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**
Revised Date:

Subject: General Principles of Representation
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
☐ Policy Under Construction

MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial
Section #: 10-10-20-20
Effective Date: **11/01/92**
Revised Date:

Subject: General Principles of Representation
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:

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 #: 10-10-20-40
Effective Date: 11/01/92
Revised Date:

Subject: General Principles of Representation
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-20-60
Effective Date: 11/01/92
Revised Date:
Subject: General Principles of Representation
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: **06/30/2016**

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: Joel Elmer

MSPD Policy Regarding Pursuing Private Versus Court Ordered Department of Mental Health (DMH) Evaluations:

In deciding whether to pursue a mental health evaluation through a court ordered DMH evaluation or evaluation through a private mental health examiner, attorneys should make this determination in consultation with their District Defenders. In order to help guide attorneys and District Defenders in making this decision, please consult the attached document--MSPD Guide to Mental Health Evaluations.

Mental Health Eval. Factors Final 2-2016.docx

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

MSPD Policy Regarding Pursuing an NGRI Defense

MSPD Policy NGRI 2-2016.docx

Approval Information:

☒ **Policy Approved** **Approved By:** Joel Elmer **Approval Date:** 06/30/2016 02:03:15 PM

☐ Policy Under Construction

MSPD GUIDE TO MENTAL HEALTH EVALUATIONS FOR COMPETENCE TO PROCEED AND RESPONSIBILITY FOR THE CHARGED OFFENSE

FEBRUARY 8, 2016

Ellen A. Blau
Trial Division Director
1010 Market St., Suite 1100
St. Louis, MO 63101
314-340-7662 Ext 282
Cell. 314-803-0776
Email: ellen.blau@mspd.mo.gov

TABLE OF CONTENTS

SECTION	Pg.
PREFACE	3
INTRODUCTION	3-4
SUMMARY	4-5
TERMS	5-7
DESCRIPTION SECTIONS I-IV	7
SECTION I: DO I NEED A MENTAL EVALUATION IN MY CASE AND IF SO, WHAT KIND, COMPETENCE RESPONSIBILITY OR BOTH	8-10
Factors Suggesting There May Be A Need For Mental Health Investigation And Evaluation	8-9
Mental Health Investigation	9
What Kind Of Evaluation Should I Request, Competence, Responsibility, Or Some Combination	9-10
SECTION II: SHOULD I DO A COURT ORDERED EVALUATION OR A PRIVATE EVALUATION	11-18
Deciding Whether To Do A Private v. Court Ordered DMH 552.020 Competency Evaluation	11-12
Risks of any court ordered DMH Evaluation pursuant to RSMo. 552.020 and/or 552.030 et. Seq.	12-13
Benefits of Court Ordered 552.020 Competence Evaluations	13-14
Benefits of Private Evaluations	14
Negatives of Private Evaluations	14-15
Cost Benefit Analysis In Determining Court Ordered 552.020 Competence Evaluation v. Private Competence Evaluation	15-16
CASE FACTORS INDICATING THAT A COURT ORDERED 552.020 COMPETENCE EVALUATION MAY BE LESS RISKY, AND THEREFORE, AN ACCEPTABLE OPTION	16-17
CASE FACTORS INDICATING THAT A COURT ORDERED 552.020 COMPETENCE EVALUATION MAY BE MORE RISKY, AND THEREFORE, MIGHT NOT BE THE BEST OPTION	18
SECTION III: SPECIAL CONSIDERATIONS RESPECTING THE MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY (NGRI) DEFENSE AND EVALUATIONS	19-21
552.030 COURT ORDERED RESPONISBILITY EVALUATIONS	19
552.030 Court Ordered Responsibility Evaluation Non-Dangerous Cases	20
Risk of 552.030 Evaluation Even if the Client is Charged with an Offense that may be Eligible for an Immediate Conditional Release	21
Lower Risk 552.030 Evaluation	21
SECTION IV, APPENDIX: MENTAL HEALTH CONDITIONS THAT MAY OR MAY NOT CONSTITUTE A MENTAL DISEASE OR DEFECT AS DEFINED IN RSMO. 552.010	22-25
SECTION IV, APPENDIX: QUICK GUIDE CHART, COURT ORDERED V. PRIVATE COMPETENCE EVALUATION	26

PREFACE:

This Memorandum was developed with a great deal of help and input from members of the MSPD Mental Health Committee to whom I am extremely grateful, including: Justin Carver, Mary Fox, Maggie Johnston, Kevin Locke, Amy Lowe, Nina McDonnell, Leon Munday, Pamela Musgrave, Stephen Reynolds, Sue Rinne, and Sharon Turlington.

INTRODUCTION:

The purpose of this memo is to help attorneys decide whether they need to have a mental health expert evaluate the client for competence to proceed to trial as defined in RSMo 552.020 and/or responsibility for the alleged offense as defined in RSMo. 552.030 (Mental Disease or Defect Excluding Responsibility, a/k/a Not Guilty by Reason of Insanity--NGRI) or 552.015.2(8) (Diminished Capacity). And, if so, how to determine what type of evaluation and who should do it, a private mental health expert versus an expert appointed by the court through a request pursuant to RSMo. 552.020 and/or 552.030.

In a perfect world, the best practice is usually, though not always, to hire a private capable expert whenever a mental health evaluation is needed. Unfortunately, we don't live in that world.

We should hire a private defense expert to do evaluations when an evaluation is needed and the benefits of a private evaluation and the risks of a court ordered evaluation are high. We should consider a court ordered DMH evaluation when an evaluation is needed and the risks of a court ordered DMH evaluation are low.

In a court ordered evaluation, the Department of Mental Health (DMH) does the evaluation, they choose the examiner, they decide what materials to review, they decide whether to interview any witnesses, they will interview the client, they write a report regardless of their conclusion, and the report goes to the prosecutor, court and defense counsel. This is in contrast to a private evaluation in which we would need to disclose a report if we are using the expert but would request that the expert not even prepare a report if a report would not be helpful to the client and we are not going to have the expert testify.[1] Moreover, in a private evaluation, we select the expert, define the referral questions, provide the materials to the expert for review, may request collateral witness interviews, and do not request a report that may need to be disclosed to the State unless we determine that such a report will help the client.

---

[1] There are certain circumstances, though rare, in which we might have to disclose a report of a private expert even if we are not calling them to testify, which is why we consult with the expert and usually would not want him/her to prepare a report if it is not going to be helpful to the client. With a private evaluator, unlike a court ordered evaluator, there is no requirement that the expert prepare a report if the expert's conclusion is not helpful and we are not going to use the expert. See, *State v. Carter*, 641 S.W.2d 54 (Mo. 1982). c.f., *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701-702 (Mo. 1983).

This memo addresses the issues of risk in court ordered versus private evaluations by providing guidance in defining low and high risk situations, assessing these risks and addressing some other related issues (such as whether to seek a mental evaluation at all) in detail. It covers competency and the statutory responsibility defenses--NGRI and diminished capacity.

SUMMARY:

Here is a summary of the memo as it pertains to competency, as this is the area in which there will probably be the most opportunity to consider court ordered DMH evaluations, highlighting circumstances where the benefits of a private evaluation and potential risks of court ordered DMH evaluation are high, and also highlighting circumstances where the risks of a court ordered DMH evaluation are low.

The decision to request funds for a private evaluation (which your District Defender and Division Director will still need to review and approve or deny) or to ask for a court-ordered evaluation rests with the attorney and District Defender. I am always available to consult with you concerning mental health issues, so please do not hesitate to call or e-mail me.

Factors suggesting benefits of a private mental exam and risks of court ordered DMH Exam are high:

> Serious case with very high stakes—sentence of LWOP; client was using drugs or alcohol at the time of the alleged crime, or has a history of drug/alc. abuse with no documented history of a qualifying mental disease or defect (see list in Section IV); DMH previously evaluated the client and concluded he/she did not have a qualifying mental disease or defect (see Section IV for definition and list) and/or concluded that the client was malingering; client is charged with committing a crime at a DMH facility; client has no documented history of being diagnosed with a condition that would qualify as a mental disease or defect and is not currently consistently exhibiting clear symptoms of mental illness that can be corroborated by others such as jail workers etc.; DMH evaluators in the area in which the client will be evaluated have a track record suggesting unfairness, egs. placing gratuitous information in reports that only serves to disadvantage the client but is not necessary, or consistently finding clients competent when other evaluators disagree.

