Habeas Performance Standards with Commentary

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INTRODUCTION

Oregon Revised Statute 151.216(1)(j) mandates that the Oregon Public Defense Commission (OPDC) "[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state."

The following standards were developed by OPDC staff with input from a *habeas* provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

Each standard sets a baseline for practice of appointed defense work and is followed by commentary that supplements the baseline standards. OPDC recognizes that in any given case, some standards and commentary might be inapplicable or even mutually exclusive.

Commentary is particularly challenging as there are many times when the commentary is impractical or even against a client's best interest or desire. OPDC acknowledges that to practice law, exceptions to these baseline rules and their commentary must apply. The commentary provides additional considerations for counsel performing public defense. There are times when items listed in the commentary may be useful or helpful during representation. They are not meant to establish baseline minimum performance standards.

OPDC is grateful to Oregon Public Defense Commission *Habeas* Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 Role of Lawyer in *Habeas* Cases

The lawyer for a plaintiff in a *habeas* case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests. The lawyer should be familiar with applicable statutes, caselaw, and local court practices, and should stay aware of changes and developments in the law. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court. The lawyer should understand the difference between Post-Conviction Relief (PCR), Extradition, Direct Appeal, *habeas* (authority for confinement), and *habeas* (conditions of confinement).

Commentary:

1. *Habeas* lawyers should be aware of other available remedies to assure that they are exhausted prior to seeking *habeas*.

2. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.

3. A lawyer is bound by the client's definition of their best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. If a client lacks capacity to assist in their own litigation or if a lawyer reasonably suspects that they lack that capacity, the lawyer should follow Standard 2.3.

4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should exercise reasonable professional judgment regarding technical and tactical decisions and consult with the client on the strategy to achieve the client's objectives.

6. A lawyer should exercise reasonable professional judgment regarding the need for expert witnesses in the case, be familiar with and able to work with experts as defined in Standard 3.2, and immediately and continually assess the need for experts starting at appointment.

7. A lawyer assigned to actively assist a pro se plaintiff should be fully prepared about the matter. The lawyer should be prepared to advise the plaintiff and the court if a full representation role should be transferred to the lawyer at some point during the proceedings.

STANDARD 1.2 EDUCATION TRAINING AND EXPERIENCE OF *HABEAS* COUNSEL

A. A lawyer must be familiar with the statutes, the applicable substantive and procedural law, and its application in the jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay abreast of changes and developments in the law and with changing best practices for providing quality representation in *habeas* cases.

B. Prior to handling a *habeas* matter, a lawyer must have sufficient experience or training to provide quality representation. Prior to accepting appointment in a *habeas* case, a lawyer must be certified for that case type by OPDC.

Commentary:

1. A lawyer should remain proficient in the law, court rules, and practice applicable to *habeas* cases, and regularly monitor the decisions of Oregon Appellate Courts.

2. Lawyers should maintain membership in state and national organizations that focus on educating and training lawyers in *habeas* law. Lawyers should subscribe to professional listservs, if available, consult online resources, and attend continuing legal education programs relating to the practice of *habeas* law. A lawyer practicing *habeas* law should complete an average of at least 10 hours of continuing legal education training in civil procedure, civil rights, prisoner's rights, or related areas each year. Lawyers practicing

authority to confine *habeas* cases may supplement this requirement with criminal law CLEs specific to sentencing or extradition.

3. Before undertaking representation in a *habeas* case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. Less experienced lawyers should observe or serve as co-counsel with more experienced lawyers prior to accepting lead counsel responsibility for *habeas* cases. More experienced lawyers should mentor less experienced lawyers.

4. A lawyer providing representation in *habeas* cases should be familiar with key agencies and services typically involved in those cases or should know how to familiarize themselves as needed for their cases, such as the Oregon Department of Corrections, the Oregon Youth Authority, local juvenile departments, local community corrections programs, and private medical or treatment facilities and programs.

5. A lawyer should stay informed of the practices of the specific judge before whom a client they are representing is appearing.

6. Lawyers representing youth in *habeas* cases should be educated on and understand the additional trauma that youth in the prison system go through and should be prepared to provide resources to their clients to help them cope with that trauma.

STANDARD 1.3 OBLIGATIONS OF *HABEAS* COUNSEL REGARDING WORKLOAD

Before seeking appointment to act as counsel or accepting appointment, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a plaintiff in a *habeas* matter without hampering their representation of existing clients. Lawyers should be cognizant of ORS 34.362, that petitions claiming deprivation of a constitutional right require "immediate judicial attention", when evaluating their ability to accept representation in a

case. If, after accepting representation, the lawyer is unable to offer quality representation in the case, the lawyer must move to withdraw.

