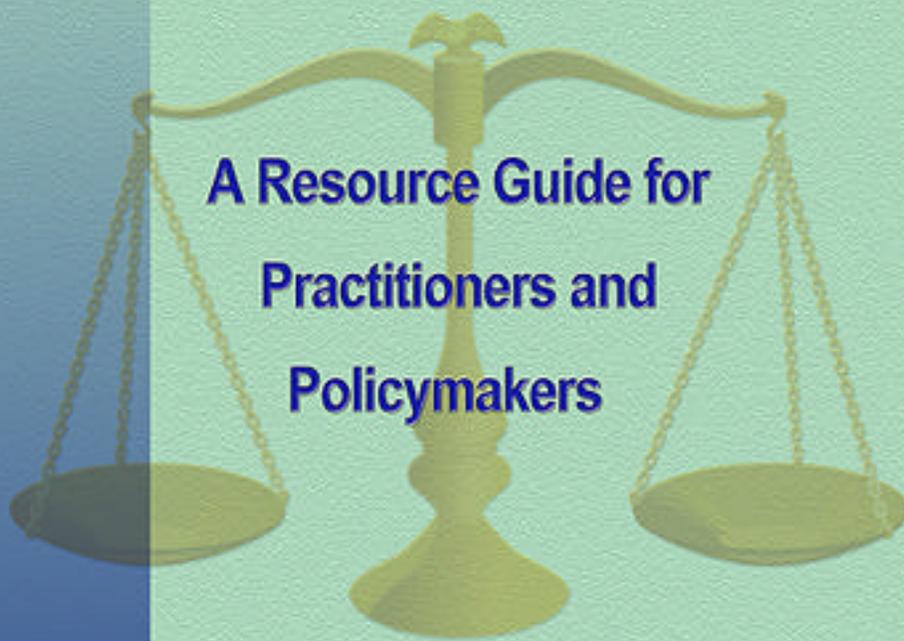




# Compendium of Standards for Indigent Defense Systems



A Resource Guide for  
Practitioners and  
Policymakers

**Volume V**  
Standards for  
**Juvenile Justice Defense**

**December  
2000**

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## Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has

*Gideon v. Wainwright* to provide every criminal defendant charged with a serious crime with competent counsel.” Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar “to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices.” Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

The standards presented here do not necessarily represent the only acceptable models. Rather, they have been collected to give practitioners and policymakers examples of the range of current “best practices” developed at the state and local level, along with the recommendations of several national standards-setting bodies.

The Office of Justice Programs is making the *Compendium* available in hard copy, CD, and electronic formats. It is our hope that this resource will be used by State and local governments and agencies to compare standards from other jurisdictions and develop their own, thereby helping to assure the fulfillment of the Sixth Amendment and of *Gideon v. Wainwright*.

Mary Lou Leary  
Acting Assistant Attorney General  
Office of Justice Programs

Nancy E. Gist  
Director  
Bureau of Justice Assistance

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### ***Advisory Board Members***

Ms. Marea Beeman, Vice President, The Spangenberg Group

Professor Adele Bernhard, Pace University School of Law

Mr. Larry Landis, Director, Indiana Public Defender Council

Mr. Jim Neuhard, State Appellate Defender, State of Michigan

Mr. Paul Petterson, Indigent Defense Counsel, National Association of Criminal Defense Lawyers

Ms. Patti Puritz, Director, Juvenile Justice Center, American Bar Association

Ms. Jo-Ann Wallace, Chief Counsel, National Legal Aid and Defender Association

Mr. Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association

Professor Richard Wilson, Washington College of Law, The American University

### ***Institute for Law and Justice Staff***

Edward Connors, President

Joan Peterschmidt, Senior Project Management Associate

### ***Office of Justice Programs Staff***

Arnold J. Hopkins, Office of the Assistant Attorney General, Office of Justice Programs

Kristine Orlando, Grants Program Specialist, Bureau of Justice Assistance

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# Introduction

The *Compendium of Standards for Indigent Defense Systems* presents national, state, and local standards relating to five major aspects of indigent defense:

- Administration of defense systems (Volume I)
- Attorney performance (Volume II)
- Capital case representation (Volume III)
- Appellate representation (Volume IV)
- Juvenile justice defense (Volume V)

These standards are non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants. Some standards are aspirational, that is, a goal for the future; other standards are enforced by operating or funding agencies. The standards and rules collected here were issued by national organizations; state agencies; bar associations; public defender agencies; state high courts; and local court or bar associations.

The *Compendium* is intended to be useful for persons preparing to establish, review, or improve a public defense program or system. It should also be useful for persons dealing with funding sources; for agencies or organizations that are developing standards governing either criminal defense systems or individual attorney performance; and for academics and courts that need a reference point.

## ***Sponsorship and Development***

The *Compendium* was commissioned by the Bureau of Justice Assistance in the Office of Justice Programs of the United States Department of Justice. It was developed by the staff of the Institute for Law and Justice with guidance from an advisory board of practitioners and academics in the field of criminal defense systems. The assistance of the Spangenberg Group is also gratefully acknowledged, especially in helping identify state and local standards for inclusion in the *Compendium*.

## **Methodology**

Once a standard was identified, ILJ staff sought permission from the sponsoring agency to reprint the standard here. The intent of the *Compendium* was to be as inclusive as possible. No effort was made to include only the “best” standards. If any standards have been left out, we apologize to the standards’ sponsors.

Each volume lists specific topics, such as provision of training or the need for adequate facilities, and then presents all the standards relevant to those topics. By and large, the selection of topics followed the topical headings used in the standards themselves.

The materials included in the *Compendium* go beyond standards themselves. In several instances, we have included court rules and agency operational policies that are the functional equivalent of standards. The inclusion of such materials points to the need to put standards into context. At the state level, standards do not exist by themselves. Their content is often shaped by state legislation and court rules, either of which may have been the force requiring the development of the standards. Thus, to understand state and local standards, some knowledge of the governing state law is required. By necessity, any state law that creates a defense services delivery mechanism also treats the issues of governance, structure, jurisdiction, funding, and many other topics often covered by standards. While this *Compendium of Standards for Indigent Defense Systems* includes a limited review of state laws, an exhaustive review is beyond its reach.

Implicit in the standards are the ethical requirements expected of all attorneys in all types of cases. In a sense, the standards are but commentary to certain overriding ethical principles: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for this representation” (ABA Model Rules of Professional Conduct 1.1, adopted 1983). Further, as the Model Code of Professional Responsibility (Canon 7) directs, “A lawyer should represent a client zealously within the bounds of the law.” What the standards do is identify how those principles can be achieved and measured in the indigent defense setting, no matter what type of indigent defense system is used.

These standards may be used either to evaluate an existing system (consisting of public defenders, contract firms, private assigned counsel, or a combination of such systems) or to compare or consider replacing one type of system with another.

The standards allow funders to determine whether providers of defense services are performing effectively and efficiently. For the clients, who can neither choose nor readily change their attorneys, these standards provide some measure of assurance that their lawyers will provide high-quality, zealous representation. Finally, these standards inform both funders and attorneys what services are required and what services need to be funded.

# List of Standards and Table of Key Elements

## Standards Included

### ***National***

American Bar Association, *Juvenile Justice Standards Relating to Appeals and Collateral Review*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Interim Status*, 1979

American Bar Association, *Juvenile Justice Standards Relating to the Juvenile Probation Function*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Monitoring*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Pretrial Proceedings*, 1979

American Bar Association, *Juvenile Justice Standards Relating to Transfer Between Courts*, 1979

### ***State and Local***

Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, 1997

Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, 1995

Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, 1999

Minnesota Office of the State Public Defender, *Caseload Standards for District Public Defenders in Minnesota*, 1991

North Dakota Legal Counsel for Indigents Commission, *Indigent Defense Guidelines and Procedures*, 1998

Washington Defender Association, *Standards for Public Defense Services*, 1989

## Key Elements

Category	Type of Standard	Source	Cite
<b>A. Purpose of Standards</b>			
	Purpose of standards	ABA Interim Status	1.1, 1.3
<b>B. Attorney Role</b>			
	Function of defense counsel	ABA Counsel for Private Parties	1.1
		ABA Counsel for Private Parties	2.1 (A)(i)(ii)
	Role of counsel	Connecticut Guidelines	Guideline 1.2
		Massachusetts Manual	Policy IV A2 J1.1, 1.3
	Attorney qualifications and training	Indiana Standards	Standard E4
		Massachusetts Manual	Policy III A(4) Para. 2 Policy IV A2 J1.2
		Washington Standards	Standard Fourteen
	Independence of counsel	ABA Counsel for Private Parties	2.1 (D)
<b>C. Juvenile Defense Administration</b>			
	Organization of services	ABA Counsel for Private Parties	2.2 (except next)
	Workload	ABA Counsel for Private Parties	2.2 (B) (iv)
		Indiana Standards	Standard J
		Minnesota Standards	Standard 2
		Washington Standards	Standard Three
	Attorney compensation	ABA Counsel for Private Parties	2.1 (B)
	Support services	ABA Counsel for Private Parties	2.1 (C)
		ABA Transfer Between Courts	2.3 (C)
	Monitoring system	ABA Monitoring	3.1 (A) (D), 3.2, 3.3
	Client eligibility	North Dakota Guidelines	Guideline 1 B
<b>D. Counsel Appointment</b>			
	Scope of right to counsel	ABA Counsel for Private Parties	2.3
		ABA Pretrial Proceedings	5.3 (A)
		ABA Juvenile Probation Function	2.13
		ABA Transfer Between Courts	2.3 (A) (B)
	Time of appointment	ABA Counsel for Private Parties	2.4 (A)
		ABA Pretrial Proceedings	2.2 (C)
	Duration of appointment	ABA Counsel for Private Parties	2.4 (B)
		ABA Monitoring	3.1 (B)
	Waiver of counsel	ABA Counsel for Private Parties	6.2