Factors suggesting the risks of a court ordered DMH competence evaluation are low:

> When the client is actively psychotic and others, especially those who work at the jail, will corroborate this; when the client suffers a

documented developmental disability (IQ below 70); when a court previously found the client incompetent in a criminal case or incapacitated in a probate case; when the client has or has had a guardian as an adult; when DMH previously diagnosed the client with a serious mental health condition; when there is a well-documented history of diagnosis with a qualifying mental illness (see list in Section IV); when the client is clearly incompetent but the prosecutor will not agree to an incompetence finding without a DMH evaluation; when the DMH evaluators in the area in which the client will be evaluated have a track record of fairness to defendants; when the client is taking medication to treat a serious mental health condition (including medication administered in the jail) and we can document the prescription; when the client has suffered a significant documented head injury; when the client suffers from documented dementia, when a trial date is rapidly approaching and the court will not continue the case for a private evaluation.

TERMS:

COMPETENCE

The term "competence" refers to the client's ability to assist his/her lawyer and have a rational as well as a factual understanding of the proceedings.[2] A defendant is competent to proceed if he/she can consult with counsel with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings against him/her.[3] Competence, like mental illness, is dynamic. A client may be competent at some points in time during the proceedings and incompetent at other points in time. Therefore, the issue of competence may and should be raised whenever it becomes relevant and may need to be raised more than once. A client has a due process right to be competent throughout the proceedings and cannot move forward through the process if he/she is not competent.[4]

When a court finds a client to be incompetent, he/she is committed to DMH and remains there until competence is restored or there is an opinion and judicial finding that there is no substantial probability that competence can be restored in the reasonably foreseeable future.[5] An incompetent person can only be held in DMH pursuant to criminal charges for a

---

[2] RSMo. 552.020, *Dusky v. United States,* 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975). *See also Cooper v. Oklahoma*, 517 U.S. 348 (1996); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992); *State v. Tilden*, 988 S.W.2d 568 (Mo. Ct. App. W.D. 1999*); Woods v. State*, 994 S.W.2d 32 (Mo. Ct. App. W.D. 1999); *Brooks v. State*, 882 S.W.2d 281 (Mo. Ct. App. E.D. 1994).

[3] Dusky v. United States*,* 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975). *See also Cooper v. Oklahoma*, 517 U.S. 348 (1996); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992); *State v. Tilden*, 988 S.W.2d 568 (Mo. Ct. App. W.D. 1999*); Woods v. State*, 994 S.W.2d 32 (Mo. Ct. App. W.D. 1999); *Brooks v. State*, 882 S.W.2d 281 (Mo. Ct. App. E.D. 1994).

[4] *Pate v. Robinson*, 383 U.S. 375 (1966). See also, *Bolden v. State*, 171 S.W.3d 785 (Mo. Ct. App. W.D. 2005).

[5] RSMo. 552.020.11(1)

"reasonable period" of time, after which the criminal charges must be dismissed and if the client is to remain in DMH involuntarily, the State must seek civil commitment and guardianship.[6] Missouri's statute requires that Guardianship and or civil commitment proceedings be filed before the court dismisses the criminal charges and the dismissal is without prejudice.[7]

RESPONSIBILITY

Responsibility refers to two separate statutorily defined defenses. Mental Disease or Defect Excluding Responsibility (a/k/a NGRI),[8] and Mental Disease or Defect Negating a Culpable Mental State (a/k/a diminished capacity/dim. cap.)[9].

NGRI

NGRI is a complete and an affirmative defense in which the defense bears the burden of production and persuasion to establish by a preponderance of the evidence that as a result of a mental disease or defect (as defined in RSMo. 552.010), the defendant was unable to know and appreciate the nature, quality or wrongfulness of his/her conduct at the time of the offense.[10] The consequence of this defense, if the client is successful, is that he/she is committed to DMH for an indeterminate period of time. In most situations, he/she remains in a locked ward at DMH until such time as he/she qualifies for a court ordered conditional or unconditional release.[11] The court with jurisdiction over conditional and unconditional releases is determined by the nature of the crime for which the client was found NGRI.[12]

DIMINISHED CAPACITY

Diminished Capacity is a defense in which the defense bears the burden of production to produce some evidence that the defendant had a mental disease or defect within the ambit of RSMo. 552.010, and as a result of it, the defendant did not have the specific mental state required for the crime charged, but rather the mental state for a lesser included offense. The burden of persuasion to show that the defendant had the requisite mental state beyond a reasonable doubt remains with the State. A defendant successful with this defense is not committed to DMH, but rather, is

---

6 RSMo. 552.020.11(6); *Jackson v. Indiana*, 406 U.S. 715 (1972)
7 RSMo. 552.020.11(6)
8 RSMo. 552.030
9 RSMo. 552.015.2(8)
10 RSMo. 552.030
11 There are certain limited circumstances (depending on the nature of the crime—cannot be a dangerous felony) in which the client may be considered for an immediate conditional release provided that the court has DMH provide an opinion on the issue prior to any commitment to DMH, DMH recommends the immediate conditional release and the court grants it. See, 552.020.4 and 552.030.3
12 See, RSMo. 552.030 and 552.040.

convicted of a lesser included offense and is sentenced within the range of punishment for the lesser.[13]

DMH
MO Department of Mental Health.

DESCRIPTION SECTIONS I-IV:

SECTION I
The first section of this Memorandum discusses the Case Factors that may suggest a mental health investigation and evaluation is indicated and selection of the initial referral question (competence v. responsibility).

SECTION II
The second section identifies risks and benefits of court ordered evaluations pursuant to RSMo. 552.020 or 552.030 and private evaluations; identifies situations in which it may be better for the client to start with a court ordered competence evaluation rather than a private evaluation, especially if it is a lower risk situation; and has 2 lists of case factors to use to help identify how risky or not a court ordered evaluation may be in your case. There are cases in which it is better for the client to do a court ordered evaluation, especially if it is "low risk." There are also cases in which there may not be a specific benefit to the client of doing a court ordered evaluation (other than that the expert can't be cross examined on fees if it's a court ordered evaluation) over a private one, but the risk of harm or a bad outcome for the client is low. The risk factor lists in Section II are there to help you assess where your case may fall on the spectrum in order to make informed decisions.

SECTION III
Section III focuses on the NGRI defense and Responsibility Evaluations pursuant to RSMo. 552.030.

SECTION IV
Section IV is the appendix that lists conditions and diagnoses that would and would not be considered legally significant mental health conditions as defined in RSMo. 552.010, and would be a necessary predicate to an incompetence or lack of responsibility finding. It also includes a list of items that could complicate or cause problems if one is addressing a competence issue or pursuing a mental disease or defect defense. The Appendix in Section IV can be used in conjunction with the Risk Factor Sections to help identify where the case and the client fall on the risk/benefit spectrum.

[13] RSMo. 552.015.2(8); MAI-CR3rd 308.03; *State v. Frazier*, 404 SW.3d 407 (Mo. Ct. App. W.D. 2013); *State v. Walkup*, 220 S.W.3d 748 (Mo. banc 2007); *State v. Strubberg*, 616 S.W.2d 809 (Mo. banc 1981); *State v. Moore*, 1 S.W.3d 586 (Mo. Ct. App. E.D. 1999);

SECTION I: DO I NEED A MENTAL EVALUATION IN MY CASE AND IF SO, WHAT KIND, COMPETENCE RESPONSIBILITY OR BOTH

Factors Suggesting There May Be A Need For Mental Health Investigation And Evaluation

1. Probable cause statement and/or discovery give the impression that the crime itself is not rational or has no rational motive.
2. Family members and/or client indicate client has mental health issues and/or head injury.
3. There is a history of some mental health treatment.
4. There is a history of head injury.
5. Client was in special school district.
6. School records reflect client was in special school district.
7. Client has trouble communicating.
8. Client has difficulty reading and/or writing.
9. Client does not make sense when you talk to him/her.
10. Client talks very rapidly, goes from one topic to another without making sense.
11. Client is floridly psychotic and out of touch with reality.[14]
12. Client is hallucinating, now or in the past—hearing things that are not there, seeing things that are not there.
13. Client is delusional, now or in the past—has a false fixed belief such as the FBI implanted a microchip in his head and is tracking his thoughts through the microchip.
14. Client's affect (display of emotional reaction or lack of reaction) and reactions are not consistent with the context—eg. laughs inappropriately or is very flat and has no emotional range.
15. Hygiene is very poor
16. Client's motor behavior is very disorganized, not goal directed, or alternatively, catatonic (rigid, abnormal posture)
17. Client's thinking is very disorganized and doesn't make sense.
18. Client writes things that are very disorganized, make no sense or reflect delusional beliefs.
19. Client refuses to meet with you for no apparent rational reason.
20. School records reflect an IQ below 75
21. Client is taking psychotropic medications
22. Medical records reflect head injury.
23. Medical records reflect diagnosis that could impact mental status, Egs. diabetes; dementia.
24. Mental health records diagnose client with a condition that could qualify as a mental disease or defect under RSMo. 552.010 (for a list see Section IV).

