MISSOURI STATE PUBLIC DEFENDER

GUIDELINES FOR REPRESENTATION

NOVEMBER 1, 1992

MISSOURI STATE PUBLIC DEFENDER SYSTEM

GUIDELINES FOR REPRESENTATION

Effective November 1, 1992

Missouri State Public Defender System
Office of the State Public Defender
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PREAMBLE

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.

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I. GENERAL PRINCIPLES OF REPRESENTATION

1.1 Role of the Public Defender

(a) 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.

1.2 Ethical Obligations of the Public Defender

(a) 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.

1.3 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.

1.4 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.

1.5 Pre-charge Intervention

(a) 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.

II. INITIAL PREPARATION AND PRELIMINARY PROCEEDINGS

2.1 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 I, 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.

2.2 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.

2.3 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.).

2.4 Preliminary Discovery

(a) 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.).

III. PRELIMINARY HEARINGS

3.1 Purpose of the Preliminary Hearing

(a) 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.

3.2 Timing of the Preliminary Hearing

(a) 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.

3.3 Preparation for the Preliminary Hearing

(a) 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.

3.4 Recording of the Preliminary Hearing

(a) 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.).

3.5 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.

IV. PRETRIAL PREPARATION

4.1 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.

4.2 Investigation

(a) 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.

4.3 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.

V. GUILTY PLEAS

5.1 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.

5.2 Conduct of Plea Negotiations

(a) 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.

5.3 Continuing Duty to Prepare Case For Trial

(a) 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.

5.4 Prerequisites for Guilty Pleas

(a) 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.

5.5 Conduct of Guilty Plea Proceedings

(a) 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).

5.6 File Memorandum

(a) 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.

VI. TRIAL PREPARATION

6.1 General Trial Preparation

(a) 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 cases 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.

6.2 Developing a Theory of the Case

(a) 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.

6.3 Preparing for Cross-Examination of State's Witnesses

(a) 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'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.

6.4 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.

6.5 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.

VII. TRIAL PROCEEDINGS

7.1 Sequestration of Witnesses

(a) 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.

7.2 Stipulations

(a) 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.

7.3 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, 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 to not only uncover information to allow for proper and intelligent use of peremptory challenges and challenges for cause, but also is an opportunity 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.

7.4 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.

7.5 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.

7.6 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.

7.7 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.

7.8 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 7.6 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.

7.9 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.

7.10 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.

7.11 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.

VIII. POST TRIAL MOTIONS

8.1 General Principles

(a) 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 court to consider and rule that motion.

8.2 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 limits 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, 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.

8.3 Bench Trial

(a) 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.

IX. SENTENCING ADVOCACY

9.1 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.

9.2 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.

9.3 Post-Sentence Counseling

(a) 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.

X. POSTTRIAL PROCEEDINGS

10.1 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.

10.2 Petitions under Supreme Court Rules 24.035 and 29.15

(a) 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.

XI. POSTCONVICTION PROCESS

11.1 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. 1.4(j) -- 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 postconviction 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 I, Section 18(a) of the Missouri Constitution.

11.2 General Principles of Postconviction Cases

(a) The Missouri State Public Defender system is obligated to provide representation to the indigent person who files a state postconviction 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 postconviction 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 postconviction 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 postconviction action.

COMMENTARY: A postconviction 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 postconviction 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 postconviction 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.

11.3 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 postconviction 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 postconviction 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 postconviction 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 postconviction 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 postconviction motion. However, the trial attorney should not sit at counsel table or otherwise provide assistance to the prosecuting attorney.

COMMENTARY: A movant in a postconviction 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 postconviction 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 postconviction action, at least as to the issues asserted in the postconviction 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 postconviction 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.

11.4 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 postconviction 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 postconviction motion. The trial attorney should schedule a time with postconviction counsel, during normal working hours, to review the trial file.

11.5 Altering the Client's File

(a) 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.