Category	Type of Standard	Source	Cite
<b>E. Attorney Responsibilities Generally</b>			
	Need to act diligently and promptly	ABA Counsel for Private Parties	1.5
	Need to act ethically	ABA Counsel for Private Parties	1.2, 1.3, 3.4, 4.4, 7.5, 7.7, 7.10
<b>F. Lawyer–Client Relationship</b>			
	Client meetings	ABA Counsel for Private Parties	4.2
	Keeping client informed	ABA Counsel for Private Parties	3.5
	Confidentiality	ABA Counsel for Private Parties	3.3
		Massachusetts Manual	Policy IV A2 J2.5 (c)(d)
	Resolving conflicts of interest	ABA Counsel for Private Parties	3.1, 3.2
		ABA Interim Status	8.1
	Advice to give client	ABA Counsel for Private Parties	5.1, 5.3, 8.3
	Testimony by respondent	ABA Counsel for Private Parties	7.9
	Decision making	ABA Counsel for Private Parties	5.2
<b>G. Attorneys' Initial Duties</b>			
	Early release	ABA Interim Status	8.2
		ABA Counsel for Private Parties	6.1, 6.4
	Visiting detention facility	ABA Interim Status	8.3
	Acting promptly	ABA Counsel for Private Parties	4.1
	Challenging prior counsel	ABA Counsel for Private Parties	10.7
	Initial duties	Massachusetts Manual	Policy IV A2 J2.1 to 2.5
<b>H. Pretrial Duties</b>			
	Client interviews	ABA Counsel for Private Parties	4.2
	Discovery	ABA Counsel for Private Parties	7.3 A
		ABA Pretrial Proceedings	3.1, 3.2 (B), 3.13, 3.16
		Massachusetts Manual	Policy IV A2 J5.5, 5.10
	Continuing duty	ABA Pretrial Proceedings	3.15
	Duty to investigate	ABA Counsel for Private Parties	4.3, 8.2
		Massachusetts Manual	Policy IV A2 J5.1
	Making of motions	ABA Counsel for Private Parties	7.3 B
		Massachusetts Manual	Policy IV A2 J5.3, 5.7, 5.9

<b>Category</b>	<b>Type of Standard</b>	<b>Source</b>	<b>Cite</b>
<b>I. Transfer Hearings</b>			
	Transfer hearings	Massachusetts	Policy IV A2 J3.1 to 3.4
	Post-hearing remedies	ABA Counsel for Private Parties	8.5
<b>J. Plea Negotiations</b>			
	Consideration of early disposition	ABA Counsel for Private Parties	6.3, 7.1
		Massachusetts Manual	Policy IV A2 J6.2
		Massachusetts Manual	Policies IV A2 J 6.1, 6.3
	Other plea-related duties	Massachusetts Manual	Policies IV A2 J6.4-6.6
<b>K. Trial</b>			
	Juror selection	ABA Counsel for Private Parties	7.6
		Massachusetts Manual	Policy IV A2 J7.4
	Witness examination	ABA Counsel for Private Parties	7.8
		Massachusetts Manual	Policies IV A2 J7.6, 7.7
	Other trial duties	Massachusetts Manual	Policy IV A2 J7.1, 7.2, 7.3, 7.5, 7.8, 7.9, 7.10
<b>L. Disposition/Sentencing</b>			
	Counsel's importance at sentencing	ABA Counsel for Private Parties	9.1
	Duty to investigate	ABA Counsel for Private Parties	9.2
		Massachusetts Manual	Policy IV A2 J8.1
	Client counseling	ABA Counsel for Private Parties	9.3
	Hearing duties	ABA Counsel for Private Parties	9.4
	Counseling after disposition	ABA Counsel for Private Parties	9.5
	Continuing duty to client	ABA Counsel for Private Parties	10.1
		Massachusetts Manual	Policy IV A2 J9.2
	Other disposition duties	Massachusetts Manual	Policies IV A2 J8.2 to 8.5
<b>M. Postdispositional Hearing Duties</b>			
	Post dispositional hearings	ABA Counsel for Private Parties	10.2
		Massachusetts Manual	Policy IV A2 J 9.1
	Right to counsel on appeal	ABA Appeals and Collateral Review	3.1
	Cooperation with appeals counsel	ABA Counsel for Private Parties	10.3
	Continuing counsel	ABA Counsel for Private Parties	10.5, 10.6

## **A. Purpose of Standards**

These two standards underscore the difference between the punitive criminal justice system and the rehabilitation model of the juvenile justice system. Compare to Section A, “Function of Standards,” in *Compendium* Volume II, “Standards for Attorney Performance.”

### ***ABA Juvenile Justice Standards Relating to Interim Status***

#### **1.1 Scope and overview**

The standards in this volume set out in detail the decision making process that functions between arrest of a juvenile on criminal charges and final disposition of the case. By limiting the discretion of officials involved in that process, and by imposing affirmative duties on them to release juveniles or bear the burden of justification for not having done so, the standards seek to reduce the volume, duration, and severity of detention, and of other curtailment of liberty during the interim period.

#### **1.3 Guidelines for measuring progress**

To the extent that these standards require time-consuming or costly modifications in the law, practice, and facilities of a jurisdiction, they should be viewed as guidelines by which to measure the progress of the jurisdiction toward compliance with the stated goals. Detailed specifications are presented wherever possible, so that departures from them will be visible, and officials can be called to account for them.

## **B. Attorney Role**

Standards included here address the following topics:

1. Function of defense counsel
2. Role of counsel
3. Attorney qualifications and training
4. Independence of counsel

See also *Compendium* Volume II, “Standards for Attorney Performance,” pages A3-A5, B2-B4.

# 1. Function of Defense Counsel

*Commentary.* Implicit in these standards is the principle that counsel has a key role to play in all juvenile proceedings, without regard to any doctrinaire “right to counsel.” To support this expanded right to counsel, the ABA standards also seek to expand the number of qualified attorneys available to represent clients in juvenile proceedings.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **1.1 Counsel in juvenile proceedings, generally**

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

### **2.1 General principles concerning the provision and organization of legal services**

#### **A. Responsibility for provision of legal services.**

Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

- (i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.
- (ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

## 2. Role of Counsel

*Commentary.* The following standards regarding the role of counsel differ greatly in their specificity and direction. The Connecticut standard includes auxiliary responsibilities that are commonly associated with juvenile status. The Massachusetts standards are more specific to juvenile defense. See also *Compendium* Volume II, “Standards for Attorney Performance,” pages A3-A5.

### ***Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense***

#### **Guideline 1.2. Role of Defense Counsel in Juvenile Matters**

- (a) Counsel should abide by the guidelines enumerated in Guideline 1.1.
- (b) Counsel in juvenile matters often has occasion to counsel the client and, in some cases, the client’s family with respect to related non-legal matters (e.g., education, family, therapy, etc.), which should be discharged to the best of counsel’s training and ability or with appropriate assistance of other professions by referral.
- (c) Counsel should be prepared to assist in securing appropriate legal or other services for the client in matters arising from or related to the juvenile proceedings.
- (d) Counsel should be familiar with dispositional alternatives and services, should investigate the client’s social, educational and psychological history, and should advocate a plan approved by the client generally proposing the least restrictive alternative.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 1.1 Role of Defense Counsel**

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

The role of counsel in delinquency... cases is to be an advocate for the child. Counsel should insure that the interests and rights of the client are fully protected and advanced, irrespective of counsel’s opinion of the client’s culpability. This requires fully explaining

to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings. Counsel should also make sure the juvenile fully understands all court proceedings, as well as all his/her rights and defenses. Upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent .\*

Counsel should not discuss any attorney–client privileged communications with the parent, or any other person, without the express permission of the juvenile. Counsel should advise the juvenile of the above at the onset of the attorney–client relationship. Counsel should fully inform both the juvenile and the juvenile’s parents about counsel’s role, especially clarifying the lawyer’s obligation regarding confidential communications. The lawyer should counsel the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his own decisions and advocate the juvenile’s viewpoint and wishes (as determined by the juvenile) to the Court. Counsel should refrain from waiving substantial rights or substituting his own view, or the parents’ wishes, for the position of the juvenile.

\* The use of the word parent hereafter refers to parent, guardian, custodial adult or person assuming legal responsibility for the child.

### **J 1.3 General Duties of Defense Counsel**

The role of counsel is to insure that the juvenile is afforded due process. Counsel should assert rights and raise all issues in the context of the case where strategically appropriate. This includes the filing of motions, supporting memoranda and handling the delinquency or youthful offender proceedings generally in accordance with the standards for performance in criminal proceedings.