[14] This means client is currently acutely psychotic (out of touch with reality), has observable hallucinations and/or delusions, is catatonic etc.

25. Client has been found to be incapacitated, or has been involuntarily committed at any time in the past.[15]
26. Client currently has or, as an adult, has ever had a guardian.
27. Client has been inpatient at DMH in the past.
28. DMH has diagnosed client at some point with a condition that could qualify as a mental disease or defect under 552.010 (see Section IV for list), either while a patient or in a forensic evaluation for competence or responsibility.
29. DMH has concluded at some point in time that client is incompetent or NGRI.
30. A court has found client incompetent or NGRI in the past.

Mental Health Investigation: If anything about the case suggests that there may be a significant mental health issue, it is best to start with some investigation of mental health by talking to the client and people close to the client, along with gathering any relevant records to assess whether the client has mental health issues, and if so, what kind of mental health issues may afflict the client. This will help in deciding whether we need an evaluation, what kind, whether it should be private or court ordered, what kind of expert is needed and will help the expert do a thorough job that can withstand the test of the adversary process.

What Kind Of Evaluation Should I Request, Competence, Responsibility, Or Some Combination

In most circumstances, when the attorney suspects that the client may have a legally significant mental health condition, it is best to investigate competence first with a mental health expert, and only if the client is competent but also has a condition that would qualify as a mental disease or defect within the meaning of RSMo. 552.010 (see lists in Section IV), to move on to investigate responsibility--NGRI or diminished capacity defenses.

There are several reasons for this. First, any mental health evaluation, especially any court ordered one in which the expert talks to the client and writes a report going to all of the parties and the court, involves waivers of the constitutional rights to remain silent and to counsel, and an incompetent person cannot make knowing and intelligent waivers. Second, in a responsibility evaluation, an evaluator will need to interview the client about the specifics of the offense and his/her thought process at the time. This could be used against the client in certain circumstances even if the expert concludes the client does not meet the defense criteria and/or if the client decides not to pursue the defense. Third, before doing a responsibility evaluation, the attorney and client should have the ability to weigh the potential risks and benefits. If we have done a competence evaluation first, we will at least know whether there is a forensic expert diagnosing the client with a legally significant mental disease or defect and whether the client is competent to move forward to consider the consequences, including risks and benefits of the next step. Fourth, a client must have the opportunity to discuss

[15] These would be the civil versions of findings that could result in the appointment of a guardian or involuntary commitment outside the context of a criminal case.

with counsel whether to plead NGRI or pursue a dim. cap. defense and must be competent to have this discussion. Having a competence evaluation first, helps to ensure that the client is competent to discuss these important strategic decisions.

SECTION II: SHOULD I DO A COURT ORDERED EVALUATION OR A PRIVATE EVALUATION

Deciding Whether To Do A Private v. Court Ordered DMH 552.020 Competency Evaluation

In order to make an informed choice, absent an emergency (eg. the client is acutely suicidal and in need of immediate mental health services), it is best to do an investigation in which we gather and review relevant records (these may include: mental health treatment, mental health DMH, school, medical, SSI, military, jail, DOC etc.) and interview witnesses in addition to the client who may have observed the client at relevant times and who can describe behaviors that may be consistent with the diagnosis of a legally significant mental illness. This investigation will help in a number of different ways. The investigation will help us evaluate how much risk there is with a private v. a court ordered evaluation. The investigation will help us with private evaluations in determining what type of expert is needed. The investigation will also help the expert, court ordered or private, do a better job that is better able to withstand the test of the adversary process.

There is a statutory right, upon a showing of reasonable cause to believe that the client lacks competence, for the court to order an evaluation of the client for competence.[16] This right grants an evaluation of competence upon on the motion of either party, State or Defense, or on the court's own motion. The right of all parties, however, is limited to the issue of competence and must rest on a showing of good cause.[17]

The defense, on its motion, may ask the court to have the competence evaluation also cover the issue of responsibility/NGRI. Usually, this is not a good idea and it is better to take the incremental approach for the reasons discussed above. The State only has the right to a responsibility evaluation if the defense has already pled NGRI or has provided notice of intent to rely on the NGRI defense. This is one of the reasons it is usually best not to provide this notice unless and until we know that the client has a qualifying mental disease or defect and there is an expert who has assisted the defense privately in determining the availability of the defense.[18] The statute, RSMo. 552.030, does have time limits about which we need to be aware so that we can show diligence and provide notice of intent to rely on the defense in a timely manner. If we start with a court ordered evaluation limited to the issue of competence, there is nothing to prevent us from requesting a second court ordered evaluation on the issue of responsibility/NGRI after receiving the results and report of a court ordered competence evaluation.

---

16 RSMo. 552.020.2

17 *State ex. Rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003).

18 *State ex. Rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003); *State ex. Rel. Jordan v. Mehan,* 597 S.W.2d 724 (Mo. App. E.D. 1980)

In some circumstances, the State or the court may push for a court ordered competence evaluation. Because any court ordered evaluation will include an interview with the client and result in a report that goes to all of the parties and the court, the defense should evaluate the risk of any court ordered evaluation and if the defense believes the risk of a harmful outcome is too high, the defense can and should hold the state and court to its burden objecting based on lack of adequate cause if defense counsel is concerned about the risk of a harmful evaluation.[19] Especially in high risk situations, the defense may be able to convince the court to not order an evaluation unless and until the defense investigates the issue with a private evaluation first. If, however, the court moves forward with ordering the evaluation, the defense should review the court Order and make certain it is limited to the issue of competence.

Risks of any court ordered DMH Evaluation pursuant to RSMo. 552.020 and/or 552.030 et. Seq.

1. Evaluator will write a report regardless of the conclusion.
2. There is no right through 552 to obtain a court ordered private evaluation.[20]
3. The report will be disclosed to the court and the prosecutor regardless of the conclusion—there is no right to an evaluation with no report or an evaluation with a report that only goes to the defense, unless the defense is going to use the expert.[21]
4. In doing the evaluation, the evaluator will interview the client, possibly on multiple occasions, may discuss facts directly related to the case and will disclose information and conclusions from these interviews in the report. Any court ordered evaluation pursuant to 552 et. seq., therefore, implicates the client's Fifth Amendment right to remain silent and Sixth Amendment right to counsel.[22]
5. The report may not have anything helpful to the client and may have things that could harm the client, egs., a conclusion that the client does not have a condition that would qualify as a mental disease or defect as defined in 552.010 (see appendix for lists); has a condition that could be harmful to the client in the case in chief, in sentencing or a case in the future, such as a personality disorder; and/or a conclusion that he/she is malingering.
6. If the defense raises a mental health issue in the current case with a different expert, even on an issue not directly related to the DMH evaluation, the state may be able to call the DMH evaluator to rebut the opinion of the private expert with the DMH evaluation/evaluator.[23]

---

[19] *State ex. Rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003).
[20] *State ex. Rel. Jordan v. Mehan,* 597 S.W.2d 724 (Mo. App. E.D. 1980); *State v. Williams*, 254 S.W.3d 70 (2008).
[21] See, *State ex. Rel. Jordan v. Mehan*, 597 S.W.2d 724 (Mo.App. E.D. 1980); *State v. Williams*, 254 S.W.3d 70 (2008).
[22] See, *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 101 S.Ct. 1866 (1981); *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792 (1988); *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146 (1989).
[23] See., *State v. Copeland*, 928 S.W.2d 828 (MO Banc. 1996), reversed in part, *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000).

