and do 2) or 3) in their presence, being as general as possible to avoid disclosing specific trial strategy and/or confidential/privileged information and maintaining that we should not have to disclose the records to the State unless and until we review them and make an informed choice as to whether or not we will be using them.

If anyone has any other ideas for getting the records, please let me know. Also, if anyone wants a sample motion dealing with the ex parte issue, let me know and I will forward one to you that deals with some of the MO caselaw

that leads me to think that we have to give the State some notice that we are requesting an ex parte proceeding.

Thanks, ellen

Peter Sterling

Peter Sterling

10/09/2003 08:53 AM

To: Anthony Cardarella/Area007/MSPD@MSPD, Bert Godding/Area005/MSPD@MSPD, Catherine Rice/Area035/MSPD@MSPD, Christine Sullivan/Area011/MSPD@MSPD, Christopher Davis/Area032/MSPD@MSPD, Daniel Underwood/Area001/MSPD@MSPD, Darren Wallace/Area029/MSPD@MSPD, David Miller/Area043/MSPD@MSPD, Dewayne Perry/Area030/MSPD@MSPD, Marty Robinson/Area99J/MSPD@MSPD, Peter Sterling/Area071/MSPD@MSPD, Dan Gralike/Area99C/MSPD@MSPD, Cathy Kelly/Training/MSPD@MSPD, Lew Kollias/Area066/MSPD@MSPD, Karen Kraft/Area054/MSPD@MSPD, Ellen Blau/Area071/MSPD@MSPD, Jane Frew/Area99C/MSPD@MSPD, Mary Willingham/Area99C/MSPD@MSPD, Lisa Martin/Area99C/MSPD@MSPD, Kathleen Lear/Area99J/MSPD@MSPD, Donna Anthony/Area037/MSPD@MSPD, Kris Kerr/Area022/MSPD@MSPD, Stormy White/Area021/MSPD, Leon Munday/Area016/MSPD@MSPD, James Wilson/Area026/MSPD@MSPD, Jan King/Area019/MSPD@MSPD, Jeff Stephens/Area004/MSPD@MSPD, Jeffrey Martin/Area017/MSPD@MSPD, Joe Zuzul/Area028/MSPD@MSPD, Joel Elmer/Area016/MSPD@MSPD, Kathleen Brown/Area015/MSPD@MSPD, Kathryn Benson/Area013/MSPD@MSPD, Lisa Clover/Area023/MSPD@MSPD, Lisa Preddy/Area020/MSPD@MSPD, Mary Bellm/Area006/MSPD@MSPD, Michael Hamilton/Area012/MSPD@MSPD, Michael Skrien/Area034/MSPD@MSPD, Raymond Legg/Area010/MSPD@MSPD, Rick Baker/Area046/MSPD@MSPD, Rodney Hackathorn/Area031/MSPD@MSPD, Shawn Goulet/Area021/MSPD@MSPD, Susan Faust/Area044/MSPD@MSPD, Thomas Gabel/Area045/MSPD@MSPD, Victor Head/Area039/MSPD@MSPD, Wayne Williams/Area024/MSPD@MSPD, Richard Scheibe/Area002/MSPD@MSPD, Eric Affholter/Area022/MSPD@MSPD, Kirk Zwink/Area014/MSPD@MSPD, Jahnel Lewis/Area025/MSPD@MSPD, Lashon Rhodes/Area036/MSPD@MSPD

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Subject: Using subpoenas to get copies



I have seen two recent instances of the use of subpoenas to obtain copies of records improperly. It once was a fairly common practice to induce the cooperation of records custodians by serving a subpoena duces tecum (deposition or hearing) which would be "excused" upon receipt of copies of the desired records. That practice has been condemned by the Office of Chief Disciplinary Counsel. It is our responsibility to make sure attorneys and staff including investigators are aware of the proper procedures and improper practices are stopped.

Informal Advisory Opinion Number: 970129

QUESTION: Attorney's firm represents Husband in a dissolution action. Pursuant to a subpoena duces tecum served upon Wife's therapist, Wife's therapist produced the contents of the file on Wife, including all notes of the sessions together and sessions that included Husband, both alone and with Wife. The bottom of each page is stamped "CONFIDENTIAL INFORMATION NOT FOR SECONDARY RELEASE". What is Attorney's obligation or limitation on producing copies of these documents to Husband, opposing counsel, or any expert retained by Husband via counsel?

ANSWER: If Attorney obtained the information properly, through a deposition, and Attorney did not make any representations about use of the documents, Attorney may use the documents as appropriate in the representation of Attorney's client without violating the ethical rules. Because Attorney asks about opposing counsel, it appears possible that Attorney used a subpoena to obtain production of these documents outside a deposition and possibly without providing notice of a deposition to opposing counsel. Such a procedure is inappropriate under the Rules of Civil Procedure and the Rules of Professional Conduct. Under those circumstances, it would not be appropriate to use the information without informing opposing counsel that it was obtained and how.

Informal Advisory Opinion Number: 950264

QUESTION: Attorney intends to subpoena records related to Attorney's client. Attorney asks whether the procedures are different since the client's, rather than a non-party's, records are the subject of the subpoena.

ANSWER: In Missouri, the purpose of a subpoena is to compel the attendance of an individual or representative of an organization. The subpoena may also compel the person to whom it is addressed to bring documents to this appearance. If the subpoena is used in litigation in which there is an opposing party, Attorney may not use the subpoena to obtain the documents and waive the appearance. The procedures do not change if the documents are documents to which Attorney's client should otherwise have access. If Attorney must obtain the documents through subpoena because Attorney is unable to obtain them through a request or demand by Attorney's client, Attorney must follow these procedures

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Approved By: Peter Sterling

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Guidelines for Representation

Category: Trial

Section #: 10-10-50-40

Effective Date: 11/01/92

Subject: Pretrial Preparation

Revised Date:

Title: Pretrial Motion Practice

- (a) The Public Defender should file any motions that the Public Defender deems strategically and legally appropriate. The decision to file motions should be made only after conducting sufficient investigation and researching relevant law. The Public Defender must be familiar with Missouri statutes and rules, as well as local court rules governing the procedure and time limitations for filing and trying pretrial motions. Before filing a pretrial motion, the Public Defender should consider any potential adverse effects which might be suffered by the client as a result of filing the motion.
- (b) Where appropriate, the Public Defender should consider filing a motion to challenge any of the following:
 - 1. Unreasonable searches and seizures;
 - 2. Illegally obtained statements from the defendant;
 - 3. Suggestive identification procedures;
 - 4. Denial of the client's right to speedy trial;
 - 5. Unconstitutionality of the statute under which the client is charged;
 - 6. Insufficiency of the charging document under which the client is charged;
 - 7. Insufficiency of the evidence in a felony case, as presented to either the Grand Jury or the Associate Circuit Court, resulting in the filing of the Indictment or Information.
- (c) Where appropriate, the Public Defender should consider motions:
 - 1. Requesting speedy trial,
 - 2. Requesting severance from or joinder with other defendant or charges,
 - 3. Requesting funds for experts, investigations, special procedures, etc.
 - 4. Requesting change of Judge and/or venue.
- (d) The Public Defender should also consider filing Motions in Limine to bring to the trial court's attention problematic issues which might arise at trial regarding actions of the prosecutor or witnesses.
- (e) When preparing for a pretrial motion, counsel should do all of the following:
 - 1. Conduct that investigation and discovery necessary to advance the claim,
 - 2. Carefully research the appropriate statutory, constitutional and case law pertaining to the claim,
 - 3. Fully understand the burdens of going forward and of proof pertaining to the motion filed,
 - 4. Where appropriate, subpoena pertinent evidence and witnesses,
 - 5. Carefully consider the benefits versus the costs of having the client testify,

6. Where appropriate, submit to the court written suggestions of law in support of the positions espoused in the motion,
 7. Where appropriate, the Public Defender should consider seeking interlocutory relief after an adverse pretrial ruling on the motion.
- (f) When the Public Defender files a pretrial motion which he/she deems appropriate, the Public Defender needs have the court conduct on the record an appropriate pretrial hearing and needs obtain from the court on the record a pretrial ruling on the motion.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-60-1

Effective Date: 11/01/92

Subject: Guilty Pleas

Revised Date:

Title: Discussions with the Client Concerning Plea Negotiations

- (a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should discuss with the client all alternatives, including the possible resolution of the case through a negotiated plea of guilty. The Public Defender will make it clear to the client that the ultimate decision to enter a plea of guilty has to be made by the client. Based upon the information garnered via discovery, investigation and client interviews, the Public Defender should candidly explain to the client the prospective strengths and weaknesses of the cases for the prosecution and defense, discussing the availability of prosecution witnesses, the concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial.
- (b) The Public Defender must not advise a client to plead guilty merely because the client admits guilt to the Public Defender, or merely because of a favorable disposition offer. Rather, before advising a client to plead guilty, the Public Defender needs to believe that the complete circumstances of the case warrant such advice.
- (c) When the Public Defender believes that the client's desires are not in the client's best interests, the Public Defender, in the exercise of sound professional judgment, may attempt to persuade the client to change his/her position. In attempting to persuade the client, the Public Defender must not attempt to unduly influence or coerce the client into pleading guilty by means such as overstating the likelihood of conviction or the potential consequences of conviction, or threatening to withdraw from representation of the client should the client refuse to plead guilty. If the Public Defender's efforts to persuade the client are unsuccessful, the Public Defender should assure the client that the Public Defender will defend the client vigorously.
- (d) The Public Defender should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case the Public Defender should inform the client of the negotiations as soon as possible after they occur.

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Guidelines for Representation

Category: Trial

Section #: 10-10-60-20

Effective Date: 11/01/92

Subject: Guilty Pleas

Revised Date:

Title: Conduct of Plea Negotiations

Once negotiations are begun, the Public Defender should attempt to obtain the most favorable disposition possible for the client. The Public Defender must keep the client informed of the status of plea negotiations.