- (a) Counsel’s primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
- (b) Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case. Counsel must also arrange for prompt and thorough consultation with the parent or guardian, said consultation to be within parameters established by the client.
- (c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients. It is recommended that counsel anticipate that juvenile clients will require more contact between court dates than the average adult client .

- (d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client.
- (e) Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
- (f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead delinquent or not delinquent and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.
- (g) The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.
- (h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
- (i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- (j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
- (k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
- (l) Where counsel is unable to communicate with the client or his or her guardian because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance including an interpreter for pre-trial preparation, interviews, and investigation, as well as in-court proceedings.
- (m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize inconvenience to others.

(n) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

### 3. Attorney Qualifications and Training

*Commentary.* No standard for attorney qualifications requires training or experience in the juvenile justice system. Compare relevant provisions in *Compendium* Volume I, “Administration of Defense Services,” and Volume II, “Attorney Performance Standards,” pages B2-B4. However, many, if not most, jurisdictions have continuing legal education requirements. Compare relevant provisions in *Compendium* Volume I, “Administration of Defense Services,” pages E26-E31.

#### ***Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases***

##### **E. Appointment of Counsel**

...

4. *Juvenile Delinquency.* To be eligible to serve as lead counsel in a case where a juvenile is alleged to be delinquent because he or she committed an act that would be Murder or a Class A or B felony if committed by an adult, an attorney shall meet the qualifications for appointment as provided in 1 or 2 above as may be appropriate. To be eligible to serve as lead counsel in other juvenile delinquency cases, an attorney shall have tried to completion a comparable case in adult court, or have at least one (1) year of experience in juvenile delinquency proceedings.

#### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

##### **III. A. 4. Juvenile Delinquency Cases**

Training Requirement: The training requirement is satisfied by attendance at a five-day seminar, *Zealous Advocacy*. The program is administered through Massachusetts Continuing Legal Education (MCLE) at various locations throughout the state several times a year.

##### **J 1.2 Education, Training and Experience Defense Counsel**

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

representation, including information about practices of prosecutors and other court personnel.

To provide competent representation in delinquency . . . , counsel must be familiar with [state law] . . . as well as relevant case law. Counsel should also be cognizant of the roles of the Department of Youth Services (DYS), Social Services (DSS), Mental Retardation (DMR), and Mental Health (DMH). Counsel should be aware of the various service delivery systems and placement processes. Counsel should have a basic understanding of the law regarding: DYPS classification procedures, Children in Need of Services (CHINS), Care and Protection, school suspension and expulsion, special education, and DSS Fair Hearings. Counsel should be aware that each of these other areas of law and social service systems has a potential overlap with the delinquency/youthful offender proceedings.

### ***Washington Defender Association, Standards for Public Defense Services***

#### **Standard Fourteen: Qualifications of Attorneys**

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
  - a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
  - b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. Trial attorneys' qualifications according to severity or type of case:
  - e. Juvenile Cases Class A Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
    - i. Minimum requirements set forth in section 1, and
    - ii. Either:
      - a. has served one year as a prosecutor; or
      - b. has served one year as a public defender; or
      - c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
    - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
  - f. Juvenile Cases Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
    - i. Minimum requirements set forth in Section 1; and
    - ii. Either:

- a. has served one year as a prosecutor; or
  - b. has served one year as a public defender; or
  - c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
- iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
- g. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

## 4. Independence of Counsel

**Commentary.** The independence of counsel is a basic precept of the adversary system. Compare *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages E5-E9.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **2.1 General principles concerning the provision and organization of legal services**

...

##### **D. Independence**

Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer–client relationship.

## C. Juvenile Defense Administration

The standards in this section address the following topics:

1. Organization of services
2. Workload
3. Attorney compensation
4. Support services
5. Monitoring system
6. Client eligibility

Compare relevant standards in *Compendium* Volume I, “Standards for the Administration of Defense Services.”

# 1. Organization of Services

*Commentary.* The standards for the organization of juvenile defense services track standards for criminal defense services. (See *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages F1 *et seq.*) However, they do not include any reference to contract defense services.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **2.2 Organization of Services**

#### A. In general.

Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

#### B. Defender systems.

##### (i) Application of general defender standards.

A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

##### (ii) Facilities.

If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

##### (iii) Specialization.

While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

#### C. Assigned counsel systems.

An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

## 2. Workload

*Commentary.* The ABA standards reiterate the important principle that attorneys should not overextend themselves. The three state standards set specific numerical guideposts for identifying excessive annual workloads. The standards agree that juvenile workload should be capped at a lesser number than that set for defense representation in misdemeanor cases, but they differ on the degree. Indiana sets a standard at two-thirds that for misdemeanor cases (200 juvenile cases versus 300 misdemeanor cases), Washington about one-third (250 juvenile versus 700 misdemeanor cases), and Minnesota only one-quarter (175 versus 700). See comparable provisions in *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages E49-E62.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **2.2 Organization of Services**

...

#### **B. Defender systems.**

...

##### **(iv) Caseload.**

It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

### ***Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases***

#### **J. Caseloads of Counsel**

The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

1. *Caseloads for Public Defenders Without Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office that does not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. The categories in Table 1 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

**Table 1**

Type of Case	Full Time	Part Time (50%)
<i>TRIAL</i>		
Juvenile delinquency	200	100

2. *Caseloads for Public Defenders With Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office with support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. The categories in Table 3 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

**Table 2**

Investigator Juvenile	One for every six attorneys
Secretary Juvenile	One for every five attorneys

**Table 3**

Type of Case	Full Time	Part Time (50%)
<i>TRIAL</i>		
Juvenile delinquency	250	125

***Minnesota Office of the State Public Defender, Caseload Standards for District Public Defenders in Minnesota***

**2. Recommended Caseload Standards**

The following caseload standards, per attorney, are recommended, with the understanding that each “type of case” line defines a full year’s work for an attorney:

<u>Type of Case</u>	<u>Full-Time</u>	<u>One-Half Time</u>
Other Juvenile	175 per year	87.5 per year

***Washington Defender Association, Standards for Public Defense Services***

**Standard Three: Caseload Limits and Types of Cases**

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel

should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

250 Juvenile Offender cases per attorney per year

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

### 3. Attorney Compensation

*Commentary.* Under the standard below, the scope of work for which an attorney should be compensated is greater than the scope for which criminal defense attorneys are traditionally compensated. See comparable provisions relating to attorney compensation and defender salaries in *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages G6-G8 and H15-H26.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **2.1 General principles concerning the provision and organization of legal services.**

...

###### B. Compensation for services.

- (i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client’s family.
- (ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer’s entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child’s resources alone.
- (iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client’s parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.
- (iv) Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

## 4. Support Services

**Commentary.** See comparable provisions in *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages E18-E25. Note that the ABA standards specially mention the need for experts in transfer hearings.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **2.1 General principles concerning the provision and organization of legal services**

...

##### C. Supporting services.

Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.

- (i) Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.
- (ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.

### ***ABA Juvenile Justice Standards Relating to Transfer Between Courts***

#### **2.3 The hearing**

...

- C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.

## 5. Monitoring System

**Commentary.** The ABA standards relating to juvenile justice include a unique concern for monitoring compliance with all appellate standards. There are no comparable standards for attorney duties in criminal court.

### ***ABA Juvenile Justice Standards Relating to Monitoring***

#### **3.1 Monitoring individual cases**

The primary responsibility for monitoring individual cases rests with counsel for the juvenile.

...

- D. Counsel should be cognizant of his or her monitoring capability in individual cases, and perform a monitoring function in accordance with these standards insofar as applicable in order to facilitate coordination and cooperation with systemic monitoring activities. When necessary, counsel should commence legal action, including filing of appropriate motions in juvenile court, seeking appellate review, initiating civil suits, and applying for writs, to compel the adoption of or compliance with standards and practices that provide a basis for monitoring.

#### **3.2 Establishment of lawyers' committee**

Whether counsel is provided by public defender or legal aid organization, arrangement with the private bar, or by some other means, a specific lawyers' committee of the bar association comprised of counsel representing juveniles in the juvenile justice system should be established on a local or regional basis, to systematically monitor the activities and performance of the juvenile justice agencies in accordance with the applicable provisions of these standards and the Counsel for Private Parties volume.

#### **3.3 Role of lawyers' committee**

In performing this monitoring function, the lawyers' committee should:

- A. advise, assist, criticize, and evaluate local or regional juvenile justice agencies;
- B. publish regular, periodic reports on its findings in all appropriate media;
- C. draft and disseminate comments on proposals for changes in legislation, rules, regulations, policies, and practices relating to activities of the juvenile justice system;
- D. ensure that the bases for monitoring provided for under these standards and the other volumes of the Juvenile Justice Standards Project or similar bases under the laws, rules, and regulations of the jurisdiction, are established and maintained;
- E. assist and cooperate with the monitoring activities conducted by any other monitoring mechanism to the fullest extent possible while preserving client confidentialities.

## 6. Client Eligibility

*Commentary.* As the final two paragraphs of this standard make clear, appointment of counsel in juvenile proceedings can have a different dynamic than in adult criminal cases. Compare applicable standards in *Compendium* Volume I, “Standards for the

### ***North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures***

#### **1. Guidelines for Determining Eligibility for Indigent Defense Services**

...

