

LOUISIANA STANDARDS ON INDIGENT DEFENSE

CHAPTER 6

STANDARDS RELATING TO THE PERFORMANCE OF COUNSEL PROVIDING REPRESENTATION TO INDIGENTS

Purpose of Standards. The purpose of these standards is to provide recommended and aspirational guidelines for the consideration and use by district indigent defender boards as well as staff, contract, appointed, and *pro bono* counsel representing indigent clients. The immediate attainment of these standards by a district indigent defender board and indigent counsel is not a mandatory requirement for participation in the service and financial assistance programs of the Louisiana Indigent Defender Board. However, a district indigent defender board's assent to these standards as guidance for indigent counsel and as goals to be immediately worked toward and to be achieved over time, is a requirement for such participation.

These standards are intended to supplement and in no way abrogate the Rules of Professional Conduct. Nor are these standards in any way intended to confer upon indigent defendants substantive rights beyond those recognized by the federal and state constitutions and enactments of the legislature.

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Part I. General Standards

Standard 6-1.1. Role of Defense Counsel.

(A) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(B) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion and to render effective, quality representation.

(C) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Counsel has no duty to execute any directive of the accused which does not comport with law or such standards; he is the professional representative of the

accused, not his alter ego.

(D) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to counsel's attention, he or she should stimulate efforts for remedial action.

(E) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Counsel should comply with the *Louisiana Standards on Indigent Defense: Standards Relating to the Provision of Counsel to Indigents Accused of Capital Crimes*.

(F) Defense counsel is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct.

(1) Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards.

(2) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction.

(G) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(H) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

Standard 6-1.2. Delays; Punctuality.

(A) Defense counsel should act with reasonable diligence and promptness in representing a client.

(B) Defense counsel should avoid unnecessary delay in the disposition of cases. He or she should be punctual in attendance in court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

(C) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(D) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

(E) Defense counsel should not carry a workload that, by reason of its excessive size,

interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations, in accordance with *Louisiana Standards on Indigent Defense: Standards Relating to Workload for Counsel Providing Defense Services to Indigents*. Defense counsel should not accept representation of an accused for the purpose of delaying trial.

Standard 6-1.3. Client Interests Paramount.

The duties of a lawyer to his or her client are to represent his or her legitimate interests, and considerations of personal and professional advantage should not influence counsel's advice or performance.

Part II. Lawyer-Client Relationship

Standard 6-2.1. Establishment of Relationship.

(A) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives and scope of the representation. Counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

(B) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(C) Personnel of jails, prisons, and custodial institutions should be prohibited to any extent possible from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising from charges, detention, or incarceration.

Standard 6-2.2. Interviewing the Client.

(A) As soon as practicable, counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(B) Counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford counsel free rein to take action which would be precluded by counsel's knowing of such facts.

Standard 6-2.3. Acceptance of Fees.

Counsel appointed to represent an indigent client should not accept any form of payment for services from the accused or a third party on behalf of the accused. Payment for services to indigent clients should be to the district indigent defender board and in accordance with the *Louisiana Standards on Indigent Defense: Standards Relating to the Recovery and Recoupment of Costs Expended in Defense of Indigents*.

Standard 6-2.4. Prompt Action to Protect the Accused.

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

Standard 6-2.5. Advice and Service on Anticipated Unlawful Conduct.

(A) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(B) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which counsel knows to be illegal or fraudulent but counsel may discuss the legal consequences of any proposed course of conduct with a client.

(C) Defense counsel should not agree in advance of the commission of a crime to serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law.

(D) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

Standard 6-2.6. Duty to Keep Client Informed.

(A) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(B) Defense counsel should explain developments in the case to the extent reasonably

necessary to permit the client to make informed decisions regarding the representation.

Standard 6-2.7. Obligations of Standby Counsel.

(A) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(B) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

Part III. Investigation and Preparation

Standard 6-3.1. Duty to Investigate.

(A) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and 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. The duty to investigate exists regardless of the accused's admissions or statements to counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(B) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator or other third party where defense counsel's sole purpose is to obstruct access to such evidence.

Standard 6-3.2. Illegal Investigation.

Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

Standard 6-3.3. Relations with Prospective Witnesses.