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Guidelines for Representation

Category: Trial

Section #: 10-10-60-40

Effective Date: 11/01/92

Subject: Guilty Pleas

Revised Date:

Title: Continuing Duty to Prepare Case For Trial

Notwithstanding the existence of ongoing plea negotiations, the Public Defender should continue to prepare the case in the same manner as if it was going to proceed to trial on the merits.

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MSPD Policies and Procedures Database

Guidelines for Representation

Category: Trial

Section #: 10-10-60-60

Effective Date: 11/01/92

Subject: Guilty Pleas

Revised Date:

Title: Prerequisites for Guilty Pleas

If the client decides to accept a plea bargain offer, before the Public Defender allows the client to plead guilty, the Public Defender must be satisfied at the following:

1. That the client admits guilt, or feels that there is a substantial likelihood of conviction at trial, and feels that it is in his/her best interests to plead guilty under the plea agreement rather than face the perils of trial (North Carolina v. Alford);
2. That the client understands all aspects of the plea agreement, and understands all consequences of a plea of guilty under the agreement;
3. That the state could make a case against the client at trial;
4. That a plea of guilty by the client is voluntary, and intelligent, with full understanding of the nature of the charge and the consequences of the plea;
5. That there is a factual basis for the client's plea of guilty;
6. That the client understands the rights he/she is waiving, including the right to trial by jury, the right to assistance of counsel at trial, the right to compulsory process, the right to confrontation of witnesses, the right to testify and privilege against self-incrimination, and the state's burden of proof beyond a reasonable doubt;
7. That the client understands the consequences of conviction, including the maximum possible sentence faced by the client, any mandatory minimum sentence faced by the client, the potential liability faced by the client for enhanced punishment after a subsequent conviction, the client's probation and parole eligibility, and the likelihood of potential civil liabilities arising out of conviction for this particular offense.

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Guidelines for Representation

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Section #: 10-10-60-80

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Subject: Guilty Pleas

Revised Date:

Title: Conduct of Guilty Plea Proceedings

During the guilty plea proceeding, the Public Defender must be attentive that the client appears to understand the proceedings and must be vigilant to enforce all aspects of the plea agreement. The Public Defender needs to be prepared to make sentencing arguments on behalf of the client at the time such arguments are appropriate. (See VIII Sentencing Advocacy).

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-60-100

Effective Date: 11/01/92

Subject: Guilty Pleas

Revised Date:

Title: File Memorandum

The Public Defender shall prepare a memo for the file detailing the contents of the discussions with the client concerning a guilty plea. A copy of that memo shall be provided to the client.

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Guidelines for Representation

Category: Trial

Section #: 10-10-70-1

Effective Date: 11/01/92

Subject: Trial Preparation

Revised Date:

Title: General Trial Preparation

In advance of trial, the Public Defender should take all steps necessary for complete discovery, investigation and legal research. This preparation should include consideration of the following:

1. Review of all reports and information supplied by the prosecutor, all information provided by the client, and all materials obtained from the court, including transcripts of prior proceedings in this case or in related cases;
2. Location of, interview with, and service of subpoenas upon all potential helpful witnesses;
3. Examination of all potential real or documentary evidence, and service of subpoenas duces tecum on the custodians of that evidence thought by the Public Defender as necessary for trial;
4. Arrangement for defense experts on any evidentiary issues deemed by the Public Defender to require the services of an expert;
5. Preparation of demonstrative evidence, such as photographs, charts, maps, diagrams, or other visual aids thought by the Public Defender to aid the fact-finder in understanding the defense case;
6. Research of all law pertinent to the issues of the case, with special attention given to finding evidentiary problems in the anticipated case for the State and for the defense, and to learning ways to exploit the evidentiary weaknesses in the State's case and shore up the weaknesses in the defense case.

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Guidelines for Representation

Category: Trial

Section #: 10-10-70-20

Effective Date: 11/01/92

Subject: Trial Preparation

Revised Date:

Title: Developing a Theory of the Case

Based upon his/her preparation, the Public Defender must develop a defense theory of the case. The Public Defender must also anticipate the prosecution theory of the case, as well as what witnesses are likely to be called by the prosecution in its case in chief and in rebuttal. In keeping with the theories postulated by the Public Defender, the Public Defender needs to develop strategy for cross-examination of State's witnesses and strategy for presentation of the defense case, both to highlight weaknesses in the State's case and to advance the defense theory of the case.

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Guidelines for Representation

Category: Trial

Section #: 10-10-70-40

Effective Date: 11/01/92

Subject: Trial Preparation

Revised Date:

Title: Preparing for Cross-Examination of State's Witnesses

In preparing for cross-examination of State's witnesses, the Public Defender should consider doing all of the following:

1. Review and organize all prior statements and testimony given by each witness, being attentive to inconsistencies, variations, contradictions and omissions within and between prior statements given by the witness;
2. Obtain certified copies of prior convictions or pending cases of witnesses for impeachment purposes;
3. Be alert to all issues relating to a witness's competency and/or credibility;
4. Consider whether cross-examination of a particular witness is necessary, and to what extent the witness should be cross-examined, based upon the likelihood that helpful information will be generated from that witness versus the danger that more damaging information may be obtained from the witness through defense questioning;
5. Consider what techniques for cross-examination might be most appropriate for a particular witness.

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Guidelines for Representation

Category: Trial

Section #: 10-10-70-60

Effective Date: 11/01/92

Subject: Trial Preparation

Revised Date:

Title: Preparing the Defense Case

- (a) In preparing the defense case, the Public Defender should first consult with and advise the client in an effort to determine whether it will be in the client's best interest to testify, and whether it will be in the client's best interest to put on any defense evidence at all, particularly in light of what prosecution rebuttal that evidence might spawn. In deciding how to structure the defense case, the important considerations which the Public Defender must take into account are as follows:
1. What potential evidence is admissible which could corroborate the defense case, and what is the import of any evidence which is unavailable;
 2. What affirmative defenses are available to the client, what are the potential benefits and limitations of such defenses, and what are the defense burdens of production and persuasion as concerns presentation of these defenses;
 3. What the client's decision is as to whether to testify;
 4. To the extent that a witness is to be called at time of trial, what pretrial preparation of the witness needs be done and what direct examination of the witness should be conducted to maximize the beneficial impact of that witness;
 5. Whether the order of witnesses will have any impact on the defense case;
 6. Whether the use of character witnesses will help or hurt the defense, especially in light of the risks of wide ranging cross-examination of these witnesses and rebuttal against such witnesses;
 7. Whether there is a need for expert witnesses;
 8. Whether real or demonstrative evidence will be useful and/or admissible.
- (b) The Public Defender should be fully informed as to the law and rules of evidence relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial. Particularly, the Public Defender should be prepared to preserve at trial all objections made through pretrial motion practice.

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Guidelines for Representation

Category: Trial

Section #: 10-10-70-80

Effective Date: 11/01/92

Subject: Trial Preparation

Revised Date:

Title: Choice between Jury Trial vs. Bench Trial

- (a) The decision whether to proceed to trial with or without a jury rests solely with the client after the offer of full and complete advice by the Public Defender. The Public Defender should fully advise the client of the advantages and disadvantages of either a bench trial or a jury trial. The Public Defender should exercise great caution before advising a jury waiver, and should only so advise if the Public Defender feels such a tactical decision is sound in light of the Public Defender's full familiarity with the facts of the case, the availability of and likely responses by prosecution witnesses, and the particular judge's fact-finding and sentencing track record.
- (b) If the client chooses to waive jury, the Public Defender should be prepared to offer a written request for waiver which the client has signed and also prepare the client to waive jury on record in open court.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-1

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Sequestration of Witnesses

Unless the Public Defender's tactical considerations dictate otherwise, the Public Defender should seek sequestration of all witnesses for trial. The Public Defender should make to the court a specific request for such sequestration of witnesses, and should make that request at the earliest necessary juncture of trial, as early as the voir dire examination.

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Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Stipulations

Before the Public Defender enters into stipulation with the prosecution, the Public Defender must weigh the advantages and disadvantages of such stipulations. This is particularly true when those facts to which the parties are stipulating are necessary elements of the prosecution's case.

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Guidelines for Representation

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Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Voir Dire and Jury Selection

(a) Preparation for Voir Dire

1. The Public Defender should be familiar with those aspects of the law which pertain to voir dire, including the number of peremptory challenges allowed to the parties and the extent of proper examination by both the State and the defense;
2. In keeping with the Public Defender's trial strategy, the Public Defender should conceive voir dire questions which address the issues of the case and ferret out, not only general biases, but also biases related to the particular type of case, and to the particular defense being presented;
3. The Public Defender should be alert to any irregularities in the composition or selection of the venire, and be prepared to raise proper challenges to those irregularities;
4. The Public Defender should be familiar with the peculiar practices for selecting a jury exercised by the trial judge, and should be alert to any potential legal challenges to those procedures;
5. To the extent possible, the Public Defender should be familiar with the peculiar voir dire practices of the prosecutor trying the case, and where necessary should be prepared to challenge any improper actions of the prosecutor;
6. To the extent possible, the Public Defender should, prior to jury selection, obtain as much information as possible concerning perspective jurors including, but not limited to, a jury list.

(b) Examination of Prospective Jurors

1. In conducting voir dire examination, the Public Defender should realize that this is his/her opportunity to communicate directly with the potential jurors not only to uncover information to allow for proper and intelligent use of peremptory challenges and challenges for cause but also to establish rapport with the prospective jurors;
2. When the Public Defender deems it appropriate and necessary, the Public Defender should be prepared to object to any improper voir dire questions posed by the prosecutor;
3. Particularly if voir dire questions may elicit sensitive information, the Public Defender should consider requesting individual voir dire conducted outside the presence of other jurors.