##### Section B. Juveniles

The eligibility guidelines for an adult defendant should be considered in determination of eligibility of juveniles.

The financial and legal responsibility of parents or adoptive parents is provided:

1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them.
2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if the parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter shall, unless undue financial hardship would ensue, be responsible for providing legal counsel and for paying other necessary expenses of representation for their child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word “parent” includes adoptive parents.

Consideration should also be given to potential conflicts of interest for attorneys employed by a juvenile’s family.

The judge should consider appointment of counsel for appropriate juveniles even if counsel is not requested by the juvenile or the parent.

## D. Counsel Appointment

Standards in this section address the following issues:

1. Scope of right to counsel
2. Time of appointment
3. Duration of appointment
4. Waiver of counsel

Compare standards in *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages B1-B17 and D1-D7.

# 1. Scope of Right to Counsel

**Commentary.** These standards implement the principle that counsel in juvenile proceedings is essential, as set forth above (page B2). See also *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages D2-D6.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **2.3 Types of proceedings**

#### **A. Delinquency...proceedings.**

- (i) Counsel should be provided for any juvenile subject to delinquency....
- (ii) Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency ....., including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile’s custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

## ***ABA Juvenile Justice Standards Relating to the Juvenile Probation Function***

### **2.13 Juvenile’s right to counsel at intake**

A juvenile should have an unwaivable right to the assistance of counsel at intake:

- A. in connection with any questioning by intake personnel at an intake interview involving questioning in accordance with Standard 2.14 or other questioning by intake personnel, and
- B. in connection with any discussions or negotiations regarding a nonjudicial disposition, including discussions and negotiations in the course of a dispositional conference in accordance with Standard 2.14.

## ***ABA Juvenile Justice Standards Relating to Transfer Between Courts***

### **2.3 The hearing**

- A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.

- B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.

## 2. Time of Appointment

**Commentary.** See also the relevant standards set forth in *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages B2-B5 and D2-D4.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **2.4 Stages of proceedings**

##### A. Initial provision of counsel.

- (i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile’s lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.
- (ii) In administrative or judicial postdispositional proceedings which may affect the juvenile’s custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

### ***ABA Juvenile Justice Standards Relating to Pretrial Proceedings***

#### **2.2 Initial appearance**

...

- C. At the initial appearance, counsel should be appointed if necessary, and a date should be set for the fact-finding hearing.

### 3. Duration of Appointment

**Commentary.** See comparable provisions in *Compendium* Volume I, “Administration of Defense Services,” page B6.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **2.4 Stages of proceedings**

...

B. Duration of representation and withdrawal of counsel.

- (i) Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.
- (ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer’s professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.
- (iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

#### ***ABA Juvenile Justice Standards Relating to Monitoring***

##### **3.1 Monitoring individual cases**

...

B. Counsel should be provided for the entire period during which the juvenile is under the jurisdiction of the court.

## 4. Waiver of Counsel

*Commentary.* Waiver of the right to counsel in juvenile justice proceedings is subject to several complications stemming from the status of the juvenile. See *Compendium* Volume I, “Standards for the Administration of Defense Services,” page D5.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **6.2 Waiver of the rights of mature respondents**

- A. A respondent considered by counsel to be mature should be permitted to act through counsel in the proceedings. However, the juvenile may not personally waive any right:
  - 1. except in the presence of and after consultation with counsel; and
  - 2. unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile’s counsel regarding the decision. If the parent requires an interpreter for this purpose, the court should provide one.
- B. The decision to waive a mature juvenile’s privilege against self-incrimination; the right to be tried as a juvenile or as an adult where the respondent has that choice; the right to trial, with or without a jury; and the right to appeal or to seek other postadjudication relief should be made by the juvenile. Counsel may decide, after consulting with the juvenile, whether to waive other rights of the juvenile.

## **E. Attorney Responsibilities Generally**

Standards here address two topics:

1. Acting diligently and promptly
2. Acting ethically

Compare standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages C1-C5.

# 1. Acting Diligently and Promptly

**Commentary.** The counterpart to the requirement that attorneys not accept cases they do not have the capacity to handle (pages D3-D5) is that the cases they do accept must be handled with professionalism.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **1.5 Punctuality**

A lawyer should be prompt in all dealings with the court, including attendance, submissions of motions, briefs and other papers, and in dealings with clients and other interested persons. It is unprofessional conduct for counsel intentionally to use procedural devices for which there is no legitimate basis, to misrepresent facts to the court or to accept conflicting responsibilities for the purpose of delaying court proceedings. The lawyer should also emphasize the importance of punctuality in attendance in court to the client and to witnesses to be called, and, to the extent feasible, facilitate their prompt attendance.

## 2. Acting Ethically

■ *Commentary.* The backdrop to all standards is the responsibility to act ethically.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **1.2 Standards in juvenile proceedings, generally. (Counsel governed by general standards of conduct.)**

A. As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

#### **1.3 Misrepresentation of factual propositions or legal authority**

It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discussions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client's responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense is a statement of the party's posture with respect to the proceeding and is not a representation of fact or of legal authority.

#### **3.4 Advice and service with respect to anticipated unlawful conduct**

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

#### **4.4 Relations with prospective witnesses**

The ethical and legal rules concerning counsel's relations with lay and expert witnesses generally govern lawyers engaged in juvenile court representation.

#### **7.5 Relations with court and participants**

- A. The lawyer should at all times support the authority of the court by preserving professional decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.
- (i) When court is in session, the lawyer should address the court and not the prosecutor directly on any matter relating to the case unless the person acting as prosecutor is giving evidence in the proceeding.

- (ii) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court, the prosecutor or probation department personnel.
- B. When in the company of clients or clients' parents, the attorney should maintain a professional demeanor in all associations with opposing counsel and with court or probation personnel.

### **7.7 Presentation of evidence**

It is unprofessional conduct for a lawyer knowingly to offer false evidence or to bring inadmissible evidence to the attention of the trier of fact, to ask questions or display demonstrative evidence known to be improper or inadmissible, or intentionally to make impermissible comments or arguments in the presence of the trier of fact. When a jury is empaneled, if the lawyer has substantial doubt concerning the admissibility of evidence, he or she should tender it by an offer of proof and obtain a ruling on its admissibility prior to presentation.

### **7.10 Argument**

The lawyer in juvenile court representation should comply with the rules generally governing argument in civil and criminal proceedings.

### **1.6 Public statements. (Juvenile counsel.)**

- A. The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.
- B. Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA Standards Relating to Fair Trial and Free Press.

## F. Lawyer–Client Relationship

Standards included here address the following topics:

1. Client meetings
2. Keeping client informed
3. Confidentiality
4. Resolving conflicts of interest
5. Advice to give client
6. Testimony by respondent
7. Decision making

Compare with standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages D1-D25.

# 1. Client Meetings

Commentary. See also the relevant provisions of *Compendium* Volume II, “Standards for Attorney Performance,” pages D2-D4.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **4.2 Interviewing the client**

- A. The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.
- B. In interviewing a client, it is proper for the lawyer to question the credibility of the client’s statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

## 2. Keeping Client Informed

**Commentary.** Again, the client's juvenile status requires more of counsel in dealing with the parent or guardian. See also the comparable standards in *Compendium* Volume II, "Standards for Attorney Performance," pages D5-D7.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **3.5 Duty to keep client informed**

The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation. This duty may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of confidentiality set forth in 3.3, above.

### 3. Confidentiality

*Commentary.* As the Massachusetts standards suggest, special rules may apply to confidentiality requirements in juvenile proceedings. Not discussed in the ABA standards is the question of how confidentiality requests affect parents or guardians. Compare provisions in *Compendium* Volume II, “Standards for Attorney Performance,” page D16.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **3.3 Confidentiality**

###### **A. Establishment of confidential relationship.**

Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer’s obligation of confidentiality makes privileged the client’s disclosures relating to the case.

#### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

##### **J 2.5 Special Concerns**

...

- (c) Counsel should be aware of the special privacy considerations given a juvenile, i.e., G.L. C.119, §65 requires all delinquency hearings be closed to the general public.
- (d) Counsel should be aware that delinquency papers are not public documents. However, after two findings of delinquency on felony charges, the probation officer may make public the juvenile’s name when the juvenile is charged with a third felony.

## 4. Resolving Conflicts of Interest

**Commentary.** Compare relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages D24-D28.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **3.1 The nature of the attorney-client relationship**

##### A. Client’s interests paramount.

However engaged, the lawyer’s principal duty is the representation of the client’s legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel’s advice or performance.

#### **3.2 Adversity of interests**

##### A. Adversity of interests defined.

For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:

- (i) Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.
- (ii) Formally represent more than one client and it is their duty to contend in behalf of one client that which may prejudice the other client’s interests at any point in the proceeding.
- (iii) Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client’s legitimate interests.