7. If at some point in the future, even in a different case, or on a different issue, the defense raises a mental health issue and has an expert testify about it, the State may be able to use this prior evaluation and examiner to rebut it.[24]
8. Even if the defense does not inject the issue of mental health into the current case at all, there are circumstances in which the State may be able to use information from the evaluation against the client and may even be able to call the evaluator as a witness against the client.[25]
9. We have no control over who does the DMH evaluation. Some are good. Some are not. Some will review records or talk to collateral witnesses when we request it. Some won't.
10. The culture of the various DMH institutions that do forensic evaluations varies and some are better than others.
11. Clients have a Constitutional right to competent mental health experts in cases in which the client's sanity is likely to be a significant issue at trial to assist the defense in preparing and presenting a defense. This right, according to a case out of the MO Court of Appeals, Western District, is not satisfied through a court ordered 552 evaluation in which a report goes to the court and the State.[26]

Benefits of Court Ordered 552.020 Competence Evaluations:

The DMH expert's credibility cannot be challenged based on a fee we are paying to him/her because we aren't paying him/her a fee.

Situations in which it may be better and even necessary for the client to have a 552.020 competence evaluation, especially if we can help limit the risks:

1. Client is too sick to participate in an evaluation and the only way an evaluation can occur is if the client is committed to DMH for a period of time for observation and evaluation.

---

[24] See, *Kansas v. Cheever*, 134 S.Ct. (2013); see also, *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906 (1987).

[25] See, *State v. Worthington*, 8 S.W.3d 83 (MO Banc. 2000)—defense requests court ordered competence evaluation. DMH does it. State calls DMH evaluator in case in chief during penalty phase of death penalty case to provide testimony establishing an aggravating circumstance. See also, *State v. Pickens*, 332 S.W.3d 303 (Mo.App. ED 2011)—defense requests court ordered evaluation pursuant to both 552.020 and 552.030 (competence and responsibility). DMH does the evaluation. Concludes client suffers from factitious disorder by proxy (thereby providing a reason/motive for her killing 1 child and assaulting the other). The defense does not thereafter rely on a mental disease or defect defense. The state, in its case in chief, calls Dr. Armour to testify not that he examined Pickens, but to talk about what factitious disorder by proxy is and in hypothetical questions, whether the trial testimony is consistent with Pickens having that diagnosis, that the actions in the hypothetical were consistent with factitious disorder by proxy, and that the actions in the hypothetical were rational and deliberate, and that factitious disorder was not a mental disease or defect that would excuse responsibility for the actions in the case. *State v. Grubbs*, 724 S.W.2d 494 (Mo. banc 1987), State can use the evaluation in formulating trial strategy.

[26] *Williams v. State*, 254 S.W.3d 70 (Mo.App. WD 2008), see also, *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Lyons v. State*, 39 S.W.3rd 32, 36-37 (Mo.Banc 2001)

2. Client is very ill, floridly psychotic,[27] in a jurisdiction in which the State will not concede incompetence on the basis of a private evaluation and will insist on a DMH evaluation. If the risks above can be limited, and/or a 632 involuntary civil commitment is not an available alternative, starting with a 552 court ordered competence evaluation may be the quickest way to get the client treatment.[28]
3. The case is old, the trial date is rapidly approaching and because mental illness is dynamic, not static, client decompensates and attorney thinks competence is an issue but court won't continue the case for a private evaluation and the only way to get it done is with a court ordered 552 evaluation.

Benefits of Private Evaluations

1. If the evaluation results are not helpful to the client, we let the expert know that we do not want a report, there is no report and the information cannot be used against the client now or in the future.
2. All experts have biases and areas of specialization within mental health. A private evaluation gives us an opportunity to select a competent and appropriate expert based on the specific needs of the client and the case—eg. if there is a severe head injury, it may be necessary to have a neuro-psychologist conduct the evaluation.
3. If the State does not accept our report and evaluation, our expert's report can still go to DMH before they complete their assessment and may help persuade the DMH evaluator to reach conclusions more helpful to the client and consistent with our evaluator.[29]

Negatives of Private Evaluations

1. Expert will be cross examined and credibility will be challenged based on expert's receipt of fees for services. There are cases in which the prosecutor has requested and received information from all fees that the expert received from MSPD and not just those fees received on the case at issue.

---

[27] Actively and acutely out of touch with reality, hallucinating, delusional, and/or making little or no sense when speaking.

[28] RSMo. 632 et. seq. is the civil involuntary commitment statute. If a client is acutely ill and in need of immediate treatment and hospitalization, this is the best, quickest way to get it for them if it is available. Unfortunately, with all of the DMH budget cuts, there are limited beds for this. If it is a serious/violent charge, DMH may be willing to take the client on a civil involuntary commitment and the client would go to Biggs. If we think the client is in urgent need of care and he/she isn't getting it at the jail, we may be able to work with the Court, the Jail and DMH so that the Jail pursues the civil involuntary 632 commitment and DMH agrees to take the client. On less serious cases, or if the client is not currently violent, it is harder to get the client bed space on a 632 civil commitment.

[29] It is generally easier to try to persuade someone of something before they reach a conclusion rather than trying to convince them later that their original conclusion is wrong and they made a mistake. Especially if we know that the DMH evaluators in a certain area are not thorough, accurate or fair, or when our examiner has a specialty applicable to the client/case that is not likely to be found in a DMH expert, it can help to have our evaluation first to lay everything out before DMH does the evaluation, provide the evaluation to DMH, which may help DMH get it more right the first time.

2. If the State won't accept our expert's conclusion and our client is incompetent, it will take additional time to conduct the DMH evaluation, resolve the issue and get the client into DMH.
3. May not be possible if client is too sick to participate in the evaluation.

Cost Benefit Analysis In Determining Court Ordered 552.020 Competence Evaluation v. Private Competence Evaluation

The best case scenarios are: we do a private evaluation, it is helpful to the client and the State accepts it; or the State doesn't accept our helpful evaluation but requests a DMH evaluation that ends up being helpful and consistent with ours; or alternatively, we do a good job of assessing and limiting risks, get a court ordered DMH evaluation without a private evaluation, and the DMH evaluator reaches a conclusion helpful to the client.

The worst case scenario of a court ordered 552 evaluation is that we do one and the evaluator writes a report concluding that the client has no legally significant mental disease or defect as defined in RSMo. 552.010, but rather, merely has a personality disorder and/or is malingering. This may do more than simply not help the client, it may also harm the client in the current case and also in the future. If the evaluator concludes that the client has a legally significant mental disease or defect and does not say that the client merely has a personality disorder, a substance related disorder or is malingering, even if the evaluator does not conclude that the client is incompetent or not responsible, this will not have as much potential to harm the client now or in the future. It will, however, make it substantially more difficult to litigate competence or responsibility successfully at the present time if we obtain a 2nd evaluation from a private expert. This is because no matter how good the private evaluation is, the court ordered expert is already on the record with the opinion that the client is competent to proceed, and may have made a diagnosis that is incompatible with the private expert's diagnosis, or determination of competence or responsibility for the offense.

The following lists are specific case factors that, if present, would help limit or increase the risks of a harmful court ordered 552 evaluation. The attorney can review these factors in conjunction with the lists in Section IV to see which may or may not be present in a specific case to help assess the risks and make the best decision for the client and the case.

In general, the least risky cases to start with a court ordered 552.020 competency evaluation are those in which the client has a documented history of having a diagnosed condition that qualifies as a mental disease or defect within the ambit of RSMo. 552.010, the client was diagnosed with the condition before the alleged crime occurred (and better still, not in connection another alleged crime), if DMH has had contact with the client in the past, they too diagnosed the client with a qualifying mental disease or defect, DMH has concluded that the client was incompetent or NGRI in the past, a court has found the client incompetent or

NGRI in the past, we know the group of evaluators at the DMH facility most likely to do the evaluation and they have done good work in the past, and/or the client is not accused of a crime occurring within a DMH facility.