(c) Challenges

1. Unless sound tactical reasons dictate otherwise, the Public Defender should challenge for cause all venirepersons about whom a legitimate argument can be made that those persons suffer prejudice or bias against defense positions;
2. When challenges for cause are not sustained, the Public Defender should consider exercising peremptory challenges to eliminate such venirepersons;
3. In exercising challenges for cause and peremptory challenges, the Public Defender should consider the

total number of peremptory challenges available to him/her as well as the venireperson who may replace a person who is removed;

4. The Public Defender should make every effort to consult with the client in exercising challenges;
5. The Public Defender should be alert to prosecutorial misuse of peremptory challenges and, where appropriate, should seek from the court remedial measures for such misuse.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-60

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Opening Statement

- (a) It will normally be in the client's best interests that the defense make an opening statement immediately after that of the prosecutor. The Public Defender should consider all of the strategic advantages and disadvantages concerning whether or when to make an opening statement, including the option of deferring the opening statement until the beginning of the defense case.
- (b) The Public Defender, in making an opening statement, may wish to accomplish any or all of the following:
1. Provide an overview of the defense theory of the case;
 2. Summarize the testimony of witnesses and the role of each in relationship to the entire case;
 3. Describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 4. Identify the weaknesses of the prosecution's case;
 5. Remind the jury of the prosecution's burden of proof;
 6. Clarify the jury's duties and responsibilities;
 7. Establish a rapport with the jury.
- (c) Whenever the prosecutor oversteps the bounds of proper opening statement, the Public Defender should consider making objection to that improper conduct of the prosecutor, and requesting relief of a cautionary instruction and/or mistrial.

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Guidelines for Representation

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Section #: 10-10-80-80

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: **Confronting the Prosecution's Case**

- (a) Having, prior to trial, conceived of his/her theory of the case and plan of attack, the Public Defender must implement that plan of attack, conducting appropriate cross-examination of witnesses to elicit testimony and evidence damaging to the State's case and helpful to the defense case.
- (b) The Public Defender should be alert to inconsistencies, variations, contradictions and omissions within a particular witness's testimony, and between that witness's testimony and prior statements given by that witness. The Public Defender should be prepared to emphasize these inconsistencies, variations, contradictions or omissions when they occur.
- (c) The Public Defender should be alert to any and all matters relating to witness competency and credibility, including bias or motive for testifying. Where appropriate, the Public Defender should consider using certified copies of prior convictions or pending cases against a particular witness.
- (d) If the Public Defender is surprised by any new testimony or evidence which should have been provided in discovery but was not, the Public Defender should consider challenge to the evidence based upon the discovery failure.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-100

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Establishing an Appellate Record

- (a) The Public Defender should be alert to, and understand the importance of, establishing a complete record of the trial proceedings for appellate purposes. The Public Defender needs understand that his/her efforts in this regard begin with vouchsafing that the entire proceedings are being recorded, preferably by a stenographer rather than through a tape recording device.
- (b) In order to preserve for appellate review legal issues raised prior to trial, the Public Defender must make proper and timely objections in accordance with the issues raised in the particular pretrial motion.
- (c) When making any trial objection, the Public Defender needs make certain that his/her objection is timely made and fully states the grounds upon which the objection is made.
- (d) Where appropriate, the Public Defender needs to be prepared to make an offer of proof of evidence deemed by the trial court to be inadmissible.
- (e) The Public Defender must be vigilant to obtain for the record precise rulings from the court on all objections made, and must make every effort to cause the court to state for the record its reasons for its rulings.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-120

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Motions for Judgment of Acquittal

- (a) At the close of the prosecution's case, and out of the presence of the jury, the Public Defender should move orally and in writing for judgment of acquittal at the close of the state's evidence. In that motion, the Public Defender should set forth with specificity the grounds for the motion, particularly emphasizing any charges and/or elements for which proof has been deficient. The Public Defender must obtain from the court and for the record an immediate ruling on the motion.
- (b) If a defense case is then presented, at the end of all of the evidence, and outside the hearing of the jury, the Public Defender should move, orally and in writing, for judgment of acquittal at the close of all of the evidence, again setting forth the grounds for relief with specificity, and again emphasizing those charges or elements for which sufficient proof has not been elicited. Again, the Public Defender must obtain for the record a ruling from the court concerning the motion.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-140

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Presenting the Defense Case

- (a) Prior to executing the plan and strategy developed pretrial, the Public Defender should consider to what extent circumstances have changed due to the way that the State's case has been presented in fact. To the extent that a strategy conceived pretrial has been undermined, or to the extent that presentation of certain witnesses and evidence has been rendered unnecessary or inadvisable, the Public Defender should be prepared to revise his/her strategy based upon current events. To the extent that the pretrial strategy remains viable, the Public Defender should present the appropriate witnesses and evidence.
- (b) The Public Defender should conduct a direct examination of each witness following the Rules of Evidence, effectively presenting the defense theory, and anticipating and diffusing potential weaknesses.
- (c) Should an objection to Defender's direct examination be sustained, the Public Defender should make appropriate efforts to rephrase the question or questions, and to the extent that he/she is prevented from eliciting the testimony sought, should take steps to preserve the issue by making an appropriate offer of proof (See Establishing an Appellate Record).
- (d) The Public Defender should take appropriate steps to prevent improper cross-examination by the prosecutor.
- (e) Where appropriate, the Public Defender should conduct reexamination of witnesses to clarify issues and to rehabilitate the witness.
- (f) The Public Defender should keep a record listing all exhibits identified and noting whether or not those exhibits were admitted into evidence.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-160

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Jury Instructions

- (a) The Public Defender should be familiar with MAI-CR3d, and should consider giving all instructions appropriate to the case and supportive of the defense theory of the case.
- (b) The Public Defender should be aware that proffered instructions must be in writing and submitted to the court in proper form. The Public Defender should also be familiar with trial judges' practices concerning submission and ruling upon proposed instructions.
- (c) When peculiar facts of the case justify it, the Public Defender should be prepared to submit to the court modified pattern instructions or instructions drafted outside of MAI tailored to the particular circumstances of the case. When such instructions are submitted, the Public Defender should provide the court any available case law in support of the proposed instructions.
- (d) Where appropriate, the Public Defender should make specific and general objection to instructions proposed by the court or the prosecutor.
- (e) If the court refuses to adopt instructions requested by the defense, or gives instructions over defense objections, the Public Defender should take all steps necessary to preserve the issue for the record, particularly making certain that the court files copies of the proposed defense instructions.
- (f) During the court's delivery of the charge, the Public Defender should be alert to any deviations from the written instructions, and should, where necessary, object or request relief from deviations made by the court.
- (g) If, during jury deliberations, the court or prosecutor proposes giving supplemental instructions to the jury, whether upon the request of the jurors, or upon their failure to reach a verdict, the Public Defender, where appropriate, should make a record voicing his/her input concerning the form and propriety of the instruction, and registering any objections to supplemental instructions thought by the Public Defender to be improper or unwarranted.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-180

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Closing Argument

- (a) The Public Defender should be familiar with the law and the trial court's practices concerning substance of closing arguments, time limits upon closing arguments, and objections to closing arguments. In developing the closing argument, the Public Defender should review the proceedings to determine what aspects can be used and persuasively argued in support of the defense theory of the case. The Public Defender should consider any or all of the following in preparing the closing argument:
 1. Highlighting weaknesses in the prosecution's case, including emphasis upon missing evidence;
 2. Highlighting strengths in the defense case;
 3. Drawing favorable inferences from the evidence;
 4. Emphasizing the weighty burden upon the state of proof beyond a reasonable doubt.
- (b) In executing the closing argument, the Public Defender should consider drawing upon helpful testimony from direct and cross-examinations as well as the verbatim instructions.
- (c) Whenever the prosecutor exceeds the scope of permissible argument, the Public Defender should consider raising objection to that argument, and requesting appropriate relief through cautionary instruction and/or mistrial.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-200

Effective Date: 11/01/92

Subject: Trial Proceedings

Revised Date:

Title: Jury Verdict

- (a) If a guilty verdict is returned, the Public Defender should be alert to any improprieties in the verdict, and should raise proper and timely objections to those improprieties.
- (b) If a guilty verdict is returned, the Public Defender should consider requesting that the jury be polled.

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Guidelines for Representation

Category: Trial

Section #: 10-10-80-210

Effective Date: 07/01/2002

Subject: Trial Proceedings

Revised Date:

Title: Jury Trial Reporting

This addresses a problem with accurate count on jury trials. The problem arises primarily because this has been a function of disposition, recorded only when the case is closed. Also, a hung jury may result in a plea. The best solution is to report jury trials as they occur, regardless of the result. The caseload tracking database has been enhanced to allow trials to be reported in the main case document. To enter a trial, look for the this line just after District Defender Comments and before the Primary Charge section

Jury Trial- Click to Enter Jury Trial Detail

Click on the box and the following table will drop down. Then enter data for the trial in each field.

| Trial Number | Trial Start Date | # Days (Length) | Result |
|--------------|------------------|-----------------|--------|
| | | | |
| | | | |
| | | | |
| | | | |

Trial Number is for cases which are tried more than once due to mistrials. Just label them sequentially 1, 2, 3 The other fields should be self-explanatory and Result is a drop-down list.

I anticipate a question as to when is a trial a "trial." For the sake of consistency, a trial occurs when the venire is sworn. In other words, if the setting gets to voir dire, it's a trial. Ellen and I share the concern that this does not account for cases which are completely prepared for trial but plead just before the trial would start but, until we can figure out how to distinguish cases which are prepared for trial and plead unexpectedly from cases which are simply plead on the trial date, we will go with the voir dire benchmark. Your suggestions on this issue would certainly be welcome.

Number of jury trials is one of the primary variables we consider in assessing workload. I strongly recommend that you take steps to make sure that every jury trial is entered as soon as it occurs. If you were unaware of this feature, please make sure that your caseload reflects any jury trial after the July 1, 2002, the first of the new fiscal year. There is a jury trial view under management so you can keep track of this element of your caseload.

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Guidelines for Representation

Category: Trial

Section #: 10-10-90-1

Effective Date: 11/01/92

Subject: Post Trial Motions

Revised Date:

Title: General Principles

After conviction at trial, the Public Defender should discuss with the client the right to seek appellate remedies and the advisability of such action. To the extent that the client decides to exercise his/her right to appeal, the Public Defender must take all steps to safeguard that right. Those steps include the preparation and timely filing of an appropriate post trial motion, requiring the court to consider and rule that motion.