##### B. Resolution of adversity.

At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client’s selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

### ***ABA Juvenile Justice Standards Relating to Interim Status***

#### **8.1 Conflicts of interest**

The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. In every case, doubt as to a conflict should be resolved by the appointment of separate counsel for the child and by advising

parents of their right to counsel and, if they are unable to afford counsel, of their right to have the court appoint such counsel. All parties should be informed by the initial attorney that he or she is counsel for the juvenile, and that in the event of disagreement between a parent or guardian and the juvenile, the attorney is required to serve exclusively the interests of the accused juvenile.

## 5. Advice to Give Client

*Commentary.* The second and third ABA standards below once again demonstrate the breadth of issues raised in juvenile justice cases compared to those in criminal proceedings. Compare to the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages D8-D13.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **5.1 Advising the client concerning the case**

- A. After counsel is fully informed on the facts and the law, he or she should with complete candor advise the client involved in juvenile court proceedings concerning all aspects of the case, including counsel’s frank estimate of the probable outcome. It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case in order unduly or improperly to influence the client’s determination of his or her posture in the matter.
- B. The lawyer should caution the client to avoid communication about the case with witnesses where such communication would constitute, apparently or in reality, improper activity. Where the right to jury trial exists and has been exercised, the lawyer should further caution the client with regard to communication with prospective or selected jurors.

#### **5.3 Counseling**

A lawyer engaged in juvenile court representation often has occasion to counsel the client and, in some cases, the client’s family with respect to nonlegal matters. This responsibility is generally appropriate to the lawyer’s role and should be discharged, as any other, to the best of the lawyer’s training and ability.

#### **8.3 Advising and counseling the client concerning transfer**

Upon learning that transfer will be sought or may be elected, counsel should fully explain the nature of the proceeding and the consequences of transfer to the client and the client’s parents. In so doing, counsel may further advise the client concerning participation in diagnostic and treatment programs which may provide information material to the transfer decision.

## 6. Testimony by Respondent

**Commentary.** This standard must be read in conjunction with those requiring ethical behavior and confidentiality of client communications (page E3). There are no comparable standards for attorney duties in criminal court.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **7.9 Testimony by the respondent**

- A. It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.
- B. If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.
  - (i) If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.
  - (ii) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

## 7. Decision Making

**Commentary.** See also the relevant provisions in *Compendium* Volume II, “Standards for Attorney Performance,” pages D19-D23.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **5.2 (control and direction of the case)**

- A. Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:
  - (i) the plea to be entered at adjudication;
  - (ii) whether to cooperate in consent judgment or early disposition plans;
  - (iii) whether to be tried as a juvenile or an adult, where the client has that choice;
  - (iv) whether to waive jury trial;
  - (v) whether to testify on his or her own behalf.
- B. Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.
- C. If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

## **G. Attorneys' Initial Duties**

Standards included here address these issues:

1. Early release
2. Visiting detention facility
3. Acting promptly
4. Challenging prior counsel
5. Initial duties

See also *Compendium* Volume II, "Standards for Attorney Performance," pages E2-E7.

# 1. Early Release

**Commentary.** See also the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages E2-E6. The two ABACounsel for Private Parties standards here refer to specific juvenile justice features.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **6.1 Intake and early disposition, generally**

Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client’s rights.

### **6.4 Detention**

If the client is detained or the client’s child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child’s release from custody.

Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

## ***ABA Juvenile Justice Standards Relating to Interim Status***

### **8.2 Duties**

It should be the duty of counsel for an accused juvenile to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.

## 2. Visiting Detention Facility

**Commentary.** The special status of juveniles requires constant monitoring to ensure that standards are being adhered to, including visits to any detention facility or program.

### ***ABA Juvenile Justice Standards Relating to Interim Status***

#### **8.3 Visit detention facility**

Whenever an accused juvenile is held in some form of detention, the attorney should periodically visit the juvenile, at no less than seven day intervals, and review personally his or her well-being, the conditions of the facility, and opportunities to relax the conditions of detention or to secure release. A report on each such visit should be retained in the attorney's permanent file of the case.

### 3. Acting Promptly

**Commentary.** Compare this standard to relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages C2-C3. This general admonition must be integrated with other standards such as those for seeking early release.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **4.1 Prompt action to protect the client**

Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients’ interests.

## 4. Challenging Prior Counsel

*Commentary.* This is a unique provision for trial level counsel, although similar standards for challenging inadequate defense on appeal appear in *Compendium* Volume IV, “Standards for Appellate Representation.” There, of course, the relief sought for inadequate counsel is reversal of a conviction.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **10.7 Challenges to effectiveness of counsel. (Duty to assess prior counsel’s effectiveness.)**

A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel’s actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.

A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.

## 5. Initial Duties

**Commentary.** See also *Compendium* Volume II, “Standards for Attorney Performance,” pages E2-E6.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 2.1 Arraignment**

- (a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release as well as the procedure for appeal of the court’s decision. If the nature of the offense and/or the client’s record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, obtain the police report, review the client’s probation record, paying particular attention to any alleged defaults, and ascertain what other relevant information may be in the possession of the probation department or prosecution.
- (b) Counsel should familiarize him/herself with the particular arraignment practices of each session in which s/he appears. For example some courts routinely obtain school attendance records at arraignment.
- (c) In addition to meeting with the juvenile client, counsel should determine whether a parent is at the court in connection with the juvenile proceeding. Counsel should ascertain the adult’s ability and willingness to assume custody of the juvenile or to post bail for the juvenile. Counsel should be aware that the court will usually release a juvenile to the care and custody of a parent. Counsel should also be aware that most juvenile courts will not release a juvenile without an apparently responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.
- (d) Counsel should be familiar with the law regarding pre-trial detention on the grounds of “dangerousness.” If the commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.
- (e) Counsel should insure that the client does not waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.
  - (1) A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the

attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c.111(e), mediation, or a continuance without a finding.

- (2) Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or pretrial hearing as soon as practicable within fifteen (15) days. Counsel must discuss with the client his/her right to return to court within fifteen (15) days and may waive this right only after discussion with the client of the pros and cons of such a waiver.
- (3) Counsel should be aware of [laws] regarding pretrial evaluation of a juvenile. Counsel should consider and protect the juvenile's rights to relative confidentiality, evidentiary, and tactical issues.
- (f) Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility. Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel should be aware that children present special competency and criminal responsibility issues and should be alert for these issues.
- (g) Counsel should insure that every client (and parent) is provided with a card noting the next court date, an office appointment date, any other important dates, as well as complete information on how to contact the attorney.

### **J 2.2 Initial Interview and Preparation for Bail Hearing**

- (a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs.
- (b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- (c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of pretrial conditions of release. Such information should generally include:
  - (1) client's residence and length of time at that residence;
  - (2) family (names, addresses and phone numbers);
  - (3) health (mental and physical) and employment background;
  - (4) explanation of any court defaults and any other information on the record;
  - (5) probation/DYS/CHINS status;
  - (6) possible sources of bail money;
  - (7) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
  - (8) client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client) names, addresses and phone numbers;

- (9) client’s school placement, status, attendance, special ed designation;
  - (10) possible adults willing to assume responsibility for the juveniles and/or post bail;  
and
  - (11) the names and addresses of any agencies involved with the child and/or parent,  
e.g. DSS worker, DMH worker, community health center, etc.
- (d) Such information should be verified whenever possible.
- (e) Whether or not the client is detained, counsel should describe the court procedures and counsel’s obligation regarding the attorney/client privilege. Counsel should explain the client’s rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.
- (f) Counsel should obtain signed releases by the client and parent for mental health records, school records, DSS records, DYS records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information.

### **J 2.3 Bail or Detention Hearing**

- (a) Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- (b) Counsel’s argument to the court should include the client’s ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth’s case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client’s defense should not be revealed at the arraignment or bail hearing.
- (c) Counsel should be prepared to address the special issues of “dangerousness” that are the focus of hearings, and, where appropriate and possible, be ready to present “proffers” that address those issues.
- (d) Counsel should consider and advocate for reasonable conditions of release or recognizance such as pre-trial probation, electronic monitoring, “stay away” orders, curfews, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties.
- (e) ...Counsel should be aware that the statute provides for a presumption of personal recognizance. The focus of the bail hearing should be “whether the juvenile will appear for further court proceedings.” Counsel should oppose any bail order which is in the nature of preventive detention, such as “DSS or DYS only cash bail”, or any bail order where the purpose of detention is ostensibly for treatment. Counsel should

be careful in considering whether a “parent only cash bail” is tantamount to preventive detention.

- (f) Even if release is not effected, counsel should advocate for the least amount of bail. The amount of bail and type of charge may determine the type of facility where the juvenile will be held, i.e., lower bail may result in a less restrictive setting within DYS. Therefore, bail appeals must be considered in every case where bail is imposed and the client is detained.
- (g) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing. It is crucial that counsel learn the bail appeal procedures applicable to each jurisdiction in which they practice.
- (h) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court, the sheriff, and DYS to any special needs of the client, e.g., medical problems, and request the court to order appropriate measures.

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

- (a) Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. “911” or “turret” tape recordings. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client’s rights governing the prosecution’s efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.
- (b) Counsel should be aware that the Juvenile Court Rules of Procedure and [law] require that discovery be in writing, and request that this requirement be honored in appropriate circumstances.