Commentary:

1. A lawyer should have access to sufficient support services and resources to allow for quality representation, including investigation resources (*see* Standard 3.1).

2. A lawyer should evaluate their ability to appear in court with clients when deciding whether to accept an appointment in a case. Lawyers should not overly rely on other lawyers to cover their appearances. A lawyer should appear personally for all critical stages of the case.

3. When possible, lawyers should appear in person or in the same manner as their clients.

STANDARD 2.1 OBLIGATIONS OF *HABEAS* COUNSEL AT APPOINTMENT

Lawyers are frequently appointed to *habeas* cases after the initial filings. As such, a lawyer must be familiar with the laws regarding amending petitions, the timelines for proceeding with a *habeas* case, and the available immediate remedies that can be sought. Lawyers should immediately begin gathering information needed for the Plaintiff's Replication. *See Standard 5.1.*

Commentary:

1. Initial petitions should contain a need for immediate judicial scrutiny and a lack of any other adequate and timely remedy. Lawyers should seek to amend pleadings/file the plaintiff's replication (*see* Standard 5.1).

2. Lawyers should be prepared to assist prospective clients with application for counsel as needed in the furtherance of justice.

3. A lawyer should promptly conduct client conflict checks and notify the appointing body of the need for substitution of counsel if it arises.

4. A lawyer should be familiar with the local practices including case docketing and processing, expected case events, the dates for upcoming court appearances, and the ability to expedite the proceedings under ORS 34.362.

5. As soon as practicable after appointment the lawyer should arrange to have client sign releases to get needed information early in the case, such as medical information in conditions of confinement cases.
   a. For authority for confinement cases the lawyer should seek the following information:
      i. The underlying criminal judgment;
      ii. The Oregon Department of Corrections' (ODOC) sentencing calculations;
      iii. Transcripts from the sentencing hearing.
   b. For extradition cases the lawyer should seek the following information:
      i. The Demand from the demanding state;
      ii. The Governor's Warrant;
      iii. Transcripts from the extradition hearing.

6. A lawyer should be prepared to preserve the client's rights and demand due process. A lawyer should make clear that the plaintiff reserves the following rights in the present matter and any other matter:
   a. Statutory right to request counsel with the court's discretion whether to make appointment;
   b. Right to decision on the motion to appoint counsel;
   c. Right to an expedited evidentiary hearing.

7. Within one day of appointment the lawyer should file motions to disqualify judges as needed. Motions should be filed according to local practices. There are varied practices regarding what constitutes a substantive pleading and lawyers need to act immediately to disqualify any judge they believe cannot act fairly and impartially in the case.

STANDARD 2.2 CLIENT CONTACT AND COMMUNICATION

A lawyer should always use clear communications, in developmentally appropriate language, and using an interpreter, as needed. A lawyer must conduct a client interview as soon as practicable after appointment but no longer than seven days after appointment. Thereafter, a lawyer must establish a procedure to maintain regular contact with the client in order to explain the nature of the proceedings, meet the ongoing needs of the client, obtain necessary information from the client, consult with the client about decisions affecting the course of the litigation, conduct a conflict check, and respond to requests from the client for information or assistance concerning the case.

Commentary:

1. A lawyer should provide a clear explanation of the role of both the client and the lawyer and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should elicit the client's point of view and encourage the client's full participation in the litigation of the case.

2. Client communication should be in a private setting that allows for a confidential conversation. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. Counsel should meet in person as needed to prepare the client for testimony and evidentiary hearings.

3. At the initial meeting, the lawyer should review the initial petition filed by the client and be prepared to discuss the necessary elements of *habeas*, the procedure the client will be facing in subsequent court appearances, possible remedies if the client prevails, and should inquire if the client has any immediate needs regarding securing evidence or obtaining interim relief.

4. At the initial meeting, the lawyer should discuss the need for releases of information (ROI) and assure the client signs and returns them.

5. A lawyer should advise the client of the consequences of prevailing on the *habeas* as well as the consequences of not prevailing.

6. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the case. Such information may include, but is not limited to:
    a. The facts surrounding the client's petition or case;
    b. Any possible witnesses who should be located;
    c. Any evidence that should be preserved, specifically including video recordings that might be overwritten;
    d. Where appropriate, evidence of the client's competence.