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Guidelines for Representation

Category: Trial

Section #: 10-10-90-20

Effective Date: 11/01/92

Subject: Post Trial Motions

Revised Date:

Title: Motion for New Trial

- (a) At a time an adverse verdict is received, counsel should request an additional ten days in which to file a post trial motion. Such requests do not preclude an earlier filing of the motion if counsel is able to do so.
- (b) Counsel should file a Motion for Judgment of Acquittal, or in the Alternative for New Trial, within the allotted time (15 days which may be extended by the court for an additional 10 days). Counsel must be aware that this time limit is absolute and inflexible. The trial court has no authority to extend the time beyond those 25 days.
- (c) The Motion for Judgment of Acquittal, or in the Alternative for New Trial, should include every ground known to counsel for setting aside the verdict and acquitting the defendant or granting a new trial, including but not limited to jurisdiction, venue, and insufficiency of the evidence. Counsel should preserve by including in the post trial motion any claims of error regarding ruling on pretrial motions, challenges for cause, objections made at trial by defense counsel and overruled, or objections made at trial by defense counsel and overruled, or objections made at trial by the prosecutor and sustained, instructions, and any other grounds counsel feels might benefit the client on appeal. If there is any question whatsoever about merit of such a ground, it should be included in the post trial motion. Failure to include any ground in a post trial motion will result in it being considered on appeal, if at all, under the Plain Error Rule. There is no penalty for including meritless points in the post trial motion.
- (d) Where appropriate, counsel may prepare and file written suggestions of law in support of any or all of the points raised in the post trial motion.
- (e) Counsel should be prepared to argue the post trial motion orally to the court, and should so argue the motion unless there is a tactical reason for not doing so.

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Guidelines for Representation

Category: Trial

Section #: 10-10-90-40

Effective Date: 11/01/92

Subject: Post Trial Motions

Revised Date:

Title: Bench Trial

No post trial motion should be filed after a conviction in a bench trial since such a motion might limit the issue available for appellate review.

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Guidelines for Representation

Category: Trial

Section #: 10-10-100-1

Effective Date: 11/01/92

Subject: Sentencing Advocacy

Revised Date:

Title: Preparation for Sentencing Hearing

- (a) In preparing for the sentencing hearing, the Public Defender should be familiar with, consider, and discuss with the client, the following:
1. The range of punishment for each offense for which the client stands convicted, and the possibility of concurrent or consecutive sentencing;
 2. The collateral consequences attaching to any possible sentence (probation or parole revocation, immigration consequences, loss of driver's license, later exposure as a prior or persistent offender);
 3. The client's desires concerning the seeking of probation;
 4. The official version of the client's prior arrest and conviction history, if any;
 5. Any victim impact statement to be presented to the court;
 6. Any need for presentence mental examination and/or commitment to a mental hospital as an aid to sentencing;
 7. The sentencing practices of the sentencing judge;
 8. The position of the probation department with respect to the client, together with any report or recommendations to be submitted by that office;
 9. The sentencing recommendation of the prosecutor;
 10. The likely conditions of a possible probation, particularly requirements for restitution;
 11. The alternative forms of probation available to the court, including the use of shock county jail incarceration, the use of special conditions including the Community Sentencing Program, community service and the power of the court to grant probation up to 120 days after a client's incarceration in the Missouri Department of Corrections;
 12. Any other information, evidence or proposal that may be helpful to the client.
- (b) To the extent possible and proper, and in advance of sentencing, the Public Defender should advocate for a favorable recommendation from both the prosecutor and the probation office.
- (c) At the earliest possible juncture prior to sentencing, the Public Defender should obtain a copy of the presentence investigation report. The Public Defender should make certain that the client has full and fair opportunity to review the report. The Public Defender should determine the accuracy and completeness of all information contained in the report, and should take the necessary steps to challenge incorrect information or omissions, and to correct these mistakes. The Public Defender should consider submitting an independent sentencing memorandum.
- (d) The Public Defender should carefully consider and discuss with the client any sentencing recommendations to be made by the defense together with the reasons behind the recommendations to be made.

(e) Where appropriate, the Public Defender should carefully prepare the client and/or witness to address the court.

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Guidelines for Representation

Category: Trial

Section #: 10-10-100-20

Effective Date: 11/01/92

Subject: Sentencing Advocacy

Revised Date:

Title: Sentencing Hearing

- (a) At sentencing, the Public Defender should zealously advocate the best possible disposition for the client.
- (b) In advocating his/her position, the Public Defender should take whatever steps are necessary including, where appropriate, the presentation of witnesses and other evidence.
- (c) The Public Defender should be vigilant for and enforce any agreement.
- (d) The Public Defender should make certain that any sentence imposed is proper under the law, and should further make certain that the sentence accurately reflects the right of the client to credit for presentence incarceration time.
- (e) The Public Defender should be alert to, and within the exercise of sound professional judgment should consider challenge to, any inappropriate conditions of probation ordered by the court.

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Category: Trial

Section #: 10-10-100-40

Effective Date: 11/01/92

Subject: Sentencing Advocacy

Revised Date:

Title: Post-Sentence Counseling

The Public Defender should verify that the client understands the court sentence, especially the conditions of probation. The Public Defender should give guidance in assisting the client to meet the obligations that are imposed.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-110-1

Effective Date: 11/01/92

Subject: Post Trial Proceedings

Revised Date:

Title: Direct Appeal

- (a) The Public Defender should discuss with the client the right to seek appeal and the advisability of such action. If the client decides to exercise his/her right to appeal, the Public Defender must take all steps to perfect that appeal, including the filing of a proper and timely notice of appeal, accompanied by a petition for leave of court for the client to proceed on appeal in forma pauperis and requesting a preparation of the trial transcript.
- (b) The Public Defender should also be aware of and comply with any additional requirements placed upon the perfection of an appeal by the particular jurisdiction.
- (c) The Public Defender should also, where appropriate, request the client's release on appeal bond.
- (d) The Public Defender retains responsibility for the case unless and until another Public Defender or private attorney assumes that responsibility.

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Guidelines for Representation

Category: Trial

Section #: 10-10-110-20

Effective Date: 11/01/92

Subject: Post Trial Proceedings

Revised Date:

Title: [Petitions under Supreme Court Rules 24.035 and 29.15](#)

If the client is sentenced to the penitentiary, the Public Defender needs to advise the client of his/her rights to request post-conviction relief under either Supreme Court Rule 24.035 or Supreme Court Rule 29.15.

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Guidelines for Representation

Category: Trial

Section #: 10-10-120-1

Effective Date: 11/01/92

Subject: Post-conviction Process

Revised Date:

Title: Obligations of the Public Defender

- (a) Mission Statement: The mission of the Missouri State Public Defender System is to provide high quality, zealous advocacy for indigent people who are accused of crime in the State of Missouri. The lawyers, administrative staff, and support staff of the Missouri State Public Defender system will ensure that this advocacy is not compromised. To provide this uncompromised advocacy, the Missouri State Public Defender System will supply each client with a high quality, competent, ardent defense team at every stage of the process in which public defenders are necessary.
- (b) Guidelines for Representation:
 - 1. 1.4(a) - A Public Defender's primary and most fundamental responsibility is to promote and protect the best interests of the client...
 - 2. 1.40) - The Public Defender's obligation to the client continues throughout the pendency of the client's case, or until and unless another attorney is assigned to the case or files an appearance in the case. The Public Defender should fully cooperate with any successor counsel.
- (c) Policy Position: The addition of the following guidelines for the appropriate conduct of trial counsel in post-conviction proceedings is required to reinforce the fact and its perception to all within and outside the system, and most importantly to its clients, that the Missouri State Public Defender System is devoted to the client. Therefore, it maintains a standard of advocacy which was established to exceed that of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 18(a) of the Missouri Constitution.

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MSPD Policies and Procedures Database

Guidelines for Representation

Category: Trial

Section #: 10-10-120-20

Effective Date: 11/01/92

Subject: Post-conviction Process

Revised Date:

Title: General Principles of Post-conviction Cases

- (a) The Missouri State Public Defender system is obligated to provide representation to the indigent person who files a state post-conviction action. See *State ex rel. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986).
- (b) The client who avails him/herself of the right to pursue a post-conviction challenge is entitled to the same level of advocacy that the system provides in any other proceeding where representation is provided. The action is against the State of Missouri and is a challenge to the original judgment and sentence.
- (c) While allegations in the post-conviction motion usually center on the important Sixth Amendment question involving the assistance of counsel rendered in the underlying criminal proceeding, the attorney is not a party; the State of Missouri is a party, while the continuing validity of the State's judgment is questioned.
- (d) All employees of the system must recognize that the plaintiff in the post-conviction action is still a client of the Missouri State Public Defender System. The obligation of all system employees, as noted in our Mission Statement and representational guidelines, remains constant throughout any post-conviction action.

COMMENTARY: A post-conviction challenge is a challenge to the State's judgment and sentence. The State is the party opponent, not the trial attorney. It is the movant versus the State of Missouri as party respondent, unlike a malpractice action where the movant becomes a plaintiff and the attorney then becomes a named party defendant.

*Some concern has been voiced as to res judicata effect of a finding of ineffective assistance of counsel in a later malpractice action. Res judicata is not applicable. There is no mutuality of parties since the attorney is not a named party in the action and is not provided the opportunity to litigate the action as a party. Further, even if a breach of duty is shown, a plaintiff in a malpractice action bears the responsibility of showing prejudice from that breach of duty. therefore, if the movant in a successful post-conviction action enters a plea of guilty to the charges, no prejudice may be shown nor money damages collected. See *State ex rel. O'Blennis v. Adolf*, 691 S.W. 2d 498 (Mo. App. 1985).*

The movant in a post-conviction action continues to be a client of the Public Defender system as the case proceeds through the courts on the challenge to the judgment and sentence. As a client of the system, the movant is entitled to the same level of advocacy to which any other client in the system is entitled. The mission statement of the Public Defender system, of providing zealous advocacy to indigent citizens accused of crimes, applies equally to those indigent accused citizens who are convicted of crimes and whose liberty is now forfeited based on that conviction.