CASE FACTORS INDICATING THAT A COURT ORDERED 552.020 COMPETENCE EVALUATION MAY BE LESS RISKY, AND THEREFORE, AN ACCEPTABLE OPTION

1. School records reflect an IQ below 70 that we can give to the evaluator.
2. School records reflect client received the services of special school district and/or had an individualized education plan (IEP) that we can give to the evaluator.
3. DMH diagnosed the client with a serious mental health condition that would qualify as a mental disease or defect under 552.010 at some point in the past (this is helpful even if DMH concluded at the time that the client was competent and/or responsible).
4. DMH concluded that the client met the NGRI or diminished capacity standards at some point in the past.
5. DMH concluded that the client was incompetent at some point in the past.
6. Court found client NGRI in the past.
7. Court found client incompetent in the past.
8. Court found client incapacitated (civil version of incompetent, though standard is different and not dispositive of either competence or responsibility in a criminal case[30]) in the past.
9. Client, while an adult, has had a guardian in the past.
10. Adult client currently has a guardian.
11. There is a long documented history, from multiple providers, consistently diagnosing the client with a serious mental illness that would qualify as a mental disease or defect under 552.010 that we can give to the evaluator.
12. Client has been involuntarily committed to a mental health facility in the past and we have the records that we can give to the evaluator.
13. There are records from before the alleged crime and those records include a diagnosis with a serious mental health condition that would qualify as a mental disease or defect under 552.010 that we can give to the evaluator (See Section IV for list).
14. There are records from after the alleged crime that include a diagnosis with a serious mental health condition that would qualify as a mental disease or defect under 552.010 that we can give to the evaluator (see Section IV).
15. Client has been prescribed medication to treat a mental health condition and we have the prescription/records.
16. Client is currently taking medication to treat a mental health condition and we have the records reflecting the prescription that we can give to the evaluator.
17. Client has been prescribed anti-psychotic medication and we have the records and/or prescription.

[30] State v. Moore, 1 S.W.3d 586 (Mo. Ct. App. E.D. 1999); State v. Moore, 952 S.W.2d 812 (Mo. Ct. App. E.D. 1997).

18. Client is currently taking anti-psychotic medication and we have the records and/or prescription.
19. Medical records reflect a head injury at some point in the past.
20. Medical records reflect a diagnosis that could impact mental status egs. diabetes; dementia.
21. Client receives SSI for a mental health condition and we have the SSI.
22. Military records suggest client has a mental health condition that would qualify as a mental disease or defect under 552.010 that we can give to the evaluator.
23. Client was a combat veteran, we have the military records and those records do not have anything harmful such as prior bad acts and/or a personality disorder diagnosis.
24. Jailers are saying they believe client has a serious mental health condition.
25. Jail records reflect a diagnosis with a mental health condition that would constitute a mental disease or defect under 552.010 (see appendix for list).
26. Client seems to be floridly psychotic—currently and acutely exhibiting symptoms that may include hearing things that are not there, seeing things that are not there, grossly disorganized thought/speech, pushed/rushed speech to the point that he/she does not stop and no one else can get a word in, jumps from one topic to the next with no connection, making no sense.
27. The jail records reflect that the jail is giving the client medication to treat a mental health condition.
28. The jail records reflect that the jail is giving the client anti-psychotic medication.
29. There is a toxicology screen from a test at or near the time of the crime and the report reflects that the client had no drugs or alcohol in his/her system at or near the time of the allege crime (blood draw or urinalysis if done and reflect no drugs/alc. and client is exhibiting signs of serious mental illness is helpful) especially when witness descriptions indicate client was behaving in a manner suggestive of a serious mental illness.
30. Family members, friends, employers, colleagues, neighbors etc. describe specific behaviors that the client exhibited before and/or during the crime that would be consistent with a mental illness—egs.
    a. They describe seeing the client talking and yelling but there was no one else there.
    b. Client was doing and saying things that would reflect he/she was paranoid and delusional, such as running from UPS trucks saying that they were following him/her.
31. The local office and/or MSPD has knowledge of the evaluators from the DMH institution that will conduct the evaluation and the evaluators there have demonstrated thorough, reasonable and good work on MSPD cases.
32. Any time we have records helping to establish that the client has a legally significant mental health condition, such as any of the records described above, these records can be provided to the evaluator—whether DMH or private—to help establish that the client does have a legally significant mental health condition.

CASE FACTORS INDICATING THAT A COURT ORDERED 552.020 COMPETENCE EVALUATION MAY BE MORE RISKY, AND THEREFORE, MIGHT NOT BE THE BEST OPTION

1. The client is aggressive, threatening, or otherwise a behavior management problem wherever he/she currently is.
2. The defendant is charged with a crime alleged to have occurred at a DMH facility.
3. There are no mental health records at all.
4. Alternatively, there are mental health records and they do not reflect a diagnosis of something that would constitute a mental disease or defect under 552.010 (see appendix for list)
5. Client was using drugs or alcohol during the crime.
6. Client has a history of drug or alcohol use/abuse/dependence.
7. DMH concluded at some point in the past that client has a personality disorder (see appendix).
8. DMH has concluded in the past that the client does not have a condition that would qualify as a mental disease or defect under 552.010 (see appendix for list).
9. DMH has concluded in the past that client was malingering.
10. DMH has provided only provisional or "rule out" diagnoses of conditions that would qualify as a mental disease or defect under 552.010.
11. Mental health records provide only provisional or "rule out" diagnoses of conditions that would qualify as a mental disease or defect under 552.010.
12. DMH records include "rule out" malingering or "rule out" some sort of personality disorder.
13. Any records concluded that client was malingering or suggested in any way that it was possible client was malingering.
14. Mental health or other records reflect client has a personality disorder.
15. The local office and/or MSPD has knowledge of the group of evaluators from DMH who will conduct the evaluation and the history of evaluations from the DMH institution that would conduct the evaluation is not likely to be favorable to the client.
16. We do not have any knowledge of or history of working with the evaluators at the DMH institution who will conduct the evaluation.

In summary: in assessing risks and benefits, the more well-documented and clear the client's history of mental illness is, the more diagnostic consistency there is, the more that both treating and past DMH forensic experts believe that it is an illness with an etiology independent of drugs and alcohol that qualifies as a mental disease of defect under 552.010 (See Section IV for lists of conditions that qualify and don't qualify), and the more that DMH has had prior experience with the client and agrees with the qualifying diagnosis, the lower the risk of having DMH perform the evaluation.

SECTION III: SPECIAL CONSIDERATIONS RESPECTING THE MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY (NGRI) DEFENSE AND EVALUATIONS

552.030 COURT ORDERED RESPONISBILITY EVALUATIONS

As a general rule, pursuing a not guilty by reason of mental disease or defect defense (NGRI), pursuant to 552.030, regardless of who does the evaluation, is risky in less serious cases because there is a substantial possibility that the client will spend more time in a locked hospital ward than he/she would spend incarcerated with a regular conviction and DOC sentence.[31] Many clients are not aware of this and need to know this in order to make an informed choice about pursuing this defense in less serious cases. There are people serving the equivalent of a life sentence in a locked ward in the Department of Mental Health as a result of NGRI findings in misdemeanor and C/D felony cases. This is why MSPD continues to have a policy that before an attorney pursues an NGRI defense on any case lower than a B felony, the attorney needs to discuss the case with his/her District Defender and Division Director.[32] This does not apply to the RSMo. 552.015.2(8), mental disease or defect negating a culpable mental state (a/k/a diminished capacity) defense. It also does not apply to determinations of competence to proceed to trial where the consequences are different. Even in less serious cases, an incompetent person cannot waive the right to be competent to proceed.

If it is a case in which the client wants to consider a not guilty by reason of mental disease or defect defense, there will need to be a qualified mental health expert who conducts an evaluation and holds the opinion that as a result of a mental disease or defect, as defined in RSMo. 552.010, the client was unable to know and appreciate the nature, quality or wrongfulness of his/her conduct at the time of the offense.[33]

Especially if it is a serious case, if we meet with the client close to the time of the crime and he/she seems to be exhibiting significant signs of mental illness, it may be helpful to get an expert to see the client as close in time as possible to the alleged crime so that the expert can meet with the client and do a mental status evaluation that could be part of a competence evaluation and/or responsibility evaluation at some point down the road.

---

[31] See, "The Unconditional Release of Mentally Ill Offenders from Indefinite Commitment: A Study of Missouri Insanity Acquittees," Linhorst, Donald M., PhD., MSW, J Am Acad. Psychiatry Law, Vol. 27, No. 4, 1999; "The Impact of Insanity Acquittees on Missouri's Public Mental Health System," Linhorst, Donald M., PhD., MSW, Dirks-Linhorst, P. Ann, Law and Human Behavior, Vol. 21, No. 3, 1997.

[32] The Policy is in MSPD's Guidelines for Representation and states: 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.

[33] RSMo. 552.030; MAI-CR3rd 306.02

552.030 Court Ordered Responsibility Evaluation Non-Dangerous Cases—In a less serious case that meets the criteria below, it may be in the client's best interest to do a court ordered 552.030 evaluation so that the court orders an opinion on whether the client should be immediately conditionally released.[34] This may be helpful to the client, especially if we already have an expert saying that the client has a qualifying mental disease or defect based on a competence evaluation or private/independent expert that has found that the client meets the 552.030 NGRI standard and there is a report articulating that opinion. The following are the factors to consider in making a decision about whether to request a court ordered evaluation pursuant to RSMo. 552.030.