7. During an initial interview with the client, a lawyer should.
    a. Obtain information concerning the following as applicable to the type of case:
        i. The client's history within the institution including how long they have been incarcerated at a particular institution, family history of health conditions including mental health conditions, client's disciplinary history;
        ii. The client's history of service in the military, if any;
        iii. The client's current and historical physical and mental health concerns;
        iv. Where to locate necessary records;
        v. Prior incarcerations, current place of incarceration, and place of incarceration at the time of filing;
        vi. The client's immediate medical needs, if any;
        vii. The client's expected release date, length of time in custody, eligibility for early release;
        viii. Contact information for client, their family, or other resources where the client can be contacted in the event they are released from custody.
        ix. The names of individuals, or other sources, that counsel can contact to verify the information provided by the client or who could provide other background information and the client's permission to contact these individuals;
        x. For extradition cases, the lawyer should consider asking their client for information regarding:
            A. Challenges to identity;
            B. Challenges to fugitive status;

C. The client's presence or lack thereof in the demanding state at the time of the alleged incident.

b. Provide the client information and advice including but not limited to:

i. An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;

ii. A warning to keep confidential communication between themselves and the lawyer/lawyer's staff. Everything they say may become part of their case;

iii. The petition and any potential ramifications of its filing;

iv. The ability to amend the initial petition;

v. A general procedural overview of the progression of the case, where possible;

vi. That communication with people other than the lawyer's team is not privileged and may be monitored;

vii. That all calls and video visits not using the attorney phone are recorded and not confidential and emails are never confidential;

viii. That the client should make and keep written records of communication with the institution through filing kytes regarding:

A. Sentence calculations in authority for confinement cases;

B. In conditions of confinement cases, any condition relevant to the case -such as medical care requested, received, or denied, air quality, access to services, etc.- encountered while incarcerated.

8. Frequency and Manner of Client Contact

a. Following their initial contact with the client, lawyers should speak with their clients no less than once per month to obtain information and update the clients on the status of their case.

i. All calls should use the attorney line;

ii. If feasible, at least once during the pendency of the case the lawyer should meet the client in person;

iii. Lawyers should meet with their client in person as needed throughout the case;

iv. Letters are not a substitute for client contact.

b. Lawyers should continue having contact with their clients as required throughout the case and following case resolution according to Standards 8.2, 9.1, and 9.2.

STANDARD 2.3 WORKING WITH CLIENTS WHO HAVE DIMINISHED CAPACITY

A lawyer must be able to recognize the symptoms of clients with diminished capacity and should follow the Oregon Rules of Professional Conduct, Rule 1.14, when representing those clients. Lawyers should act to preserve all their client's rights and should seek expert assistance as needed. In extreme cases lawyers should consider seeking the appointment of a Guardian Ad Litem or Conservator as needed to fully protect the client's rights. Lawyers representing clients with diminished capacity should continue to seek the lawful objectives of their client and not substitute their judgment for that of their client.

Commentary:

1. A lawyer should assess whether the client's level of functioning limits their ability to communicate effectively with counsel, as well as their ability to have a factual and rational understanding of the proceedings.

2. In deciding whether to request a competency determination, a lawyer should consider, among other things:
   a. Their obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
   b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.

3. If the lawyer decides to proceed with a competency hearing, they should secure the services of a qualified expert.

4. A lawyer should continue to evaluate a client's fitness throughout the case and should take appropriate action if a client's mental health deteriorates.

STANDARD 3.1 INVESTIGATION

A lawyer has the duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for hearing, and to best advise the client as to the possible outcomes of the case. A lawyer has a duty to be familiar with the process to request funding for an investigator from OPDC if they do not have access to an in-house investigator. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. Retain an investigator as soon as possible after appointment in conditions of confinement cases. In authority to confine and extradition cases a lawyer should retain an investigator as soon as possible if the lawyer determines an investigator is needed.

2. A lawyer should obtain copies of the petition, order to show cause, defendant's response, and writ, and should examine them to determine the specific issues that the client raised and the elements of each.

3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2.

4. A lawyer should carefully review all documents received as part of their investigation or discovery and should assess their value to the client. Lawyers should create a system for organizing or cataloging documents and note taking at the beginning of their case to facilitate document review throughout the case.

5. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if

necessary, to testify as a plaintiff's witness at the evidentiary hearing. When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons).

6. A lawyer should obtain all relevant prior records of the client and witnesses, including criminal, juvenile, disciplinary, education, mental health, medical, and drug and alcohol use or treatment, where appropriate.

7. A lawyer should always consider whether to reduce investigation to writing and should instruct their investigators to only do so after consultation with the lawyer.