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Guidelines for Representation

Category: Trial

Section #: 10-10-120-40

Effective Date: 11/01/92

Subject: Post-conviction Process

Revised Date:

Title: Conduct of Public Defenders and Support Staff

- (a) Active preservation of the attorney-client relationship reinforces the fact that the Missouri State Public Defender System remains devoted to the representation of the client while serving the fact-finding process in its quest to determine the truth of the matters asserted in the post-conviction motion.
1. It is the obligation of all employees (attorneys, support staff and investigators) of the Missouri State Public Defender System to conduct themselves in an appropriate and professional manner.
 2. All employees of the Missouri State Public Defender System have a duty to cooperate with other system employees to assure the highest quality of representation for clients during the post-conviction process.
 3. The trial attorney should cooperate with the PCR attorney when contacted to discuss matters pertaining to the preparation and litigation of the client's case.
 4. The trial attorney should not communicate with the Court concerning the merits or facts surrounding a client's allegations except when called as a witness on behalf of a party to the litigation.
 5. If the trial attorney is called as a witness in the case, he/she should testify truthfully about the matters asserted in the post-conviction motion. Attorneys should not volunteer information concerning the client or the client's interests that may be detrimental to the client's PCR.
 6. It is inappropriate for the trial attorney whose representation is questioned in the post-conviction action to act or give the appearance of advocacy against his/her former client. If the trial attorney is contacted by the prosecutor with reference to allegations made in the motion in which privilege has been waived, he/she may respond truthfully about the matters asserted in the post-conviction motion. However, the trial attorney should not sit at counsel table or otherwise provide assistance to the prosecuting attorney.

COMMENTARY: A movant in a post-conviction action is a client of the system and is entitled to the same level of zealous advocacy as can be expected in any action for which the system provides services. All system employees should cooperate with other employees of the system who endeavor to provide this level of advocacy to the client.

This does not mean that the trial attorney must confess error or otherwise affirmatively aid the client to obtain postconviction relief. Thus, the trial attorney should truthfully answer questions directed to the representation he or she provided.

Some attorneys in the system believe the attorney/client privilege remains despite the filing of a post-conviction motion. These attorneys would not testify unless compelled by the court to do so. Case law indicates the attorney/client privilege is waived by the filing of a post-conviction action, at least as to the issues asserted in the post-conviction motion. See Veneri v. State, 474 S. W.2d 833 (Mo. 1972), and State v. Norris, 577 S.W. 2d 941 (Mo. App. 1979). Therefore, the trial attorney can answer questions by the prosecution about the allegations in the post-conviction motion.

The trial attorney is a witness and as any witness, should not volunteer information. Additionally, the trial

attorney still owes a duty to the client and, therefore, should not disclose privileged information which may harm the client, such as evidence about other crimes. The system will not tolerate its employees acting as advocates for the prosecution against clients of the system. Under no circumstances may the attorney actively assist the prosecution in the litigation within or outside of the courtroom, beyond truthfully answering questions relating to the matters alleged in the postconviction motion.

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Guidelines for Representation

Category: Trial

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Effective Date: 11/01/92

Subject: Post-conviction Process

Revised Date:

Title: Client Files

- (a) The client file created by any attorney of the system, including "work product" in the file and any investigative information that may be kept separately, is the property of the client.
1. Prosecutors should not be given access to client files absent a court order or subpoena requiring disclosure of the client's files. In all circumstances, the prosecutor should go through normal channels to obtain matters contained in the client's file(s).
 2. Missouri State Public Defender PCR attorneys should be given complete and prompt access to the original client file(s). Trial attorneys should copy the file(s) contents if they wish to maintain the materials. After the original file(s) has been transferred to the PCR attorney(s), it is the responsibility of that attorney to maintain it. Should a petition for a writ of federal habeas corpus be filed, the client's entire case history can be provided directly from the Appellate Division or its archives.
 3. After the trial file has been transferred to the office of the appellate/PCR defender, the trial attorney may have access to it to review it at the appellate office, during normal working hours, at a time prearranged by the attorney of record or the appellate defender in charge of the office.

COMMENTARY: The view of this system is that, consonant with our mission statement, we are representatives of the client. Any work that we do on behalf of the client belongs to the client. Therefore, the client is the owner of the file, and an advocate acting on behalf of the client in a court proceeding is entitled to receive the original trial file created by the representation of the client.

Trial attorneys who would like to review the file during the post-conviction action should be allowed to do so. The proceeding is a search for the truth on the issue of whether or not the State's judgment and sentence is valid, and the trial attorney should be provided access to review the file to assist in answering questions that may be posed regarding the matters asserted in the post-conviction motion. The trial attorney should schedule a time with post-conviction counsel, during normal working hours, to review the trial file.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial

Section #: 10-10-120-70

Effective Date: 08/15/2002

Subject: Post-conviction Process

Revised Date:

Title: Electronic Client Files

This Case Management feature will electronically forward the case information document to one of three appellate offices.

Using this function helps the appellate staff by avoiding duplicate entry and reduces the possibility of errors. It can be used at the time of disposition, or any time after a case is disposed.

It is our goal that every appeals case that initiated within the PD system be sent electronically through this mechanism. This includes Direct Appeals and PCRs. The appellate or PCR attorneys may also request files as they need them.

For your convenience, we have attached a MS Word document that lists which county should go to which appellate office. If you have any questions about the appeals process, please contact your District Defender or Lisa McGee in the Central Appellate office.



CountiesPerOffice.DO

Here are instructions on how to use the Send to Appeals function. This document is from the **MSPD Help** database, which is available from every desktop.

Sending a Case to Appeals

NOTE: A case can be sent to appeals any time after it has been disposed.

To send a case to appeals:

1. First, follow the instructions for closing the case.
2. Open the case you need to send to appeals.
3. Click on the **Edit** button.



4. Scroll to the bottom of the document to the Disposition area..
5. Click on the **Send to Appeals?** button.



6. Select the Appellate office to which you need to send the case. Your choices are **Central**,

East or West. (Note: these are your only three choices. A decision to assign the case to Team A or Team B will be made at the appellate office). Leave the **Send Notification to IT Staff** box checked.



7. Click **OK**.
8. Press **Esc** to close the case information document.

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Guidelines for Representation

Category: Trial

Section #: 10-10-120-80

Effective Date: 11/01/92

Subject: Post-conviction Process

Revised Date:

Title: Altering the Client's File

Under no circumstances should any employee of the Missouri State Public Defender System alter the contents of a client's file(s) with the intent to distort the record of the client's representation.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-10-1

Effective Date: 11/01/2001

Subject: Preamble

Revised Date:

Title: Using these Guidelines

These guidelines for representation should be followed in representation of clients in appeals and post-conviction actions. They are not intended to be nor can they be inclusive of all matters that may arise in your client representation. If you believe, in the exercise of professional judgment, that a departure from the guidelines is necessary towards effective representation, you should be able to articulate reasons for departure from the guidelines. These guidelines should be used in conjunction with the more specific subcomponents examples of Attorney Expectation Components in providing client services, for self-evaluation and improvement of your performance, and by supervisors when evaluating staff performance.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-20-1

Effective Date: 01/02/91

Subject: Client Relations

Revised Date:

Title: Fealty to Client

Counsel shall act, to the best of his or her ability, as appellant’s advocate, undeterred by competing interests. The client’s interests are paramount.

COMMENT: This reminds counsel of his/her obligation to the client. The client on appeal, as at trial, is entitled to effective assistance of counsel under the Sixth and Fourteenth Amendments. Evitts v. Lucey, 469 U.S. 387 (1985). By Missouri State Public Defender System Trial Division Guidelines For Representation, Section 11112(b) provides that "The client who avails him/herself of the right to pursue a post-conviction challenge is entitled to the same level of advocacy that the system provides in any other proceeding where representation is provided." *See also*, MSPD Mission Statement. The client’s interests are paramount throughout the appellate and post-conviction representation, and counsel's fealty is with the client and the client’s case.

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Category: Appellate/PCR

Section #: 10-20-20-20

Effective Date: 01/02/91

Subject: Client Relations

Revised Date:

Title: Initial Client Contact

Upon opening the file, the assigned attorney shall immediately enter an appearance in the appropriate circuit or appellate court, and send a letter to the client, as soon as possible but no later than 5 working days, fully explaining the appellate or post-conviction process. In a post-conviction case, the client should be sent a PCR questionnaire, authorization to release documents and information, and other requests for information necessary for the attorney to timely prepare the amended motion. In either the appeal or post-conviction action, personal visits with the client are not mandatory, although they are strongly encouraged in the post-conviction cases. In either the appellate or post-conviction case where the client is not personally visited, the attorney should develop a good line of communication with the client through correspondence and/or the telephone. In all cases where the client has difficulty corresponding or communicating by phone, a visit is required.

COMMENTS: An open channel of communication between the client and attorney is essential in all cases. While a personal visit with the client in the appellate context may not be essential to the representation of the client, it has advantages by allowing the client to meet his or her attorney in person, which may also establish trust and rapport, which underpins the attorney-client relationship. However, since the record controls the scope of appellate representation, the client and attorney can usually fully evaluate all issues of concern to the client by correspondence, and a personal visit with the client is not mandatory. In the post-conviction action, a personal visit is preferable, and encouraged. If it is not feasible before the filing of the amended motion, then it should be done in all cases where the client will testify at the evidentiary hearing, to prepare the client fully for his or her testimony, and the prosecutor's possible impeachment.

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Section #: 10-20-20-40

Effective Date: 01/02/91

Subject: Client Relations

Revised Date:

Title: Consequences of Proceeding

The attorney should advise the client, as soon as practicable, of the reasonably foreseeable consequences of pursuing an appeal or post-conviction action in the client's case.