1. The client is charged with an offense that is not considered a "dangerous felony" under 556.061 and falls within the ambit of 552.020.4 and 552.030.3 (immediate conditional release may be within the realm of possibility).
2. The client is competent but has a diagnosed legally significant mental disease or defect qualifying under RSMo. 552.010 (See Section IV).
3. If the client is not charged with a dangerous felony, and the client has pled NGRI, in addition to an evaluation as to whether the client meets the NGRI standard, especially if specifically requested, the court should order that DMH provide an opinion as to whether the client should be immediately conditionally released by the court.[35]
4. The client could have this information before deciding whether to move forward with the NGRI defense or to waive that defense.
5. Without an opinion from DMH prior to the client being committed to DMH on an NGRI finding, DMH will not provide an opinion on immediate conditional release and will not consider this option.
6. Least risky option would be to get the private evaluation, know the defense is available, have the private expert write a report and then request the court ordered evaluation with an opinion regarding an immediate conditional release. Once the court orders DMH to do the evaluation, a copy of the report we have finding the client meets the NGRI criteria should be provided to the DMH evaluator along with any records we have supporting our experts findings and conclusions.
7. If the State requests a 552.030 evaluation after receiving notice of intent to rely on the defense and our expert's report, we will want to make sure that the court orders an opinion on immediate conditional release.
8. Regardless of who is requesting the court ordered evaluation on responsibility, assuming the court is going to order the evaluation, we need to specifically request that the court order that the evaluator provide an opinion regarding immediate conditional release and review the order to make certain that the relevant language is included in the court order. If the court does not order DMH to provide this opinion they will not do it and if the client is committed to DMH pursuant to an NGRI finding without this, DMH will not then go back and offer an opinion on immediate conditional release.

[34] See, RSMo. 552.020.4 & RSMo. 552.030.3.
[35] See, RSMo. 552.020.4 and 552.030.3.

Risk of 552.030 Evaluation Even if the Client is Charged with an Offense that may be Eligible for an Immediate Conditional Release:

1. DMH may conclude that the client does not meet the NGRI standard at all and then rather than just one opinion saying NGRI, there is now a contested opinion.

Lower Risk 552.030 Evaluation:

1. In a situation where DMH has consistently concluded that: 1) the client has a qualifying mental health condition; 2) that the client is incompetent now or has been incompetent in the past as a result of a legally significant mental disease or defect; 3) has found the client NGRI in the past as a result of what is currently defined as a mental disease or defect and there is evidence that the condition was active at or near the time of the crime, there may be a lower risk in requesting a court ordered 552.030, responsibility evaluation. Typically, these evaluations do not include assessments or opinions of the mental disease or defect negating a culpable mental state, a/k/a diminished capacity, defense under RSMo. 552.015.2.(8). If one needs an opinion on this, one would need to establish good cause, ensure that the court order specifies a request for an opinion on mental disease or defect negating a culpable mental state, and the State may be entitled to an evaluation on diminished capacity pursuant to the Discovery Rules.[36]

[36] There is no right in the statutes to a court ordered evaluation on the issue of diminished capacity. However, there is case law that would allow the court to order it even though it is not addressed in RSMo. 552.020, 552.030 or 552.015.2(8). See, MO.R.CRIM.P. 25.06(B)(9). *State v. Dixon*, 655 S.W.2d 547 (Mo. Ct. App .E.D. 1983) (overruled on other grounds); *State ex rel. Westfall v. Crandall*, 610 S.W.2d 45 (Mo. Ct. App. E.D. 1980).

SECTION IV

APPENDIX

MENTAL HEALTH CONDITIONS THAT MAY OR MAY NOT CONSTITUTE A MENTAL DISEASE OR DEFECT AS DEFINED IN RSMO. 552.010

552.010. The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770.

(L. 1963 p. 674 § 1, A.L. 1969 p. 572)

The following are lists of conditions that mental health examiners usually do and do not consider to be mental diseases or defects within the ambit of RSMo. 552.010. The lists are by no means exhaustive and the categorizations I have made are not absolute, but guides. Also, just because the client has a condition that would qualify as a mental disease or defect does not mean that he/she will meet the rest of the standard necessary to be considered incompetent or not responsible.

NO: Conditions that most experts would find do **NOT** constitute a mental disease or defect within the ambit of 552.010:

- Personality Disorders
    - Antisocial personality disorder
    - Paranoid personality disorder
    - Schizoid personality disorder
    - Schizotypal personality disorder
    - Borderline personality disorder
    - Histrionic personality disorder
    - Narcissistic personality disorder
    - Avoidant personality disorder
    - Dependent personality disorder
    - Obsessive compulsive personality disorder

- Paraphilic Disorders (any sexual disorders)
    - Sexual Masochism Disorder
    - Sexual Sadism Disorder
    - Pedophilic Disorder
    - Paraphilia NOS
    - Frotteuristic Disorder

- Disruptive, Impulse Control and Conduct Disorders

    - Oppositional Defiant Disorder
    - Intermittent Explosive Disorder
    - Conduct Disorder
    - Pyromania
    - Kleptomania
- Malingering
    - "The intentional production of false or grossly exaggerated psychological or physical symptoms for an external reward."[37], [38] Malingering is an appropriate area for expert testimony. So, if the expert concludes or even suspects it, he/she will be able to testify about it. This is bad, not just because it means no defense, but also because it means that the finder of fact will have a basis on which to conclude that not only does the defense not apply, but the client is lying to avoid responsibility, which could negatively impact punishment.

BEWARE OF THE FOLLOWING:

- Alcoholism with psychosis
- Drug abuse/dependence with psychosis[39]
- Any substance related disorder
- ADHD
- Dysthymia
- Anxiety Disorders[40]
- Factitious Disorder

---

[37] *State v. Worthington*, 8 S.W.3d 83, 91 (Mo. banc 1999).

[38] One can "fake bad" or "fake good." Faking bad, is the worst kind of malingering for our clients. It means trying to fake or pretend that one has a legally significant mental disease or defect for secondary gain. In the case of our client's, to avoid responsibility for the crime. If the mental health expert suspects or concludes this, it's bad for the client because not only is the expert saying the client is not sick but also is lying about it to avoid accountability. A good evaluator will explore this and rule it out when appropriate. A bad/biased evaluator will be so skeptical of our clients that the evaluator will raise this suspicion or make this claim even when the client really does have a legally significant mental disease or defect. The risk for this is greater the less history and documentation there is that the client does have a legally significant mental disease or defect. If there are records diagnosing that the client has a legally significant mental disease or defect, especially if those records predate allegations of criminal conduct, it can be very helpful in terms of reducing the risk that DMH or another evaluator will conclude malingering. Malingering can also mean "faking good. This means trying to hide or conceal real symptoms of mental illness. The "faking good" kind of malingering, unlike the "faking bad" kind, is not a significant problem for a client.

[39] Even though most mental health professionals would say these fall within the ambit of 552.010, the law on basing a defense on this is bad. This is one of the reasons why, when we have a client who does not have a documented history of a non-substance related mental disease or defect, it is important to get an accurate diagnosis before treatment begins that may mask symptoms. Once the treatment begins, if it works and the symptoms diminish, it will be difficult to determine whether the condition was a substance related condition or an independent one. Often, DMH is skeptical when there is no documented history and substance induced psychotic disorders have not been ruled out.

[40] Typically ADHD, Dysthymia and anxiety disorders will not be considered severe enough to be considered a mental disease or defect that would impact competence or rise the level of an NGRI defense.

- Factitious Disorder by Proxy[41]
- Anything with the words "Rule Out" or "provisional" in it—especially from DMH[42]
- Malingering: Any suspicion in any mental health records that client is malingering.

YES: Conditions that most experts would find DO constitute a mental disease or defect within the ambit of 552.010

- Neurodevelopmental Disorders
    - Intellectual Developmental Disorder/Intellectual Disability—formerly known as mental retardation.
    - Autism spectrum disorders[43]
- Psychotic Disorders
    - Schizophrenia
    - Delusional Disorder
    - Schizophreniform Disorder
    - Schizoaffective Disorder
    - Psychotic Disorder Due to Another Medical Condition
    - Psychotic Disorder NOS (not otherwise specified)[44]
- Bipolar Disorders
    - Bipolar I
    - Bipolar I with Psychotic Features
    - Bipolar II[45]
    - Bipolar II with Psychotic Features
- Depressive Disorders
    - Major Depressive Disorder
    - Major Depressive Disorder with Psychotic Features
- Trauma and Stressor Related Disorders
    - Posttraumatic Stress Disorder

---

[41] Not only will factitious disorder by proxy not be considered a mental disease or defect sufficient to form the basis of an NGRI defense, but it may also provide motive.