8. A lawyer may not intentionally destroy evidence in a case and should comply with all statutes governing discovery to the defense.

STANDARD 3.2 EXPERTS

A lawyer should immediately and continually evaluate the need for experts in the case and should obtain any necessary expert for either consultation or testimony or both. A lawyer must be aware of available types of experts that may be needed to properly litigate their case. A lawyer has a duty to be familiar with the process to request funding for experts from OPDC.

Commentary:

1. Experts will be used more often in conditions of confinement cases and practitioners should utilize experts in most of their conditions of confinement cases. Lawyers in authority for confinement and extradition cases may not need to employ experts, but practitioners in those cases should be aware of the rules for experts.

2. Lawyers should not overly rely on their own knowledge of a given subject and should use experts to offer consultation on viability of

claims as early in the case as possible and to offer testimony as needed to prove their case.

3. Lawyers should consider using engagement letters for any expert used on their case which clearly outline the lawyer's expectations of the expert, privilege rules, and an understanding of the expert's duty of confidentiality.

4. A lawyer should be aware of the appeals process in the event that OPDC denies funding the lawyer believes is reasonably required for the case.

5. A lawyer should be aware of how to seek needed experts if the lawyer does not have one readily available. A lawyer should be familiar with the process of obtaining lists of experts in a given field from OPDC.

6. Lawyers should independently evaluate the quality of an expert prior to engagement and should consider any evidence that would be available to the defense to impeach that expert. Lawyers should review this evaluation regularly, even with often used experts.

7. A lawyer should understand the difference between an expert used to advise the plaintiff's team and an expert used to testify and how to assure that an advisory expert does not unintentionally shift to a testimonial expert requiring disclosure to the defense.

8. A lawyer may choose whether to disclose the identity of experts pre-hearing and should, prior to disclosure, consider whether maintaining the expert's anonymity is advantageous. Lawyers may use anonymous declarations where appropriate to maintain anonymity of experts. *See Stevens v. Czerniak,* 336 OR 392, 403-404 (2004).

9. A lawyer should adequately prepare all experts for testimony, including likely questions on cross-examination.

STANDARD 4.1 DISCOVERY

A lawyer has the duty to pursue formal and informal discovery in a prompt fashion upon appointment and to continue to pursue opportunities for discovery throughout the case. A lawyer must be familiar with all applicable statutes, rules, and case law governing discovery including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the defense has engaged in discovery violations.

Commentary:

1. Lawyers should assure that the defendant has been served with the petition or order to show cause prior to filing discovery demands in accordance with Oregon Rules of Civil Procedure (ORCP) 43(B)(1).

2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions as soon as possible following appointment. The lawyer should continually seek all information to which the client is entitled. Requests should specify the timeframe and type of records sought.

3. In conditions of confinement cases discovery should include, but is not limited to, the following:
   a. All ODOC documents regarding the client's medical and mental health care while under the jurisdiction of the ODOC;
   b. All ODOC documents regarding discipline and/or complaints while under the jurisdiction of ODOC;
   c. All kytes or grievances from the client to the ODOC and responses to client's kytes.
   d. Names and addresses of defense witnesses.
   e. Prison Rape Elimination Act (PREA) records or records related to PREA requests including Special Investigation Unit (SIU) files.
   f. Client's DOC400 file (the plaintiff's electronic prison record from DOC)

4. The lawyer should follow up on all discovery or requests for production regularly to assure that they have all the needed information.

5. Lawyers should follow all scheduling orders issued by the court and should consider actively proposing favorable timelines for discovery.

6. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the plaintiff to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a basis exists to shield information in the possession of the plaintiff from disclosure.

7. A lawyer should be familiar with the applicable remedies for defense failing to provide discovery and should pursue the applicable remedies in their cases. A lawyer should file motions to compel in order to secure defendant's compliance with the discovery rules and motions to exclude if the defense fails to provide discovery according to their obligation.

8. A lawyer should take appropriate actions seeking to preserve evidence where it is at risk of being destroyed or altered.

9. Lawyers should not rely on discovery to provide all information in the case and should not assume that defense lawyers are compliant with discovery obligations unless the lawyer has verified the compliance.

STANDARD 4.2 THEORY OF THE CLAIMS FOR RELIEF

A lawyer should develop and continually reassess a theory of the client's claims for relief that advances the client's goals and encompasses the realities of the client's situation.

Commentary:

1. A lawyer should use the theory of the claims for relief when evaluating strategic choices throughout the course of the representation.