COMMENTS: The decision to appeal or waive appeal is the client's, but it can only be made intelligently with advice of counsel. A successful appeal can lead to a longer sentence or additional or greater charges, and an attorney who gets a reversal of the conviction but who fails to advise the client that he/she can be worse off as a result has not protected the client's interest. To help appellant make a realistic choice about pursuing the appeal, counsel must explain the nature of the appellate process, the average time involved, the remedies which may exist, and potential disadvantages of the appeal, if any. The phrase "as soon as practicable" may involve different time frames in different cases, as some disadvantages to appealing may not become fully apparent until the record is reviewed. This is equally true with the post-conviction action. The client must be fully advised as to the consequences of proceeding in the 24.035 or 29.15 action, including negative ramifications of success in the action, as frequently the client will be worse off by setting aside the guilty plea and losing the benefit of the bargain which caused the client to originally enter the plea at the outset. Only by being fully informed of the negative aspect of success in the action, can the client knowingly undertake the process to challenge, by appeal or post-conviction, the judgment and sentence.

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Section #: 10-20-20-60

Effective Date: 01/02/91

Subject: Client Relations

Revised Date:

Title: Client Communications

All client correspondence must be answered in a timely manner, but under no circumstances should correspondence be delayed to the extent to impair representation of the client. The attorney should take phone calls from the client where necessary to further the effective representation of the client.

COMMENT: It is paramount that the attorney facilitate open communications with the client. Supreme Court Rule 1.4 discusses the importance of communication with the client. In post-conviction representation where time is often critical to the prosecution of the case, all client correspondence shall be answered within seven calendar days. In the appellate case, all correspondence shall be answered within ten calendar days from receipt by the attorney. Where the attorney is absent from the office for an extended period of time, he or she must arrange with another staff member for review of correspondence from clients and the court for appropriate action. Not all collect calls from the client must be taken by the attorney. However, where the client cannot read or write well, or where a telephone call is in the best interests of the attorney-client relationship or otherwise necessary to provide effective service to the client, phone calls should be taken. The attorney may also request a client who frequently calls with matters not material to the representation to call on a specific day when the attorney will be in the office and will be prepared to accept the call. Important matters discussed with the client during a conversation by phone or during a client visit, should be noted in the case file.

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Section #: 10-20-20-80

Effective Date: 01/02/91

Subject: Client Relations

Revised Date:

Title: Pro Se Claims: Appellate

When an appellant insists that a particular point be raised against advice of counsel, counsel may advise appellant that counsel will assist the client in presenting the claim pro se. Should the appellant decide to raise the issue, counsel should provide technical and procedural advice conforming the pleadings for acceptability by the court, and file the necessary pleadings in an effort to get the court to accept the client's work.

COMMENT: Counsel should advise the appellant of counsel's decision not to raise certain issue the client wants raised, and of the potential effect, such as diluting better points in the brief, of pursuing these issues. However, if the client insists, counsel should advise the client to send pleadings for conformity with the appellate rules, correcting and improving the pleadings where necessary. If the client issues are completely mendacious and malicious, counsel need not assist the client where it would be unethical to do so. However, counsel may assist the client by putting an issue that is not frivolous in the brief, arguing for reconsideration of existing law, or perhaps placing the issue in the brief noting the issue is raised at the client's behest. This may get the issue heard, as it otherwise may not be considered due to local rules of all appellate districts, which preclude the client's filing of pro se pleadings directly with the court.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-20-100

Effective Date: 01/02/96

Subject: Client Relations

Revised Date:

Title: Pro Se Claims: Post-Conviction

In all post-conviction cases, counsel shall file an amended motion asserting all claims for the movant in a lawyerlike fashion. The movant should be advised of the claims that will be presented in the amended motion. If the movant insists on pursuing claims in the pro se motion that in counsel's judgment are frivolous and malicious, then the client should be advised that they may proceed on the pro se motion in lieu of an amended motion, but only after the client is fully advised of the risks of so proceeding. When only the pro se motion will be used, counsel should file a statement noting that no additional facts or claims existed beyond those in the pro se motion. Movant should receive a copy of this statement before it is filed, and movant must be notified of the opportunity to respond within 10 days of the filing of the statement. Where the attorney ascertains the existence of additional claims for relief but movant insists on pursuing mendacious or malicious claims in the pro se motion, an amended motion may be prepared and signed by movant, and filed in the case. Counsel may only advance the claims, which can be supported in good faith and may not advance claims where it would be unethical to do so.

COMMENT: Movant no longer needs to verify the amended motion filed by counsel, so the client should be advised of all grounds that will be pursued by the attorney in the amended motion before the motion is filed. If the client has additional claims that are not mendacious or malicious, they can be raised, and then not pursued or withdrawn later if no factual evidence or basis can be adduced to support the claims. The movant's pro se motion may no longer be incorporated by reference, thus the possibility for the quandary where the client insists on advancing what the attorney deems to be malicious and frivolous claims. Two possibilities exist here. First, the client after full advice may decide to proceed on the pro se motion, but Rules 24.035(e) and 29.15(e) must be complied with, and a statement indicating why the action is proceeding only on the pro se motion must be filed after the client is sent a copy, and the client must be advised of the opportunity to file a written response within 10 days of the filing of the statement. The second or better option, especially where the attorney determines grounds exist for an amended motion, is to prepare an amended motion with the meritorious claims as well as the mendacious claims of the client, which the client refuses to delete, and the client can sign the amended motion. The attorney should litigate only those claims, which do not violate canons of professional responsibility. The client should of course be fully advised that the malicious or frivolous claims, like improper medicine, are less cure and more poison for the case, and otherwise counseled as to the folly of so proceeding.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-1

Effective Date: 01/02/91

Subject: Case Representation

Revised Date: 01/02/98

Title: General Matters

Counsel shall, upon assignment to the case, ensure that an application for services and affidavit of indigency are obtained from the client, and that a promissory note has been sent to the client. A note shall be sent to the client in all stages of the proceedings, including both the post-conviction trial case and the appeal from the denial of post-conviction relief. When the note is returned by the client, it shall be processed appropriately, and the application/affidavit should be placed in the client's file.

COMMENT: The public defender serves to place the client in a position that they would be in if they were not indigent, having retained counsel to represent them. The promissory note is no more than an agreement to indemnify the system with a minimal amount for the cost of services rendered, only if and when the client is in a position to do so. See Section 600.090, RSMo 2000. A \$500 note should be obtained in all felony appeals, 29.15 trial cases, and any separate appeals from the denial of 29.15 relief, except in death penalty cases where a \$5,000 note should be obtained. A note for \$250 should be obtained in a 24.035 trial case, and a note for a similar amount should be obtained in any appeal therefrom, except a death penalty case where the obligation is \$5,000 at both the trial and appellate levels. A diligent attempt to obtain the note should be evident in the file, and if the client initially refuses to return the note, a second attempt reminding the client of his obligation to return the note should be undertaken and noted in the file. The application for services and affidavit of indigency should be obtained in all cases, since a determination for eligibility of services must be made by a defender at any stage of the proceeding. Section 600.086.3, RSMo 2000. However, where the client has already completed the application for services and request for indigency at the post-conviction trial level stage, and the client appeals the denial of post-conviction relief, then a separate affidavit of indigency need not be obtained if the defender has no reason to believe that the client's financial circumstances have changed. If the client refuses to return the application for services and affidavit of indigency or promissory note, it shall be noted in the file. Additionally, where a promissory note is not returned in a post-conviction case which goes to an evidentiary hearing, a request for judgment at the conclusion of the hearing or thereafter should be filed for the amount normally charged for the post-conviction case noted above, and any actual extraordinary costs, such as expert fees or depositions (other than of the client), which are incurred on the client's behalf.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-20

Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: File Maintenance

All appellate and post-conviction files shall be well-maintained, including fastening all relevant court documents, filings and client correspondence in chronological order.

COMMENT: The need for a well-maintained and organized file is self-evident. It not only will assist counsel assigned to the case, it will ease the transition of any other attorney who may be assigned to the case at a later time.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-40

Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: Assignment to the Case: Appellate

Assignment to the Appellate Case: Upon assignment to the case, the attorney should review the file and ensure all necessary documents for the transcript and legal file are ordered, and the notice of appeal was timely filed. If the latter was untimely filed, counsel should take remedial action under Rule 30.03. Additionally, counsel must ensure compliance with applicable local rules of the appellate court.

COMMENTS: The record on appeal, both legal file and transcript, should be ordered within 30 days of notice of appeal. Rule 30.04(c). All instructions, given and/or refused, should be requested from the clerk, reviewed closely and included in the legal file where appropriate. Instructions, especially verdict directors, should be closely reviewed (for plain error if necessary) before preparation of the brief. The trial transcript must be reviewed for sufficiency and completeness upon receipt of the transcript from the court reporter. A 30.03 motion is necessary if the notice of appeal in a criminal case was not filed within 10 days of sentencing, and within 40 days of an order denying relief in a post-conviction action. A copy of the judgment and sentence sought to be appealed must be attached to the 30.03 motion, and it must be filed within one year of the date judgment becomes final, and this time frame is applicable to both criminal and post-conviction appeals. When the appellate court rules on the motion, notice of appeal must be filed in the circuit court by the date specified in the appellate court's order. You should request permission to file late notice of appeal as a poor person directly in the appellate court, but have necessary affidavits or other documents ready if the appellate court directs the trial court to make that determination.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-60

Effective Date: 01/02/96

Subject: Case Representation

Revised Date:

Title: Assignment to the Case: Post-Conviction

Assignment to the Post-conviction Case: Upon assignment to the case and receipt of the file, the attorney should review the file and make a determination as to what documents are present and what additional documents are necessary to proceed with the representation. Upon so doing, necessary action should be taken to obtain the required documents, whether the request goes to the circuit clerk in the criminal and/or civil file, to the trial and/or the appellate attorney in a Rule 29.15 action, or to the trial attorney in a 24.035 action. Counsel should ascertain when the amended motion is due and move immediately for an extension of time, which must be obtained before the expiration of the original time provided under the rules to file the amended motion.

COMMENT: All necessary records to provide full review of the representation of trial and appellate counsel must be obtained, including client files of both the trial and appellate attorney. In a 24.035 action, the amended motion is due 60 days after the appointment of counsel and the filing of the complete guilty plea and sentencing transcript with the circuit court. 24.035(g). In a 29.15 action, the amended motion is due 60 days from the appellate court mandate and the appointment of counsel. For all intents and purposes, the amended motion will be due 60 days after the appointment of counsel since the mandate should have already been filed, as the pro se motion is not due until 90 days after the mandate is filed. Rule 29.15(a). If an extension of time is sought, then it must be filed and ruled upon by the court within the original time for the due date of the amended motion, noted above.