#### **J 2.5 Special Concerns**

- (a) Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- (b) Where appropriate, counsel should consider the advantages and disadvantages of seeking cross-complaints.
- (c) Counsel should be aware of the special privacy considerations given a juvenile, i.e., [law] requires all delinquency hearings be closed to the general public.
- (d) Counsel should be aware that delinquency papers are not public documents. However, after two findings of delinquency on felony charges, the probation officer

may make public the juvenile's name when the juvenile is charged with a third felony.

## H. Pretrial Duties

The standards in this section address the following topics:

1. Client interviews
2. Discovery
3. Continuing duty
4. Duty to investigate
5. Making of motions

Compare standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages F1-F28.

# 1. Client Interviews

**Commentary.** See the standards for “Acting Promptly” in this volume, page E2. See also *Compendium* Volume II, “Standards for Attorney Performance,” pages D2-D15.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **4.2 Interviewing the client**

- A. The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.
- B. In interviewing a client, it is proper for the lawyer to question the credibility of the client’s statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

## 2. Discovery

*Commentary.* These standards largely parallel those found in *Compendium* Volume II, “Standards for Attorney Performance,” pages F12-F15. However, ABA Pretrial Standard 3.15 is unique to this context.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **7.3A Discovery**

Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

In seeking discovery, the lawyer may find that rules specifically applicable to juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

### ***ABA Juvenile Justice Standards Relating to Pretrial Proceedings***

#### **3.1 Scope of discovery**

In order to provide adequate information for informed intake screening, diversion, and pleas in delinquency cases, and to expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

#### **3.2 (Responsibilities of the trial court and of counsel)**

...

- B. Counsel for the petitioner and respondent should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the persons concerned.

#### **3.13 Investigations not to be impeded**

Subject to Standards 3.8 and 3.17, neither the counsel for the parties nor others officially involved in the case should advise persons having relevant material or information

(except the respondent) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

### **3.16. Custody of materials**

Any materials furnished to an attorney pursuant to these standards should remain in the exclusive custody of such attorney and be used only for the purposes of conducting the case, and should be subject to such other terms and conditions as the court may provide. In the discretion of counsel for the respondent, the contents of furnished material may be disclosed to the respondent and, subject to a mature juvenile's consent under Standard 6.5 A.2, to the respondent's parent or guardian ad litem. Counsel should exercise utmost caution before doing so if disclosure might cause injury or embarrassment to the respondent or any other person and if disclosure is not necessary to protect the respondent's interests in the proceedings.

## ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

### **J 5.5 Discovery Motions**

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

- (a) details of all identification procedures, including examination of any photographs shown and selected;
- (b) written and oral statements of defendant/co-defendant(s);
- (c) copies of statements by potential witnesses;
- (d) copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
- (e) inspection of physical evidence;
- (f) list of potential witnesses and addresses;
- (g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;
- (h) probation records of all potential witnesses;
- (i) copies of Grand Jury minutes;
- (j) exculpatory evidence, identified as specifically as possible, and including promises, rewards, and inducements made to witnesses;
- (k) any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.).

### **J 5.10 Discovery compliance**

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply. Juvenile Court Rules of Criminal Procedure require written compliance.

### 3. Continuing Duty

*Commentary.* This standard simply restates what is probably the law in most jurisdictions that provide for discovery process. There are no comparable provisions in the attorney performance standards for attorney duties in criminal court. However, see ABA's *Standards for Criminal Justice: Discovery and Trial by Jury*, 3rd Edition, 1996, Standard 4.2.

#### ***ABA Juvenile Justice Standards Relating to Pretrial Proceedings***

##### **3.15 Continuing duty to disclose**

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, such party should promptly notify the other party or opposing counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court should also be notified.

## 4. Duty to Investigate

*Commentary.* These standards are significantly less extensive than some of those set forth in *Compendium* Volume II, “Standards for Attorney Performance,” pages F2-F7.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **4.3 Investigation and preparation**

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client’s admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

#### **8.2 Investigation and preparation for transfer proceedings**

In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client’s rights.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 5.1 Investigation**

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client.

## 5. Making of Motions

**Commentary.** See also the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages F21-F28.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **7.3 B Other motions**

Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client’s rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client’s advantage.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 5.3 Pre-trial Motions and Affidavits**

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

#### **J 5.7 Substantive Pretrial Motions**

Among the motions that counsel should consider are

- (a) nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;
- (b) dismissal for unconstitutionality of the statute;

- (c) dismissal for insufficiency of the complaint or indictment;
- (d) dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury;
- (e) request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
- (f) severance or joinder of defendants or charges;
- (g) suppression of evidence obtained in violation of federal and Massachusetts law, i.e (1) illegally seized evidence, (2) “un-Mirandized” or involuntary statements, (3) identifications procured by impermissibly suggestive procedures. Counsel should take care to consider issues which may be unique to juvenile defendants such as the “interested adult rule” and school search scenarios;
- (h) funds for experts, investigators, interpreters, etc. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses ;
- (i) any other issues that are appropriate.

### **J 5.9 Motion Hearings**

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

- (a) investigation and discovery necessary to advance the claim;
- (b) careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
- (c) subpoenas for pertinent evidence and witnesses;
- (d) full understanding of the burdens of proof and evidentiary rules;
- (e) careful consideration of the benefits/costs of having the client testify;
- (f) careful preparation of any witnesses who are called, especially the defendant;
- (g) submission of a memorandum of law. (In some cases, a memorandum is required; in most cases it is advisable.) Proposed findings of fact and law are often advisable, as well.

# I. Transfer Hearings

This section includes standards on the following topics:

1. Transfer hearings
2. Post-hearing remedies

# 1. Transfer Hearings

*Commentary.* Transfer hearings to determine whether a juvenile should be charged as an adult rather than as a juvenile are unique proceedings. The procedure and rules governing the transfer hearing are unique to each jurisdiction. The Massachusetts standards presented below reflect the requirements of that state's law. Nonetheless, many aspects of these standards are relevant elsewhere.

## ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

### **J 3.1 Initiation of Transfer Hearing Request**

Counsel should be prepared to argue strenuously to the court, as well as to the assistant district attorney, that the case should not be heard as a transfer hearing, because the Commonwealth made an inadequate effort to bring the defendant into court before his/her 18<sup>th</sup> birthday or because such a proceeding would not be in the interests of justice. Counsel should also consider whether changes in the rest of the juvenile code have created new options for contesting this process.

### **J 3.2 Transfer Hearing Part A**

- (a) Counsel should be aware that transfer requires the judge to make a finding of probable cause that the defendant committed the charged offense. Counsel should always seek a complete and recorded probable cause hearing except in the most extraordinary circumstances. Counsel should order a copy of the tape or transcript. In many courts it will be appropriate to request a stenographer to assure a record of the hearing, given the poor quality of the recording systems around the state. Counsel should also argue that there is no statutory provision for substituting Grand Jury minutes for a hearing and that even if the Grand Jury minutes are admitted into evidence the defendant is still entitled to call any relevant witnesses.
- (b) Counsel should refer to Section IV, Probable Cause Hearings, of the Standards for Criminal Practice, for other issues relating to preparation for the hearing.

### **J 3.3 Transfer Hearing Part B**

- (a) Counsel should be aware of the statutory findings (protection and interests of the public) that [state law] requires the judge to make. Counsel should be prepared to argue that the judge must consider, but is not limited to, the five subsidiary factors listed in [state law]. Counsel should also be prepared to argue that the Court should apply a “clear and convincing” evidence standard of proof to be met by the prosecution.
- (b) Counsel must have up-to-date knowledge of the statutory and case law governing these findings.
- (c) Counsel shall, at a minimum, review, and unless inappropriate, obtain copies of the client’s psychosocial evaluations, social services records, psychological reports and evaluations, placement or program evaluations and reports, school records, and

medical history. Protective orders concerning access to and prosecutorial use of such information should be requested. Counsel should consider moving under *ex parte*, if possible, for independent evaluations, reports and histories. Counsel shall also facilitate and make substantial efforts to secure services through school, community agencies, DSS, DYS, or DMH, as appropriate.

- (d) Counsel should be prepared to present testimony by people who can provide helpful insight into the client's character, including: teachers, athletic personnel, counselors, DYS counselors, psychologists, community members, probation offices, religious affiliates, employers, or other persons with a positive personal and/or professional view of the defendant.
- (e) Counsel should be certain that all Part B proceedings are recorded. Counsel's file should contain notes of names, addresses and essential testimony at the Part B proceeding. Due to the inadequacies of recording systems and the importance of the hearing, counsel should consider a motion for funds to obtain a court reporter.
- (f) Counsel shall order the tape or transcript of Part A & B proceedings.