2. A lawyer should be able to concisely explain the theory of the claims for relief to a lay person.

3. A lawyer should allow the theory of the claims for relief to focus the investigation and hearing preparation, seeking out and developing facts and evidence that the theory makes material.

4. A lawyer should expect the claims to change as the case progresses and the plaintiff's team receives new information. Lawyers should remain flexible enough to modify or abandon claims or theories if they no longer serve the client.

STANDARD 5.1 PLAINTIFF'S REPLICATION

To draft the replication a lawyer should review the plaintiff's initial *pro se* filing. Once the lawyer has thoroughly interviewed the plaintiff, had sufficient discovery, and had sufficient time for experts to review the claims in the *pro se* filings, the lawyer should file a Replication that clearly gives notice of the client's claims for relief.

Commentary:

1. Claims for relief may change after the Replication is filed. If the claims change the lawyer should promptly seek to amend the Replication.

2. Lawyers should adhere to all court timelines for filing the Replication and should not miss filing deadlines.

3. Lawyers should be aware of the preferences of the court and the applicable laws for the citation of law in the Replication and should comply with those standards.

STANDARD 5.2 PRE-HEARING MOTIONS

A lawyer should research, prepare, file, and argue appropriate pre-hearing motions whenever there is reason to believe they would benefit their client. A lawyer must be knowledgeable of all motion deadlines that may apply to their case. Lawyers may not miss filing deadlines.

Commentary:

1. A lawyer should respond to Defendant's Motion to Dismiss within the statutory timeframe. In *habeas* cases, motions to dismiss are the

equivalent to motions for summary judgment, though the standards are different in some ways. Lawyers should know the rules of summary judgment as well as the rules for responding to motions to dismiss. Lawyers should demonstrate facts in controversy necessary to win a motion to dismiss.

2. The decision to file a particular pre-hearing motion should be made by the lawyer after thorough investigation, discussion with their client, and considering the applicable law in light of the circumstances of the case.

3. Among the issues the lawyer should consider addressing in pre-hearing motions are:
   a. Motions for Summary Judgment;
   b. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice if filed within 24 hours of the judicial officer receiving the case;
   c. The discovery obligations of both the plaintiff and the defense, including:
      i. Motions for protective orders;
      ii. Motions to compel discovery;
      iii. Motions to exclude for violation of discovery rules;
      iv. Motions for access to records of other Adults in Custody which may be requested for 'Attorney Eye's Only' Protective Order to access unredacted records.
   d. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts;
   e. The plaintiff's right to an expedited hearing;
   f. The right to a continuance in order to adequately prepare and present the plaintiff's case or to respond to defense motions;
   g. Motion for extension of time for pleadings;
   h. Matters of evidentiary hearing evidence that may be appropriately litigated by means of a pre-hearing motion in limine, including:
      i. The relevance of evidence that is expected to be presented by or objected to by the defense;
      ii. The admissibility of particular witnesses, including experts, lawyers may also litigate this issue during an evidentiary hearing; and
      iii. The use of reputation or other character evidence.

4. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should consult with their client and carefully consider all facts in the case, applicable law, case strategy, and other relevant information.

STANDARD 5.3 OBLIGATION TO RENEW MOTIONS

During an evidentiary hearing or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pre-hearing but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pre-hearing motion if new supporting information is disclosed in later proceedings.

Commentary:

None

STANDARD 6.1 EXPLORATION OF SETTLEMENT

A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of the client's case. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without an evidentiary hearing. A lawyer cannot accept any negotiated settlement without the client's express authorization.

Commentary:

1. A lawyer should explain to the client the strengths and weaknesses of the defense's case, the timeframes for addressing the client's claims through settlement and through an evidentiary hearing, the benefits and consequences of considering a non-hearing disposition, any investigation which has been or could be conducted, and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-hearing disposition.

2. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by settlement or continuing to an

evidentiary hearing including the impact of settlements on future claims for damages.

3. With the consent of the client, a lawyer should explore with the defense available options to resolve the case without an evidentiary hearing. Throughout negotiation, a lawyer should zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for settlement.

4. A lawyer should keep the client fully informed of continued negotiations and convey to the client any offers made by the defendant. The lawyer should attempt to ensure that the client has adequate time to consider the settlement. A lawyer should advise clients about their opinion of any settlement offers but may not substitute their judgment for that of their client.

5. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's case even while engaging in settlement negotiations.

6. Before conducting negotiations, a lawyer should be familiar with:
   a. The types, advantages, disadvantages, enforceability and applicable procedures and requirements of available settlements;
   b. Whether agreements between the client and the defendant would be binding on the court, the parties, or other interested people or organizations; and
   c. The practices and policies of the particular defending authorities and judge that may affect the content and likely results of any negotiated settlement.