[42] These words mean that whomever is doing the diagnosing does not believe there is sufficient information yet upon which to base a diagnosis. In any case involving mental disease or defect, the defense has a proof burden, whether a full burden of proof or a burden of production. If the experts are not sure what is wrong or whether anything is wrong, it will be very difficult if not impossible to meet this burden. Especially in more serious cases where we are more likely to want to consider a mental disease or defect defense, it is very important that the etiology of the illness is determined and that there is some diagnostic certainty, especially if the evaluator is questioning between a psychotic mental illness such as schizophrenia v. a substance induced psychotic disorder or even malingering. Antipsychotic medication may interfere with symptom presentation and persistence which can make diagnostic consistency and certainty more difficult and potentially could result in the loss of otherwise exculpatory evidence.

[43] These will probably qualify as a mental disease or defect but will rarely rise to a level such that the expert will find a person incompetent or NGRI based solely on an Autism Spectrum disorder.

[44] This is often used when the client presents with psychotic symptoms and the mental health professionals do not know the etiology. This can be dangerous and it may be important, especially if NGRI is something to consider, to make certain that there is more diagnostic clarity and certainty before moving forward. Medications at this stage, before a diagnosis may interfere with the ability to get an accurate diagnosis.

[45] This is a milder diagnosis and would be cause for a bit more concern.

- Neurocognitive Disorders
    - Delirium (when not substance induced)
    - Major Neurocognitive Disorders Subtypes may include but are not limited to[46]:
        - Alzheimer's Disease
        - Frontotemporal Lobar Degeneration
        - Lewy Body Disease
        - Vascular Disease
        - Traumatic Brain Injury
        - HIV
        - Parkinson's Disease
        - Huntington's Disease
        - Dementia

[46] These may also be severe or mild but even if mild may still qualify especially since most are degenerative will get progressively worse with time.

QUICK GUIDE/SUMMARY:
COURT ORDERED DMH 552.020 COMPETENCE EVALUATION v. PRIVATE COMPETENCE EVALUATION

FACTORS SUGGESTING COURT ORDERED DMH COMPETENCE EVAL. LESS RISKY AND OK	FACTORS SUGGESTING COURT ORDERED DMH COMPETENCE EVAL. MORE RISKY AND NOT OK
Records (mental health, school, medical, SSI, military etc.) establish well documented consistent history of client having a condition that would qualify as a mental disease or defect under 552.010 (See Appendix, Infra. for List)	1. No documented mental health history; 2. Mental health records with no diagnosis of a qualifying condition ; 3. Mental health records diagnosing client with a condition that would not qualify under 552.010—egs. personality disorder etc.; 4. Mental health records but no consistent diagnosis.
At some point in the past: 1. DMH concluded that client has a qualifying 552.010 diagnosis; 2. DMH concluded client was incompetent; and/or 3. DMH concluded client was not responsible at some point in the past.	DMH evaluated client in the past and found: 1. client did not have a mental disease or defect under 552.010; 2. client had a personality disorder; 3. client had a provisional or rule out conclusion; 4. client had a substance induced condition; 5. client was malingering; 6. client was competent; and/or 7. client was responsible.
A Court found client not competent or not responsible in the past	
1. Client is an adult and has a legal guardian; 2. A court found client incapacitated as a result of a condition that would qualify as a mental disease or defect under 552.010; 3. A court civilly committed client to a mental institution.	
1. No history of substance abuse. 2. Evidence suggests that neither illegal drugs nor alcohol had anything to do with client's conduct at the time of the alleged offense.	1. History of substance abuse; 2. Evidence suggesting client was using illegal drugs or alcohol at time of offense.
Client is taking medication to treat a mental health condition and has a prescription for the medication	
1. Client is exhibiting severe observable symptoms of active mental illness while at the jail; 2. the jailers are observing and reporting these symptoms; and 3. the State will not accept a private evaluation on the issue of competence but will require a court ordered DMH evaluation.	
Client is too sick to cooperate with a private evaluation and there is evidence to support that the lack of cooperation is the result of a qualifying mental health condition.	
	Client is accused of committing a crime while in DMH custody.
Client is not a "behavior management problem," or when properly medicated is not a "behavior management problem"	Client is aggressive, threatening or a behavior management problem wherever he/she currently is.
Local MSPD Office has a history with the DMH evaluators who will conduct the court ordered evaluation and believes they will be fair and accurate.	Local MSPD Office has no history with the DMH evaluators who will conduct the court ordered evaluation, or has a history resulting in a belief that the evaluation will not be favorable to the client.

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. 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.

MSPD *Policies and Procedures Database*

Guidelines for Representation

Category: Trial
Section #: 10-10-20-80
Effective Date: 11/01/92
Revised Date:

Subject: General Principles of Representation
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

Oak Tower, 20th Floor -- 324 East 11th Street
Kansas City, Missouri 64106-2417
Telephone: 816-889-2099 Fax: 816-889-2999
Direct Dial: 816-889-2098 ext. 234

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 or 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

217 E McCARTY
JEFFERSON CITY, MO 65101-3112
(573) 638-2263 FAX (573) 635-8806

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

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 arrestsand/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.

Policy Administration:

Approval Information:

☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees

☐ Policy Under Construction

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.

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 #:**	**10-10-30-40**
		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, 33.0 1).

(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.).

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 #:**	**10-10-30-60**
		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.).

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 #: 10-10-40-1

Effective Date: **11/01/92**

Revised Date:

Subject: Preliminary Hearings

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.

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 #: 10-10-40-20
Effective Date: **11/01/92**
Revised Date:

Subject: Preliminary Hearings
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.

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 #: 10-10-40-40
Effective Date: **11/01/92**
Revised Date:

Subject: Preliminary Hearings
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.

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 #: 10-10-40-60
Effective Date: **11/01/92**
Revised Date:

Subject: Preliminary Hearings
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.).

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 #: 10-10-40-80
Effective Date: 11/01/92
Revised Date:

Subject: Preliminary Hearings
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.

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 #: 10-10-50-1
Effective Date: 11/01/92
Revised Date:

Subject: Pretrial Preparation
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.

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 #: 10-10-50-20
Effective Date: 11/01/92
Revised Date:

Subject: Pretrial Preparation
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.

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: **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

To Peter Sterling/Area071/MSPDAnthony Cardarella/Area007/MSPD@MSPD, Barbara Hoppe/Area99C/MSPD@MSPD, Bert Godding/Area005/MSPD@MSPD, Catherine Rice/Area035/MSPD@MSPD, Cathy Kelly/Training/MSPD@MSPD, Christine Sullivan/Area011/MSPD@MSPD, Christopher Davis/Area032/MSPD@MSPD, Dan Gralike/Area99C/MSPD@MSPD, Daniel Underwood/Area001/MSPD@MSPD, Darren Wallace/Area029/MSPD@MSPD, David Miller/Area043/MSPD@MSPD, Dewayne Perry/Area030/MSPD@MSPD, Donna Anthony/Area037/MSPD@MSPD, Eric Affholter/Area022/MSPD@MSPD, Jahnel Lewis/Area025/MSPD@MSPD, James Wilson/Area026/MSPD@MSPD, Jan King/Area019/MSPD@MSPD, Jane Frew/Area99C/MSPD@MSPD, Jeff Stephens/Area004/MSPD@MSPD, Jeffrey Martin/Area017/MSPD@MSPD, Joe Zuzul/Area028/MSPD@MSPD, Joel Elmer/Area016/MSPD@MSPD, Karen Kraft/Area054/MSPD@MSPD, Kathleen Brown/Area015/MSPD@MSPD, Kathleen Lear/Area99J/MSPD@MSPD, Kathryn Benson/Area013/MSPD@MSPD, Kirk Zwink/Area014/MSPD@MSPD, Kris Kerr/Area022/MSPD@MSPD, Lashon Rhodes/Area036/MSPD@MSPD, Leon Munday/Area016/MSPD@MSPD, Lew Kollias/Area066/MSPD@MSPD, Lisa Clover/Area023/MSPD@MSPD, Lisa Martin/Area99C/MSPD@MSPD, Lisa Preddy/Area020/MSPD@MSPD, Marty Robinson/Area99J/MSPD@MSPD, Mary Bellm/Area006/MSPD@MSPD, Mary Willingham/Area99C/MSPD@MSPD, Michael Hamilton/Area012/MSPD@MSPD, Michael Skrien/Area034/MSPD@MSPD, Peter

cc Sterling/Area071/MSPD@MSPD, Raymond Legg/Area010/MSPD@MSPD, Richard Scheibe/Area002/MSPD@MSPD, Rick Baker/Area046/MSPD@MSPD, Rodney Hackathorn/Area031/MSPD@MSPD, Shawn Goulet/Area021/MSPD@MSPD, Stormy White/Area021/MSPD, Susan Faust/Area044/MSPD@MSPD, Thomas Gabel/Area045/MSPD@MSPD, Victor Head/Area039/MSPD@MSPD, Wayne Williams/Area024/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, Barbara Hoppe/Area99C/MSPD@MSPD