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MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-80

Effective Date: 01/02/96

Subject: Case Representation

Revised Date:

Title: Timely Review of Relevant Documents, Records: Appellate

Appellate Case: The record shall be reviewed promptly for completeness before filing with the appellate court, and if not complete, additional portions necessary to supplement the record shall immediately be requested. The client shall have a copy of the record sent to him as soon as practicable. At the conclusion of the appellate case, the client must be fully apprised as to how to petition the court for post-conviction review.

COMMENT: This standard is self-evident, but a necessary reminder to ensure that the record is reviewed before filing, so as to avoid the situation of reviewing the record shortly before the brief due date only to find it to be incomplete. Necessary exhibits should also be requested from the prosecutor at the earliest opportunity. It is the client's case, and a copy of the record should be made and sent to the client when it is practicable to do so. This does afford the client the opportunity for some meaningful input on the appeal process, and even if we waited until the conclusion of the appeal process to send the record, we cannot just send the client our copy of the record due to the likelihood of the filing of a post-conviction action, and the post-conviction attorney's need to have ready access to a copy of the record to represent the client in the post-conviction case, as well as the trial and appellate attorney's need to have ready access to the record to respond fully to the client's allegations of ineffective assistance of a counsel. At the conclusion of the case, the client should be advised of his or her remedies under Rule 29.15, including any claims of inadequacy of trial and appellate counsel's representation. The appellate attorney cannot speak to the latter, but as to the former, the attorney should note, as they dissect the appellate record for purposes of preparing the appeal, clear instances of ineffective assistance of counsel and advise the client of these, so that the client may, if they choose, assert these claims in a 29.15 motion. The client must be advised of the time to file the post-conviction motion, 90 days from the filing of the appellate court mandate, and the address of the appropriate circuit court where the motion should be filed. If a rehearing and transfer motion is not going to be pursued by the attorney, the attorney should advise the client that the post-conviction motion must be filed 105 days from the date of the appellate decision, as the court will wait at least 15 days from the date of the decision to file the mandate. If the attorney receives actual notice of the filing of the mandate, the attorney must accordingly advise the client of the precise date that the motion must be filed, and that the client will lose all rights to proceed to post-conviction review if the motion is not filed by that date.

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Guidelines for Representation

Category: Appellate/PCR

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Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: Timely Review of Relevant Documents, Records:
Post-Conviction

Post-conviction Case: Upon receipt of necessary documentation, review of relevant records, and correspondence with the client, the attorney will make a determination as to any necessary investigative assistance, and whether any extraordinary request for assistance (i.e. expert assistance) is warranted. These matters are to be followed through in a timely fashion.

COMMENT: Investigative assistance is provided within the System and should be utilized to fully effectuate the zealous representation of the client. Though an attorney may be involved in the investigation of the case, the attorney should make practical and effective use of all available investigative resources. Extraordinary requests for expert assistance or other such requests as may be necessary to effectively represent the client shall be made as soon as possible in accordance with all Departmental Rules regarding requests to encumber funds for expert assistance.

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Section #: 10-20-30-120

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Subject: Case Representation

Revised Date:

Title: Appeal Bond Reduction

Counsel should move for an appeal bond or bond reduction within 10 working days if the client requests it, or as soon thereafter as the client returns affidavit in support of the motion.

COMMENT: While this may be an exercise of futility, the client is entitled to setting of bond on appeal or an attempt to reduce unreasonable bond. The attorney should advise the client of all consequences that may affect the decision to post appeal bond, including the possibility that counsel may have to move to withdraw as the client may not be indigent, and that the running of the sentence is suspended while the client is on bond. Counsel should immediately send the client the necessary affidavit to support the bond motion to comply with the time frame of the guideline. However, if the affidavit is not returned within 10 working days by the client, the motion should be filed as soon as possible when it is returned.

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Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: Brief and Motion Practice: Appellate

Appeal Case: All motions and briefs shall be prepared in accordance with the appellate division manual and rules of appellate practice, including local rules of court. All meritorious issues which provide a basis for relief and which are supportable by the record should be raised in the client's appeal. Counsel should not hesitate to assert claims which are complex, unique, controversial in nature, raise issues of first impression, challenge the assistance of other attorneys, or to change existing law.

COMMENT: The fundamental purpose served by appellate counsel is to interpose between counsel and the court the judgment of a trained professional familiar with criminal law, who can bring to the court's attention issues which may obtain relief for the client. Competent exercise of professional judgment is the primary duty owed to appellant by counsel. This standard stresses assertion of all arguable meritorious claims rather than preservation by counsel of one or two issues which in counsel's opinion will be successful. The United States Supreme Court has stated indigent defendants must be afforded counsel to argue on appeal "any of the legal points arguable on their merits." Anders v. California, 386 U.S. 738 (1967). However, while appellate counsel may exercise professional judgment and reduce the number of nonfrivolous points raised on appeal, Jones v. Barnes, 463 U.S. 735 (1983), where the issue may bear a reasonable likelihood of success, it should be asserted.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-160

Effective Date: 01/02/91

Subject: Case Representation

Revised Date: 01/02/96

Title: Brief and Motion Practice: Post-Conviction

Post-conviction Case: The attorney should file all necessary documents which are determined to be in the best interest of the client in a timely manner, so that no rights belonging to the client are jeopardized.

COMMENT: Following review of the case and consultation with the client, the client's amended motion should be filed in accordance with the proper Supreme Court Rules and time requirements, and raise all issues which are in the best interest of the client, without raising mendacious or clearly frivolous issues before the court. Form 40 shall be followed in preparing the amended motion.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-180

Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: Case Dismissals

The client's case should not be dismissed until the client is fully advised of all consequences of dismissal, and only if counsel is satisfied in the appellate case that sufficient evidence supports the conviction. If the client decides to dismiss the action, a written waiver should be obtained for filing with the court.

COMMENT: Standard 10-20-20-40 talks of the consequences of which the client should be apprised by appealing, including, inter alia, longer sentence on retrial. Regardless of counsel's advice as to the wisdom of pursuing an appeal or PCR, the decision to proceed or to dismiss the appeal must be made by the client. If the client decides to dismiss, the attorney must ensure the decision is the client's, without undue pressure from counsel, and the attorney must advise the client that a dismissal is a final act which precludes any other avenue of review, both state and federal. No appellate case should be dismissed without an independent review of the state's case. While this will normally mean waiting for the transcript to be prepared, if the client wants to dismiss the appeal without undue delay, the attorney should contact trial counsel and make the determination without benefit of transcript. If counsel is satisfied that the state's case is sufficiently substantial to support the verdict, the appeal may be dismissed. A written waiver from the client is normally required by the appellate court in support of the motion to dismiss appeal under Rules 30.13 and 84.09, and it may be required to dismiss the post-conviction trial court action under Rule 67.01. In any event, the client's file should reflect the discussions and advice given to the client about dismissal, and reflect the client's voluntary decision to dismiss the action.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-200

Effective Date: 01/02/91

Subject: Case Representation

Revised Date:

Title: Oral Argument

The attorney shall argue all cases set by the appellate court for argument, unless in the discretion of the attorney and supervising counsel, the client's best interests are not served by argument. In all cases set for argument in the Missouri Supreme Court, argument shall be conducted. Counsel shall request argument on the cover of the brief in Southern District appellate cases where argument will help the client's case. Counsel shall also timely request argument where necessary after receipt of a letter from the appellate court indicating the case will be submitted on brief unless argument is timely requested.

COMMENT: The Eastern District seldom schedules criminal appeals for oral argument, and when they do set a case for argument, it should be argued. The Western District sets more cases for argument than the Eastern District, but the same presumption applies. However, cases set for argument may be waived if counsel of record, after discussion with supervising counsel, believes it is appropriate to do so. An example here might be where the state's brief was poorly written and overlooked more persuasive authority, and the state might otherwise be provided the opportunity to improve the state's position at oral argument. By local rule, the Southern District will not schedule cases for argument unless argument is affirmatively requested. While the Eastern District has no such local rule, by practice they send a submission letter in virtually all cases, and it is necessary to file a timely written request for argument after receipt of the submission letter. When deciding whether to argue, it should be remembered that appellants are entitled to have their attorneys pursue every avenue of persuasion. Argument provides counsel with the opportunity to present recent cases to the court, counter the state's position, and answer the court's questions.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-220

Effective Date: 01/02/91

Subject: Case Representation

Revised Date: 01/02/2000

Title: Copies of Relevant Pleadings to Client; Post-Opinion Motions

The client shall be timely sent a copy of all material documents filed on his/her behalf. The client shall also be apprised of all relevant rulings by the circuit and appellate courts, and shall be sent a copy of the appellate court's opinion or the circuit court's judgment denying relief within three days of the date of the decision. In the appellate case, the attorney shall closely review the court's opinion when rendered for purposes of filing post-opinion motions to rehear and/or transfer. If pursued, the client shall receive notice and copies of motions. If the decision is made not to pursue post-opinion motions, the client should be so advised when the opinion is sent. Counsel should accept a collect call if such a letter is sent to allow for discussion between the attorney and the client as to pursuing post-opinion motions. While the attorney has the ultimate responsibility for deciding whether to pursue these motions, and may choose not to when it would be clearly legally frivolous to do so, the client's opinion should be a factor in the attorney's decision. In the post-conviction case, the attorney should timely move to file appeal in forma pauperis, and in all cases where the client desires an appeal, the attorney should file notice of appeal in the circuit court within 40 days of the date of the findings of fact, conclusions of law, and judgment denying relief.