(A) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(B) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for his or her reasonable expenses of attendance upon court, including transportation and loss of income, provided

there is no attempt to conceal the fact of reimbursement.

(C) It is not necessary for defense counsel or counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(D) Defense counsel should not improperly interfere with communication between prospective witnesses and the prosecutor.

(E) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

Standard 6-3.4. Relations with Expert Witnesses.

(A) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(B) Defense counsel should not pay an excessive fee for the purpose of influencing an expert's testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

Standard 6-3.5. Compliance with Discovery Procedure.

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

Part IV. Control and Direction of Litigation

Standard 6-4.1. Advising the Defendant.

(A) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case.

(B) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(C) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or

prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Standard 6-4.2. Control and Direction of the Case.

(A) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

- (1) What pleas to enter;
- (2) Whether to accept a plea agreement;
- (3) Whether to waive jury trial;
- (4) Whether to testify in his or her own behalf; and
- (5) Whether to appeal.

(B) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(C) If a disagreement on significant matters of tactics or strategy arises between defense counsel and his client, counsel should make a confidential, personal record of the circumstances, counsel's advice and reasons, and the conclusion reached. The confidential, personal record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Part V. Disposition Without Trial.

Standard 6-5.1. Duty to Explore Disposition Without Trial.

(A) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(B) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

Standard 6-5.2. Plea Discussions.

(A) Defense counsel should keep the accused advised of developments arising from plea discussions conducted with the prosecutor.

(B) Defense counsel should promptly communicate and explain to the accused all plea

offers made by the prosecutor.

(C) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(D) Defense counsel should not seek concessions favorable to one client which are to the detriment of the legitimate interests of defense counsel's client in another case.

(E) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to the guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

Part VI. Trial.

Standard 6-6.1. Courtroom Professionalism.

(A) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(B) Defense counsel should not engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(C) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.

(D) Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense Counsel has a right to make respectful requests for reconsiderations of adverse rulings.

(E) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

Standard 6-6.2. Selection of Jurors.

(A) Defense counsel should be prepared prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.

(B) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(C) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. Counsel should not intentionally use the voir dire to present factual matter which counsel knows will not be admissible at trial or to argue counsel's case to the jury.

Standard 6-6.3. Relations With Jury.

(A) Defense counsel should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during the trial. Defense counsel should avoid the reality or appearance of any such communications.

(B) Defense counsel should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(C) After discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way. If counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

Standard 6-6.4. Opening Statement.

Defense counsel's opening statement should be confined to a statement of the issues in the case and the evidence counsel believes in good faith will be available and admissible. Counsel should not allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

Standard 6-6.5. Presentation of Evidence.

(A) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

(B) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectional questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(C) Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the

judge or jury until such time as a good faith tender of such evidence is made.

(D) Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 6-6.6. Examination of Witnesses.

(A) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(B) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.

(C) Defense counsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify.

(D) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

Standard 6-6.7. Argument to the Jury.

(A) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(B) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

(C) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.

(D) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 6-6.8. Facts Outside the Record.

Defense counsel should not intentionally refer to or argue on the basis of facts outside the record unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

Standard 6-6.9. Post-trial Motions.

Defense counsel's responsibility includes presenting appropriate post-trial motions to protect the defendant's rights.

Part VII. After Conviction.

Standard 6-7.1. Sentencing.

(A) Defense counsel should, at the earliest possible time, be or become familiar with all sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including sentencing guidelines applicable at the sentencing stage. The consequences of the various dispositions available should be explained fully by counsel to the defendant.

(B) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the defendant. If a presentence report is made available to counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If no presentence report is prepared or if it is not disclosed, defense counsel should submit to the court and prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(C) Defense counsel should also insure that the defendant understands the nature of the presentence investigation process, and in particular the significance of statements made by the defendant to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

(D) Defense counsel should alert the accused to the right of allocution, if any, and to possible dangers of making a statement that might tend to prejudice an appeal.

Standard 6-7.2. Appeal.

(A) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and the defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal. Counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.

(B) Defense counsel should take whatever steps are necessary to protect the

defendant's rights of appeal. Defense counsel should perform in accordance with the *Louisiana Standards on Indigent Defense: Standards Relating to the Provision of Counsel to Indigents in Non-Capital Appellate Matters*.