7. A lawyer should identify negotiation goals with the following in mind:
   a. Concessions that the client might offer to the defense, including an agreement;
   b. Benefits to the client from making an agreement with the defense.

8. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-hearing disposition, and to

explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

9. A lawyer should not recommend that the client enter a settlement unless an appropriate investigation and evaluation of the case has taken place, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

STANDARD 6.2 ENTRY OF SETTLEMENT

The decision to enter into a settlement agreement rests solely with the client. A lawyer must not unduly influence the decision to enter a settlement and must ensure that when a client enters a settlement they do so voluntarily. Counsel must ensure the client has an intelligent understanding of the terms, conditions, and consequences of the settlement, including what rights the clients will forfeit.

Commentary:

1. A lawyer has the duty to be familiar with local detention practices as well as statewide detention practices such as time served calculations, work release, alternatives to incarceration, etc.

2. A lawyer has the duty to explain to the client the process that the client will go through to enter a settlement and the role that the client will play in the process. The lawyer should explain to the client that the court may in some cases reject the settlement.

STANDARD 7.1 GENERAL EVIDENTIARY HEARING PREPARATION

A. An evidentiary hearing is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A plaintiff's lawyer must be prepared on the law and facts and competently plan the litigation of the client's case.

B. A lawyer should develop, in consultation with the client and members of the litigation team, an overall strategy for the conduct of the evidentiary hearing.

C. A lawyer must, in advance of the evidentiary hearing, subpoena necessary witnesses, and develop outlines or plans for opening, closing, and anticipated direct and cross examinations.

D. A lawyer should file a hearing memorandum outlining the plaintiff's case including the expected witness testimony and arguments in their favor. Hearing memorandums need not disclose the testimony of experts unless doing so would be advantageous. If lawyers chose not to disclose their experts pre-hearing, they should be prepared to cite *Stevens vs. Czerniak*, 336 OR 392, 403-404 (2004). Lawyers should file hearing memorandums in a timely manner according to the court's scheduling order.

Commentary:

1. A lawyer should consider how much time the case will require for evidentiary hearing and make scheduling requests accordingly.

2. A lawyer should be aware of the court's available time for hearings and that if a longer than average hearing duration is requested it may delay the hearing.

3. A lawyer should assure that any witnesses provide declarations to the lawyer far enough in advance of the evidentiary hearing.

4. A lawyer should ordinarily have the following materials available for use at the evidentiary hearing:
   a. Copies of all relevant documents filed in the case;
   b. Relevant documents prepared by investigators;
   c. Outline or draft of opening statement;
   d. Direct examination plans for all prospective plaintiff's witnesses;
   e. Cross-examination plans for all possible defense witnesses;
   f. Copies of plaintiff's subpoenas;
   g. Prior statements of all witnesses (e.g., transcripts, reports, etc.);
   h. Reports from experts;
   i. The CVs of any experts expected to testify at the evidentiary hearing;
   j. Training and other available records for any professional witnesses who are expected to testify;
   k. A list of all exhibits and the witnesses through whom they will be introduced;
   l. Originals and copies of all documentary exhibits;

m. Proposed bench instructions with supporting authority;
n. Copies of all relevant statutes and cases;
o. Evidence codes and relevant statutes and/or compilations of evidence rules most likely to be relevant to the case;
p. Outline or draft of closing argument; and
q. Evidentiary hearing memoranda outlining any complex legal issues or factual problems the court may need to decide during the evidentiary hearing.

5. Lawyers should have these documents prepared for use in a digital format and should be prepared to use the share screen function of a virtual hearing as needed for presentation of evidence.

6. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the evidentiary hearing process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the evidentiary hearing. The lawyer should analyze potential defense evidence for admissibility problems and develop strategies for challenging evidence. The lawyer should be prepared to address objections to plaintiff's evidence or testimony. The lawyer should consider requesting that non-expert witnesses be excluded from the evidentiary hearing.

7. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at the evidentiary hearing and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings in accordance with Standard 5.2.

8. If the ability of the lawyer to provide live witness testimony is challenged, the lawyer should file motions to allow live testimony, cross examination, and rebuttal testimony according to the applicable statutes allowing such.

9. A lawyer should consider the advantages and disadvantages of entering pre-hearing stipulations concerning evidence. Lawyers should only enter stipulations to evidence in circumstances where there are clear benefits to the client.