COMMENT: In the appellate case, records, briefs, respondent's briefs, reply briefs, court's opinion, and post-opinion motions are material documents, which should be sent to the client as soon as they are filed. Extension motions need not be individually sent, but the client should be advised of their filing and any extensions granted in the case. This standard also affords the client some opportunity to discuss with the attorney the pursuit of post-opinion motions after the attorney has decided not to pursue them. The client's opinion should be strongly considered by the attorney in deciding to file post-opinion motions. However, when it would be clearly legally frivolous to file such motions, the attorney may ultimately decide not to pursue these motions, keeping in mind that such a decision may procedurally bar a client from seeking federal habeas corpus review. O'Sullivan v. Boerckel, 526 U.S. 838 (1999). Therefore, if the appeal involves a colorable federal constitutional argument, the better course is to file post-opinion motions to fully exhaust state remedies should the client decide to seek federal habeas review. In the post-conviction case, the amended motion, state's response (if any) to the amended motion, proposed findings of fact and conclusions of law, and court's findings of fact and conclusions of law are all material documents, which the client should receive. The attorney should request and receive permission to file the appeal in forma pauperis, and timely file notice of appeal unless the client decides not to pursue the appeal. In making this decision, the client may be advised of possible sanctions for pursuing a frivolous appeal, if there is no arguable basis to pursue the appeal. See Kimmins v. State, 923 S.W.2d 460 (Mo. App., E.D. 1996), and Purkey v. State, 921 S.W.2d 82 (Mo. App., E.D. 1996). The comments under standard 12310 are applicable in this context as well.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-30-240

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Subject: Case Representation

Revised Date:

Title: File Closure

Counsel shall close the file within two weeks after the mandate issues in the felony or post-conviction appellate case, unless further action such as a petition for certiorari is sought. In the post-conviction case at the circuit court level, the proper support personnel should be informed of any disposition and the case should be closed, and where an appeal is filed, a post-conviction appeal file must be opened.

COMMENT: Timely figures on reporting of case statistics are necessary, and this will assist the compilation of these case statistics. The timely closure of the case file will not impair the attorney-client relationship in any fashion, and the file, should it be necessary, is easily retrievable from the closed file room and/or archives.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-40-1

Effective Date: 01/02/91

Subject: Professionalism

Revised Date:

Title: Professional Demeanor

Professional demeanor should be exhibited at all times to courts, court personnel, and opposing counsel.

COMMENT: As a representative of the Public Defender System, nothing less is acceptable. An absence of professional demeanor may prejudice the client and will not be tolerated. The attorney shall make every effort to cooperate with opposing counsel without jeopardizing their advocacy for the client.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-40-20

Effective Date: 01/02/96

Subject: Professionalism

Revised Date:

Title: Attorney as Witness in Post-Conviction Proceeding

If a post-conviction challenge is made to the representation of appellate counsel, counsel should cooperate fully with the post-conviction attorney when contacted to discuss matters pertaining to the preparation and litigation of the client's case. The appellate attorney should not communicate with the court concerning the merits or facts surrounding a client's allegations except when called as a witness on behalf of a party to the litigation. If an appellate attorney is called as a witness in the case, the attorney should testify truthfully about the matters asserted in the post-conviction action. Attorneys should not volunteer information concerning the client or the client's interests that may be detrimental to the client's post-conviction action. The appellate attorney whose representation is challenged in the post-conviction action should not give the appearance of advocacy against the client. If the prosecuting attorney contacts the appellate attorney about allegations made in the 29.15 motion for which the privilege has been waived, the attorney may respond truthfully about those matters asserted in the post-conviction motion.

COMMENT: This standard tracks the Guidelines for Representation for the Missouri State Public Defender Trial Division, Guideline 11113. The post-conviction challenge is the client's continuing challenge to the state's judgment and sentence, and the appellate attorney is not a party to the challenge, but the attorney may become a witness if called to testify by either the client or the prosecutor. Rule 1.6 of the Rules of Professional Conduct, Missouri Supreme Court Rule 4, dealing with confidentiality of information relating to the client, begins with the broad admonition that "a lawyer shall not reveal information relating to the representation of a client..." but notes in subsection (b)(2), that "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary....to respond to allegations in any proceeding concerning the lawyer's representation of the client." The extent of the disclosure should go no further than necessary to respond to the client's allegations. The attorney need not wait for a subpoena to answer questions posed by the prosecutor, and may talk outside of the courtroom in an informal setting, by phone or otherwise, as long as the discussion extends no further than responding to the client's allegation in the 29.15 motion. The attorney handling the client's 29.15 action shall receive the client's appellate file upon request, which should not be disclosed in any circumstances to the prosecution absent a court order. If the file is timely given to the client's post-conviction counsel, however, the prosecution must obtain it from that attorney, and the appellate counsel is relieved of the quandary of disclosure. Once the appellate file is turned over to post-conviction counsel, the appellate attorney should be provided reasonable access to it so as to be able to respond to the allegations, which the client may raise against former counsel.

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Guidelines for Representation

Category: Appellate/PCR

Section #: 10-20-40-40

Effective Date: 01/02/91

Subject: Professionalism

Revised Date:

Title: Continuing Legal Education

Counsel shall continue to improve their substantive and procedural knowledge of criminal law, as well as their knowledge and application of civil practice as related to post-conviction litigation, by participating in 15 hours of formal CLE training yearly, as well as reading all available caselaw summaries, slip opinions, BNA Criminal Law Reporter and other periodicals circulated among the offices.

COMMENT: Few things are more important to appellate and post-conviction practice than having a broad knowledge of criminal law, essential in spotting issues which will be raised in the briefs and amended motions. A minimum of 15 hours of formalized training, along with reading of relevant caselaw summaries and periodicals, should ensure counsel continually improves the knowledge base to be an effective advocate for the client.

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Guidelines for Representation

Category: Indigency Determination

Section #: 10-30-10-1

Effective Date: 01/14/2005

Subject: Policy

Revised Date:

Title: General Policy Statement

GENERAL POLICY STATEMENT

The Missouri Legislature established the Office of State Public Defender as an independent department of the judicial branch to provide representation of indigent defendants charged with crimes in the State of Missouri. (Section 600.019, RSMo. 2000)

Every person seeking Public Defender services is required to complete an Application for Services. A probation violation case is a separate and distinct case and requires a redetermination of indigency.

If the defender determines an applicant eligible for public defender representation, the original application is to be filed in the client's file. Unless the applicant appeals a defender's determination, no copy of the application is to be filed with the court or given to the State since the application itself may contain confidential information.

There are two statutory requirements an individual must meet to be eligible for representation by the Public Defender.

- First, "when it appears from all circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel and";
- Second, "is indigent" as determined by Chapter 600. (Section 600.086.1 RSMo. 2000)

Of particular note, is the language "**means at his disposal or available to him to obtain counsel.**" If a defendant has obtained private counsel, he/she is not eligible for Public Defender services. The Public Defender should make it clear to the court that the Public Defender is not automatic, fall back counsel, every time private counsel seeks to withdraw.

After fully considering the means available to a defendant, indigence is the second part of the test in considering eligibility.

The determination of indigence shall be made by the Public Defender (Section 600.086.3, RSMo. 2000). It is not within the court's authority to make direct appointment of a Public Defender, absent an application and consideration by the Public Defender as to the defendant's eligibility. The power of direct appointment by the court no longer exists in the State of Missouri. *See; State ex rel. Public Defender Commission v. Williamson*, 971 S.W. 2d 835 (Mo.App. W.D. 1998). The State Public Defender Commission has established and enforces Guidelines for Determination of Indigence (RSMo. 600.086.2), which can be found under **Title 18 CSR 10-3010**, and accessed through the MSPD Home Page/Missouri Court Links/Code of State Regulations.

If the defender finds that the defendant does not meet the requirements necessary for Public Defender representation, Section 600.086.3 RSMo. 2000 allows "either party" the right to challenge the finding by petitioning the Court for a review of that finding. Neither the statute nor caselaw has defined "either party." It is

the interpretation of this Department that the term "either party" refers to the Public Defender or the defendant. The determination of indigence can be at any stage of the proceedings. If it is discovered that a current client is not (or is no longer) indigent, a redetermination should be commenced per Section 600.086.3 RSMo. 2000.

Aside from the eligibility of the individual seeking Public Defender services, the defender must determine whether the case is one for which Public Defender services are authorized. Section 600.042.4 RSMo. 2000 defines what cases are proper cases for which Public Defender resources may be expended.

It is the policy the Missouri State Public Defender System to aggressively pursue legal courses of action when courts misuse Public Defender services in a manner contrary to the law, legislative intent and the above policy.

THE FINANCIAL DETERMINATION

When making the financial determination, the following factors should be taken into consideration:

1. **Debts** - Debts should be taken into consideration to the extent that payments reduce the take home pay of the defendant. Debts caused by hospital bills, taxes, fines, child support and alimony are allowable only if actual payments on the debts are being made.
2. **Bond** - If the defendant has been released on bond on any case in the amount of five thousand dollars (\$5,000.00) or more, a presumption is created that the defendant is not indigent and the ability of the defendant to meet the bond must be given consideration
3. **Spouse's Income** - The spouse's income should be considered if the spouse is employed.
4. **Mortgage** - If the defendant owns or is buying a home, the defendant's equity must be determined. If a defendant's equity exceeds ten thousand dollars (\$10,000.00) the defendant does not qualify for a Public Defender.
5. **Assets** - Unless a defendant is charged with a Class A felony, cash in excess of one thousand dollars (\$1,000.00) creates a presumption of non-indigence. Bank accounts, stocks, jewelry, equity in insurance and other financial assets must be considered. If the total value of assets is more than two thousand dollars (\$2,000.00), the defendant is presumed not to be indigent.

JUVENILE CASES

There is a separate **Juvenile Application** that must be used in juvenile cases. Ask your district defender or district secretary if you are unable to locate a these applications. It is the policy of the Missouri Public Defender System that the same application process used in adult cases is to be followed in juvenile cases. In determining a juvenile's eligibility for Public Defender services, the parents' income should be considered if they support the juvenile and the juvenile is under eighteen (18) years of age.

APPELLATE/POSTCONVICTION CASES

There is a separate **Appellate/PCR Application** that must be used in all appellate or postconviction cases. Ask your district defender or district secretary if you are unable to locate this application. It is the policy of the Missouri State Public Defender System that the same application process used in the trial level of cases be followed in appellate or postconviction cases as well.

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