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

cc: 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, Barbara Hoppe/Area99C/MSPD@MSPD

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

Approval Information:

☒ **Policy Approved** **Approved By:** Peter Sterling **Approval Date:** 11/29/2006 06:58:18 AM

☐ Policy Under Construction

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.

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 #: 10-10-60-1
Effective Date: 11/01/92
Revised Date:

Subject: Guilty Pleas
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.

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 #: 10-10-60-20
Effective Date: **11/01/92**
Revised Date:

Subject: Guilty Pleas
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.

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 #:**	**10-10-60-40**
		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.

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 #: 10-10-60-60
Effective Date: 11/01/92
Revised Date:

Subject: Guilty Pleas
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.

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 #: 10-10-60-80
Effective Date: **11/01/92**
Revised Date:

Subject: Guilty Pleas
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).

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 #: 10-10-60-100

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.

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 #: 10-10-70-1
Effective Date: **11/01/92**
Revised Date:

Subject: Trial Preparation
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.

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 #: 10-10-70-20
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.

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 #: 10-10-70-40
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.

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 #: 10-10-70-60
Effective Date: 11/01/92
Revised Date:

Subject: Trial Preparation
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.

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 #: 10-10-70-80
Effective Date: **11/01/92**
Revised Date:

Subject: Trial Preparation
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.

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 #: 10-10-80-1
Effective Date: **11/01/92**
Revised Date:

Subject: Trial Proceedings
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.

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 #:**	**10-10-80-20**
		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.

Policy Administration:

Approval Information:

☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees

☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-80-40
Effective Date: 11/01/92
Revised Date:
Subject: Trial Proceedings
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.

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 #: 10-10-80-60
Effective Date: **11/01/92**
Revised Date:

Subject: Trial Proceedings
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-80-80
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

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 #: 10-10-80-100
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-80-120
Effective Date: 11/01/92
Revised Date:
Subject: Trial Proceedings
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.

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 #: 10-10-80-140
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

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 #: 10-10-80-160
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

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 #: 10-10-80-180
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-80-200
Effective Date: 11/01/92
Revised Date:

Subject: Trial Proceedings
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.

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 #: 10-10-80-210

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.

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 #: 10-10-90-1

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.

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 #: 10-10-90-20
Effective Date: 11/01/92
Revised Date:

Subject: Post Trial Motions
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.

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 #:**	**10-10-90-40**
		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.

Policy Administration:

Approval Information:

☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees

☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-100-1
Effective Date: 11/01/92
Revised Date:

Subject: Sentencing Advocacy
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.

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 #: 10-10-100-20
Effective Date: 11/01/92
Revised Date:

Subject: Sentencing Advocacy
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.

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 #: 10-10-100-40
Effective Date: 11/01/92
Revised Date:

Subject: Sentencing Advocacy
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

Guidelines for Representation

Category: Trial
Section #: 10-10-110-1
Effective Date: 11/01/92
Revised Date:
Subject: Post Trial Proceedings
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

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.

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 #: 10-10-120-1
Effective Date: 11/01/92
Revised Date:

Subject: Post-conviction Process
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.

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 #:**	**10-10-120-20**
		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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees

☐ Policy Under Construction

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 attorneylclient 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.

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 #: 10-10-120-60
Effective Date: **11/01/92**
Revised Date:

Subject: Post-conviction Process
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.

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 #: 10-10-120-70
Effective Date: 08/15/2002
Revised Date:

Subject: Post-conviction Process
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.

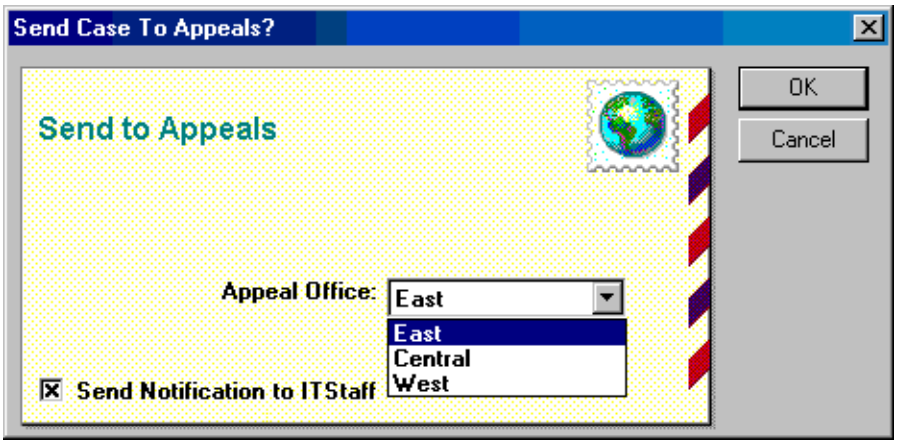
To send a case to appeals:

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.

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 #: 10-10-120-80

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.

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: Appellate/PCR

Section #: 10-20-10-1

Effective Date: **11/01/2001**

Revised Date:

Subject: Preamble

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.

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: Appellate/PCR
Section #: 10-20-20-1
Effective Date: 01/02/91
Revised Date:

Subject: Client Relations
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.

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: Appellate/PCR
Section #: 10-20-20-20
Effective Date: 01/02/91
Revised Date:

Subject: Client Relations
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.

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: Appellate/PCR
Section #: 10-20-20-40
Effective Date: 01/02/91
Revised Date:

Subject: Client Relations
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.

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: Appellate/PCR
Section #: 10-20-20-60
Effective Date: 01/02/91
Revised Date:

Subject: Client Relations
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.

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: Appellate/PCR
Section #: 10-20-20-80
Effective Date: 01/02/91
Revised Date:

Subject: Client Relations
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.

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: Appellate/PCR
Section #: 10-20-20-100
Effective Date: 01/02/96
Revised Date:

Subject: Client Relations
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 cannons 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.

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:	**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.

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: Appellate/PCR
Section #: 10-20-30-20
Effective Date: 01/02/91
Revised Date:

Subject: Case Representation
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.

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:	**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.

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: Appellate/PCR
Section #: 10-20-30-60
Effective Date: 01/02/96
Revised Date:

Subject: Case Representation
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.

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:	**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.

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:	**Appellate/PCR**	**Section #:**	**10-20-30-100**
		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.

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: Appellate/PCR
Section #: 10-20-30-120
Effective Date: 01/02/91
Revised Date:

Subject: Case Representation
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.

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:	**Appellate/PCR**	**Section #:**	**10-20-30-140**
		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.

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:	**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.

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: Appellate/PCR
Section #: 10-20-30-180
Effective Date: 01/02/91
Revised Date:

Subject: Case Representation
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.

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: Appellate/PCR
Section #: 10-20-30-200
Effective Date: 01/02/91
Revised Date:

Subject: Case Representation
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.

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:	**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.

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: Appellate/PCR
Section #: 10-20-30-240
Effective Date: 01/02/91
Revised Date:

Subject: Case Representation
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.

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: 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.

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:	**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.

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: Appellate/PCR
Section #: 10-20-40-40
Effective Date: 01/02/91
Revised Date:

Subject: Professionalism
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.

Policy Administration:

Approval Information:
☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 11/09/2001

☐ For New Employees
☐ Policy Under Construction

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.

Policy Administration:

Approval Information:

☒ **Policy Approved** **Approved By:** Marty Robinson **Approval Date:** 01/14/2005 01:28:58 PM

☐ For New Employees

☐ Policy Under Construction