10. Throughout the evidentiary hearing process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all evidentiary hearing proceedings be recorded.

11. A lawyer should plan with the client the most convenient system for conferring privately throughout the evidentiary hearing. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during all evidentiary hearing proceedings.

12. As soon as practicable after appointment, a lawyer should consider whether the assistance of a co-counsel, associate counsel, or second chair would be beneficial to the client and, if so, attempt to obtain approval for the same as soon as possible.

STANDARD 7.2 OPENING STATEMENTS

An opening statement is a lawyer's first opportunity to present their case. The lawyer should be prepared to present a coherent statement of the plaintiff's theory based on evidence likely to be admitted at the evidentiary hearing.

Commentary:

1. A lawyer's objective in making an opening statement should include the following:
   a. Provide an overview of the plaintiff's case, emphasizing the plaintiff's theme and theory of the case;
   b. Identify the weaknesses of the defense's case;
   c. Discuss the plaintiff's burden of proof and how it is met;
   d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
   e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
   f. State the ultimate inferences which the lawyer wishes the court to draw; and
   g. Humanize the client.

2. A lawyer should listen attentively during the defense's opening statement to note potential promises made by the defense that could be used in summation.

3. A lawyer should give an opening statement unless not doing so would allow more time for the presentation of the case, the issues were well briefed in the evidentiary hearing memorandum, and the judge read the evidentiary hearing memorandum.

STANDARD 7.3 PRESENTING THE PLAINTIFF'S CASE

A lawyer should present evidence at the evidentiary hearing which will advance the theory of the case that best serves the interest of the client, meets the requirements of proof for the claim, satisfies the plaintiff's burden of proof, and is convincing to the trier of fact.

Commentary:

1. A lawyer should be aware of the elements required to prove their claims and of the burden of production.

2. A lawyer should develop, in consultation with the client and plaintiff's team, an overall strategy for the case.

3. In preparing for presentation of a plaintiff's case, a lawyer should:
   a. Develop a plan for direct examination of each potential plaintiff's witness and assure each witness's attendance by subpoena;
   b. Determine the implications that the order of witnesses may have on the case; and
   c. Consider the best use and order of expert witnesses.

4. A lawyer should offer expert testimony through live presentation of the expert witness and should not rely on written declarations to the exclusion of live testimony.

5. A lawyer should carefully advise their client on whether to offer testimony in their own case. The decision to testify rests with the client. Clients may rely on a declaration in proving their case.

6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.

7. In developing and presenting the plaintiff's case, a lawyer should consider the potential cross-examination topics of the defense lawyer.

8. A lawyer should conduct redirect examination as appropriate.

STANDARD 7.4 CONFRONTING THE RESPONDENT'S CASE

The lawyer should rely on the theme and theory of the case to direct the confrontation of the respondent's case. Whether it is refuting, discrediting, or diminishing the respondent's case, the theme and theory should determine the lawyer's course of the evidentiary hearing.

Commentary:

1. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. A lawyer should be prepared to question witnesses regarding prior statements which they may have made or adopted, documents subject to disclosure, and to develop further material for impeachment beyond what was found during pre-hearing investigation.

2. As needed, but particularly in conditions of confinement cases, lawyers should review the licensing for medical staff or other witnesses with professional licenses. Lawyers should review previous publications of witnesses and request all disciplinary actions involving the witnesses from their licensing boards. Some licensing information may only be available if specifically requested from the licensing board.

3. Lawyers should fully question defense witnesses' qualifications to act as experts and the truth of the declaration or affidavit prepared on their behalf by defendant's counsel.

4. Lawyers should thoroughly prepare for cross-examination of all the defense's witnesses, in preparation for cross-examination lawyers should consider:
   a. The need for factual development;
   b. The need to meet the plaintiff's burden;
   c. The need to discredit the defense witnesses.

5. In preparing for cross-examination, a lawyer should:
   a. Consider the need to integrate cross-examination, the theory of the plaintiff, and closing argument into questions for cross-examination;
   b. Anticipate those witnesses the defense might call in its case-in-chief or in rebuttal;
   c. Consider whether cross-examination of each individual witness is likely to generate helpful information;
   d. Consider an impeachment plan for any witnesses who may be impeachable including needed exhibits or transcripts;
   e. Be alert to inconsistencies in a witness' testimony;
   f. Be alert to variations in witness testimony;
   g. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
   h. If available, review investigation reports of interviews, depositions, and other information developed about the witnesses;
   i. Review relevant statutes, procedural manuals, and regulations for possible use in cross-examining professional witnesses;
   j. Be alert to issues relating to witness credibility, including bias and motive for testifying;
   k. Be prepared with all necessary impeachment documents, including having properly certified and authenticated documents in accordance with evidentiary rules;
   l. Be mindful of ways that certain topics could "open the door" to information that might otherwise be excluded;
   m. Avoid asking questions that do not advance a plaintiff's theory, that allow the witness to provide unhelpful explanations, or questions that the lawyer does not know the answer to;
   n. Whenever possible, ask closed ended leading questions;
   o. Lawyers should seek out other sources of information on cross-examination as needed to fully prepare.