#### **J 3.4 Post Transfer Responsibilities**

- (a) After dismissal of the juvenile complaints, the youth is arraigned on adult charges; counsel should be prepared to argue bail. Counsel should consider arguing that the defendant be held in a DYS facility, even if the youth has attained the age of 19. Counsel should advise the client of his/her right to a bail appeal, and of the advantages and disadvantages of pursuing such an appeal.
- (b) Counsel shall carefully review the judge's findings to determine if the order of transfer is deficient. Where findings are deficient, counsel should file a Motion to Dismiss and/or Remand to Juvenile Court.
- (c) Counsel's motion, affidavit and memorandum should set forth relevant testimony or materials, or refer to the lack thereof, presented at the Part B hearing. Because these motions are not *de novo* proceedings, relevant portions of the part B hearing should be appended. If new counsel is representing the youth, he/she should confer with prior counsel who represented the client in the juvenile court and review the proceedings in detail. Counsel should ascertain whether there have been any significant personal or family changes arising since the conclusion of the juvenile court proceedings. Counsel should secure any further evaluations or other materials that are in the youth's best interest. New counsel should, as appropriate, confer with any representatives of state agencies or others involved with the youth.

## 2. Post-Hearing Remedies

*Commentary.* In many jurisdictions, a decision to transfer the juvenile to adult criminal court can be reviewed *de novo* in the criminal court. In other jurisdictions, review may be limited to an abuse of discretion standard. In others, no trial court review may be allowed.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **8.5 Posthearing remedies. (Transfer.)**

If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for post-transfer relief.

## **J. Plea Negotiations**

Standards included here address these topics:

1. Consideration of early disposition
2. Other plea-related duties

Compare standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages H1-H10.

# 1. Consideration of Early Disposition

**Commentary.** Compare related standards in *Compendium* Volume II, “Standards for Attorney Performance,” page H2.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **6.3 Early disposition**

- A. When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client’s consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.
- B. A lawyer should not participate in an admission of responsibility by the client for purposes of securing informal or early disposition when the client denies responsibility for the acts or conditions alleged.

### **7.1 Adjudication without trial**

Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client’s consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client’s participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client’s consent to participation in such a program.

## ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

### **J 6.1 Plea Negotiations**

- (a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.

- (b) Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.
- (c) Counsel is responsible for assuring that the juvenile understands the concept of plea bargaining in general, as well as the details of any specific plea offer made to him/her.
- (d) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based *solely* on the client's acknowledgement of guilt or *solely* on a favorable disposition offer.
- (e) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The client shall be kept informed of the status of the plea negotiations.

### **J 6.2 Client Decisions**

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

### **J 6.3 Preparation**

- (a) When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any, including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- (b) In advising a juvenile defendant regarding the consequences of a plea agreement, counsel must be certain that the client understands DYS placement policies including:

“staffing,” classification, secure treatment, residential treatment, tracking, Grant of Conditional Liberty (GCL), and revocation of GCL.

- (c) Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.

## 2. Other Plea-Related Duties

**Commentary.** See related standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages H11-H14.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 6.4 Consequences of Conviction**

Counsel must also advise the client of the consequences of a conviction, including:

- (a) the maximum possible sentence of all offenses;
- (b) mandatory minimum sentences where applicable;
- (c) effects of adult sentences on juvenile defendants;
- (d) different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- (e) potential liability for enhanced punishment after subsequent arrest;
- (f) possible Federal charges or penalty enhancements;
- (g) conviction consequences for non-citizens (G.L. c.278, §29D);
- (h) Sex Offender Registration Act (G.L., c.6, §§178C *et seq.*) and DNA Seizure and Dissemination Act (G.L., c.22E) requirements;
- (i) parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
- (j) potential civil liabilities;
- (k) potential housing consequences for the defendant and his/her family;
- (l) potential driving license consequences;
- (m) potential school suspension or expulsion consequences.

#### **J 6.5 Necessity of Admission of Guilt**

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

## **J 6.6 Disposition Argument**

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

## K. Trial

Standards here address these topics:

1. Juror selection
2. Witness examination
3. Other trial duties

See also *Compendium* Volume II, “Standards for Attorney Performance,” pages I1-I44.

# 1. Juror Selection

*Commentary.* As the ABA standards imply, important parallels between the criminal justice system and the juvenile justice system have serious implications for the latter's standards. See related standards in *Compendium* Volume II, "Standards for Attorney Performance," pages I8-I13.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **7.6 Selection of and relations with jurors**

Where the right to jury trial is available and exercised in juvenile court proceedings, the standards set forth in sections 7.2 and 7.3 of the ABA Standards Relating to the Defense Function should generally be followed.

## ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

### **J 7.4 Voir Dire and Jury Selection**

#### (a) Preparation

- (1) Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
- (2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to those procedures.
- (3) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
- (4) Counsel should develop and file in advance of trial written voir dire questions tailored to the particular case.
- (5) Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.
- (6) Counsel should consider asking for extra peremptory challenges
- (7) Counsel should consider requesting appropriate voir dire questions regarding the prospective jurors' attitude regarding the juvenile's age and credibility, as well as attitudes toward juvenile crime and whether the Juvenile Court is lenient with juvenile cases.

#### (b) Examining the Prospective Jurors

- (1) Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, “insanity” defenses.
- (2) Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
- (3) When appropriate, counsel should consider requesting individual juror voir dire even when case law does not require it, particularly if the proposed voir dire questions may elicit sensitive information.

(c) Challenges

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

## 2. Witness Examination

**Commentary.** See also the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages I20-I25.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **7.8 Examination of witnesses**

The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client’s interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client’s legitimate interests.

The lawyer’s knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.

It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 7.6 Confronting the Prosecution’s Case**

- (a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution’s case.
- (b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- (c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- (d) In preparing for and carrying out cross-examination, counsel should also:

- (1) develop a coherent and sensible theory of the case, along with the framework of the closing argument;
  - (2) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
  - (3) integrate cross-examination, the theory of the defense and closing argument;
  - (4) consider whether cross-examination of each witness is necessary or likely to generate helpful information;
  - (5) review and organize all prior statements and testimony of each witness;
  - (6) be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
  - (7) be alert to significant omissions or deficiencies in the testimony of any witness, e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics;
  - (8) consider using certified copies of prior convictions or pending cases of witnesses, keeping in mind that juvenile adjudications may be used in the same manner as adult convictions.
  - (9) be alert to all issues relating to witness competency or credibility, including bias or motive for testifying.
- (e) If counsel is surprised by any statement or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
- (f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
- (g) Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

### **J 7.7 Presenting the Defense Case**

- (a) Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- (c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate:

- (1) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
  - (2) after discussion with the client, make the decision whether to call any witnesses;
  - (3) develop a plan for direct examination of each potential defense witness;
  - (4) determine the implications that the order of witnesses may have on the defense case;
  - (5) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  - (6) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
  - (7) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  - (8) attempt to obtain the prior records of all defense witnesses.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
  - (f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses on suitable courtroom dress, demeanor and procedures, including sequestration.
  - (g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
  - (h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
  - (i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
  - (j) Counsel should guard against improper cross-examination by the prosecutor.
  - (k) Counsel should conduct re-direct examination as appropriate.
  - (l) At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each charged count and/or aggravating element.
  - (m) Counsel should keep a record of all exhibits identified or admitted.

### 3. Other Trial Duties

**Commentary.** The Massachusetts standards presented here parallel those for criminal court proceedings. See, generally, *Compendium* Volume II, “Standards for Attorney Performance,” pages I2-I7, I14-19, and I33-I40.

#### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

##### **J 7.1 General Trial Preparation**

- (a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
  - (1) summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable;
  - (2) summoning all potentially helpful physical or documentary evidence;
  - (3) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful, e.g., testing of physical evidence opinion testimony, etc.;
  - (4) obtaining and reading transcripts and other records of prior proceedings in the case or related proceedings;
  - (5) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case.
- (b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
  - (1) copies of all relevant documents in the case;
  - (2) relevant documents prepared by investigators;
  - (3) proposed voir dire questions;
  - (4) outline of opening statement;
  - (5) cross-examination plans for all possible prosecution witnesses;
  - (6) outline of argument for required findings of not guilty and authorities supporting it;
  - (7) direct examination plans for all prospective defense witnesses;
  - (8) copies of defense subpoenas;
  - (9) prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);

- (10) prior statements of all defense witnesses;
  - (11) reports from defense experts;
  - (12) a list of all defense exhibits, and the witnesses through whom each will be introduced;
  - (13) proposed jury instructions with supporting case citations;
  - (14) copies of all relevant statutes and cases, including statutes and cases relating to any potential lesser-included offenses;
  - (15) outline or draft of closing argument.
- (c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- (d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior bad acts, reputation testimony, prejudicial evidence) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
- (e) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and be fully informed of the applicable law and practices regarding:
- (1) preservation of each type of objection at every stage of the proceedings;
  - (2) offers of proof regarding evidence ruled inadmissible;
  - (3) recording of trial proceedings. Counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording.

### **J 7.2 Sequestration**

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police, if possible) for trial.

### **J 7.3 Bench Trial or Jury Trial**

- (a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.
- (b) Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

### **J 7.5 Opening Statement**

- (a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case.