6. A lawyer should be aware of the applicable law concerning admission of expert testimony and raise appropriate objections.

7. Before beginning cross-examination, a lawyer should ascertain whether the discovery rules have been complied with. If not, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

STANDARD 7.5 CLOSING ARGUMENTS

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a judgment for the client. Lawyers should also use their closing arguments to assure that the court does not consider irrelevant or immaterial information harmful to the client in determining the case's outcome.

Commentary:

1. A lawyer should be familiar with the substantive limits on both plaintiff's and defense's summation.

2. Lawyers should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.

3. Counsel should provide remedies sought under Standard 8.1 in their closing arguments.

4. A lawyer should prepare the outlines of the closing argument prior to the evidentiary hearing and refine the argument throughout the evidentiary hearing by reviewing the proceedings to determine what aspects can be used in support of plaintiff's summation and, where appropriate, should consider:
   a. Highlighting witness testimony that supports plaintiff's theory of the case.
   b. Highlighting weaknesses in the defendant's case;
   c. Demonstrating how favorable inferences may be drawn from the evidence; and
   d. Incorporating into the argument:
      i. Helpful testimony from direct and cross-examinations;
      ii. The standards of review for *habeas*; and
      iii. Responses to anticipated defense arguments.

5. Whenever the defense lawyer exceeds the scope of permissible argument, the lawyer should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.

STANDARD 8.1 OBLIGATION OF *HABEAS* COUNSEL CONCERNING DISPOSITION

A lawyer must work with the client and plaintiff's team to develop a theory of disposition or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome. Lawyers should review the accuracy of any judgments of the court and move the court to correct any errors.

Commentary:

None

STANDARD 8.2 ONGOING COMPLIANCE MONITORING

A lawyer must stay in regular contact with the client following successful disposition of the case in order to monitor defendant's compliance with the judgment. Lawyers must be prepared to resume litigation in the event of breaches. A lawyer's monitoring should continue as long as there is cause.

Commentary:

1. If defendant is non-compliant lawyers should prepare and file a motion for finding of non-compliance or contempt and should request remedies or sanctions including plaintiff's release.

2. Lawyers may request attorney fees when the defendant is non-compliant.

3. Lawyers should be familiar with post release remedies that their clients may have. This is an emerging field of law, *See White v. Reyes*, 335 Or App 124 (2024). *See also Fox v. Peters*, District Court of Oregon Case No 6:16-cv-01602-MC, 2016 WL 4265736. (D. Or. Aug. 11, 2016).

STANDARD 9.1 PRESERVATION OF ISSUES FOR APPELLATE REVIEW

A lawyer should be familiar with the requirements for preserving issues for appellate review.

Commentary:

1. A lawyer should know the requirements for preserving issues for review on appeal and other options to challenge lower court rulings.

2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

STANDARD 9.2 UNDERTAKING AN APPEAL

A lawyer must be knowledgeable about the various types of appellate relief and their application to the client's case and should impart that information to the client. Throughout the evidentiary hearing proceedings, but especially upon disposition not favorable to the client, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client. Notices of appeals must be filed within 30 days of the date of the final judgment. Lawyers may not miss appellate deadlines. When requested by the client, a lawyer should ensure that a notice of appeal is filed, and that the client receives information about obtaining appellate counsel.

Commentary:

1. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC. Lawyers may refer a case for appeal prior to the judgment being issued.

2. If the client chooses to pursue an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting reconsideration, moving for a new evidentiary hearing, moving for a judgment notwithstanding the verdict, and referring the case to an appellate lawyer through OPDC. Lawyers are responsible for knowing the impact of each of these actions on the timeline for filing the appeal

and should work with appellate counsel to assure that no deadlines are missed.

3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the evidentiary hearing court. A trial lawyer should provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.

4. If the defendant appeals a judgement granting relief, lawyers should be prepared to cooperate with appellate counsel in litigating defense requests to stay the judgment pending appeal.