- (b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- (c) Counsel's objectives in making an opening statement may include the following:
  - (1) to provide an overview of the theory of the defense case;
  - (2) to summarize the testimony of witnesses and the role of each in relationship to the entire case;
  - (3) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - (4) to identify the weaknesses of the prosecution's case;
  - (5) to remind the jury of the prosecution's burden of proof;
  - (6) to clarify the jurors' responsibilities;
  - (7) to personalize the client and counsel to the jury.
- (d) Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.
- (e) Counsel should be prepared to object the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

### **J 7.8 Closing Argument**

- (a) Before argument, counsel must file and should seek to obtain rulings on all requests for instructions in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- (b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- (c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
  - (1) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
  - (2) favorable inferences to be drawn from the evidence;
  - (3) incorporating into the argument:
    - (a) helpful testimony from direct and cross-examination;
    - (b) verbatim instructions drawn from the expected jury charge;
    - (c) responses to anticipated prosecution arguments;
  - (4) the effects of the defense argument on the prosecutor's possible rebuttal argument.

- (d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at conclusion of argument), requesting a mistrial, or seeking cautionary instruction.

### **J 7.9 Jury Instructions**

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

### **J 7.10 Taking Verdicts**

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

## L. Disposition/Sentencing

This section includes standards on the following topics:

1. Counsel's importance at sentencing
2. Duty to investigate
3. Client counseling
4. Hearing duties
5. Counseling after disposition
6. Continuing duty to client
7. Other disposition duties

Compare standards in *Compendium* Volume II, "Standards for Attorney Performance," pages J1-J31.

# 1. Counsel's Importance at Sentencing

**Commentary.** There is no comparable statement about the significance of counsel at sentencing in the standards relating to attorney duties in criminal court.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **9.1 (Active participation of counsel at disposition is essential.)**

The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

## 2. Duty to Investigate

*Commentary.* Sentencing practice has become much more significant in the past two decades. These standards underscore the importance of the attorney's tasks at sentencing. Compare *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **9.2 Investigation and preparation. (At disposition.)**

Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all witnesses material to the disposition decision.

If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 8.1 Preparation**

Defense counsel should be familiar with and consider:

- (a) the statutory penalties for each possible adjudication/conviction of the client, including each lesser-included offense and any repeat offender penalties. In particular counsel should be familiar with the sentencing provisions which distinguish between delinquency, youthful offender, and criminal adjudications.
- (b) the official version of the client's prior record, if any;
- (c) the position of the probation department with respect to the client;
- (d) the sentencing recommendation and memorandum, if any, of the prosecutor;

- (e) seeking the assistance of an expert—either through community resources, or the Committee for Public Counsel Services.
- (f) the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure to prosecution as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure and Dissemination, school suspension or expulsion, expulsion from public housing;
- (g) the sentencing practices of the judge, to the extent they may be determined;
- (h) the sentencing guidelines, as they would apply to the case;
- (i) referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing;
- (j) any victim impact statement to be presented to the court;
- (k) any other report to be presented to the court in aid of sentencing;
- (l) seeking an evidentiary hearing; e.g., restitution amount;
- (m) requesting a continuance for sentencing at a later date;
- (n) any other information or proposals that may be helpful to the client.

### 3. Client Counseling

*Commentary.* Several provisions below address issues that are unique to the juvenile justice context. See also *Compendium* Volume II, “Standards for Attorney Performance,” pages J2-J14.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **9.3 Counseling prior to disposition**

The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client’s responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client’s consent.

When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client’s cooperation with the person or persons administering the diagnostic procedure.

The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client’s history or condition or, if the client is a juvenile, the history or condition of the client’s parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer’s judgment based on knowledge of the client and the client’s family, revelation would be likely to affect adversely the client’s well-being or relationships within the family and disclosure is not necessary to protect the client’s interests in the proceeding.

## 4. Hearing Duties

*Commentary.* The ABA standards relating to counsel's duties at a disposition hearing include several that reflect the uniqueness of the juvenile court process compared to that used in criminal court. These standards for hearing duties are more detailed than those found in *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **9.4 Disposition hearing duties**

It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.

Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

...

- B. The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

## 5. Counseling after Disposition

**Commentary.** One unique feature of this standard is the duty to counsel compliance with the court's decision. By way of comparison, see *Compendium* Volume II, "Standards for Attorney Performance," pages J2-J14.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **9.5 Counseling after disposition**

When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and his or her family and to urge upon the client the need for accepting and cooperating with the dispositional order. If appeal from either the adjudicative or dispositional decree is contemplated, the client should be advised of that possibility, but the attorney must counsel compliance with the court's decision during the interim.

## 6. Continuing Duty to Client

*Commentary.* The ABA standards related to counsel's continuing duty to the client are far broader than those applicable to criminal defense attorneys, reflecting a significant difference in the roles played by counsel in the two different processes. While the Massachusetts standard below parallels standards applicable to criminal court attorneys, provisions similar (in thinking) to the ABA's are presented *supra* in this volume's "Role of Counsel" section, pages B3-B5.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **10.1 Relations with client after disposition**

The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.

If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

...

- B. The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 9.2 Continuing Duty to Represent**

Counsel remains responsible for the case and client until and unless another attorney assumes those responsibilities. Trial Counsel should file a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Counsel should be prepared to provide appellate counsel a complete copy of the client's file as well as complete cooperation in preparing the appeal.

## 7. Other Disposition Duties

**Commentary.** See also the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages J15-J20.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 8.2 Prosecution and Probation Recommendations**

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

#### **J 8.3 Pre-sentence reports**

- (a) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct inaccuracies before prejudice occurs.
- (b) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client’s Fifth Amendment rights, if appropriate.
- (c) Counsel should be aware that any juvenile sentenced as a youthful offender is entitled to have a pre-sentence investigation and report.

#### **J 8.4 Defense recommendations**

- (a) Counsel should carefully consider and discuss with the client any sentencing recommendations to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to commitment to DYS or incarceration as an adult, e.g., community services, educational services, rehabilitative programs, DSS services, including shelter care, foster placement, or residential placement, DMH or DMR services, outpatient counseling, inpatient drug treatment, and restitution.
- (b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- (c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Note that G.L. c.119 permits CWOFF even after trial for most charges. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses, e.g., reports or testimony from employers, community representatives and family.
- (d) Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

## **J 8.5 Dispositions**

- (a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- (b) Counsel should request a reasonable time period for the payment of any fines or restitution.
- (c) Counsel should make sure that the client fully understands the foreseeable consequences of the sentence, including any conditions or probation.
- (d) Counsel should make sure that the client understands the DYS Classification Grid, as well as the possibility of extension of DYS commitment. (Unless inappropriate, counsel should also advise the parent of these factors.)
- (e) Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- (f) Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- (g) If a DYS commitment results at disposition, it is highly recommended that counsel attend the case conference (also known as “staffing”) which takes place after an initial evaluation period of approximately three weeks. When attendance is not feasible, the attorney may call or write the assigned caseworker recommendations.
- (h) Counsel should be aware that delinquency findings on certain charges result in the juvenile’s case being presented to the secure treatment classification panel. Where appropriate, counsel should notify DYDS in writing of the desire to attend the classification proceedings in order to advocate for the client.

## **M. Postdispositional Hearing Duties**

Standards included here address the following topics:

1. Postdispositional hearings
2. Right to counsel on appeal
3. Cooperation with appeals counsel
4. Continuing counsel

# 1. Postdispositional Hearings

*Commentary.* The proceedings mentioned in this section are the equivalent of representation at both (1) motion hearings to reconsider sentencing based on change of status and (2) treatment status hearings (e.g., drug court hearings). As such, they can be compared with standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages J21-J22. Note that the Massachusetts standard here is unique to the juvenile justice context.

## ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

### **10.2 Postdispositional hearings before the juvenile court**

The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

## ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

### **J 5.2 Probation Surrender Hearings**

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

## 2. Right to Counsel on Appeal

**Commentary.** See also the relevant standards in *Compendium* Volume II, “Standards for Attorney Performance,” pages J25-J27.

### ***ABA Juvenile Justice Standards Relating to Appeals and Collateral Review***

#### **3.1 (Right to counsel on appeal.)**

Any party entitled to an appeal under Standard 2.2 is entitled to be represented by counsel, and the appointment of counsel at public expense upon a determination of indigency.

### ***Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures***

#### **J 9.1 Appellate Rights**

- (a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence and should file such motion in a timely fashion if requested to do so by the client or, if appropriate, to insure an accurate and legal sentence.
- (b) After advising the client of the right to appeal, trial counsel should implement the client’s decision in that regard. If an appeal is taken, trial counsel should timely file the appropriate notice of appeal and request either a tape or transcript of the prior court proceeding.
- (c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration. If the stay is denied, counsel should consider appealing the denial of the stay to a single justice of either the Appeals Court or the Supreme Judicial Court.

### 3. Cooperation with Appeals Counsel

**Commentary.** Section B of the ABA standard here is unique to the juvenile justice context.

#### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

##### **10.3 Counsel on appeal**

- A. Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.
- B. Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

## 4. Continuing Counsel

*Commentary.* See also *Compendium* Volume I, “Standards for the Administration of Defense Services,” pages B10-B11, and Volume II, “Standards for Attorney Performance,” pages J21-J24.

### ***ABA Juvenile Justice Standards Relating to Counsel for Private Parties***

#### **10.5 Postdispositional remedies, protection of the client’s right to treatment**

A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when postdispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

Counsel representing a client in postdispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client’s parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

The lawyer engaged in postdispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

#### **Counsel 10.6 Probation revocation, parole revocation**

Trial counsel should be prepared to continue representation if revocation of the client’s probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.

Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.