



Post-Conviction Relief Attorney Performance Standards with Commentary

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Table of Contents

INTRODUCTION.....	1
Standard 1.1 – General Expectations of Post-conviction Counsel.....	2
Standard 1.2 – Client Communication	3
Standard 2 – Obligations of Defense Counsel Regarding Church v. Gladden Motions.....	5
Standard 3 – Independent Investigation.....	5
Standard 4 – Asserting Legal Claims.....	7
Standard 5.1 – Litigating Claims	8
Standard 5.2 – Client’s Presence at Trial.....	9
Standard 5.3 – Obligations During Trial.....	10
Standard 6 – Obligations of Counsel After Trial.....	11

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 post-conviction relief (PCR) 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.

This iteration of the Standards was drawn heavily from the existing Oregon State Bar Post-Conviction Relief Performance Standards. OPDC has adopted those standards to make them specific to public defense PCR casework and has added language that reflects evolving standards of practice. Each standard sets a baseline for practice of appointed post-conviction work and is followed by best practices that supplement the baseline standards. Best practices are aspirational. OPDC recognizes that in any given case, some standards might be inapplicable or even mutually exclusive; OPDC acknowledges that to practice law, exceptions to these baseline rules must apply in certain situations.

OPDC is grateful to the prior work of the Oregon State Bar and to the Oregon Public Defense Commission PCR Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 – General Expectations of Post-Conviction Counsel

Counsel should not undertake representation in a post-conviction relief proceeding unless counsel fully understands the requirements of a collateral challenge to a criminal conviction, and how that differs from a record-based direct appeal of a criminal conviction.

Commentary:

1. Counsel should treat a post-conviction relief proceeding as both the first and last meaningful opportunity to present evidence not contained in the trial record on a variety of constitutional violations that may have taken place in the underlying criminal case, including but not limited to: claims involving the competence of the defendant; police and prosecutorial misconduct; judicial misconduct; faulty eyewitness evidence; unreliable informant testimony; coerced confessions; flawed forensic methods; juror misconduct; juror qualifications; ineffective and inadequate assistance of trial and appellate counsel; and whether a plea of guilty is entered knowingly, intelligently, and voluntarily.
2. Counsel should understand that while a client's innocence may or may not itself constitute a cognizable claim for state post-conviction relief, its relevance to the case is important. See *Perkins v. Fhuere*, 374 Or 575 (2025). Claims of innocence are typically intertwined with other recognized bases for post-conviction relief. For example, a meritorious "Brady claim" is typically based on suppression of evidence pointing to innocence. Similarly, a claim of inadequate or ineffective assistance of counsel may be predicated on trial counsel's failure to investigate sources of important evidence that support the client's assertion of innocence. Accordingly, post-conviction counsel should be prepared to carefully evaluate the need to investigate evidence of innocence that can support a claim for post-conviction relief.
3. Counsel should not have represented the petitioner during the underlying criminal case or direct appeal except in extraordinary circumstances, since the post-conviction proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel. Trial or appellate counsel who seek to represent their clients in post-conviction relief proceedings should do so with caution and must abide by the conflict of interest provisions of Oregon Rule of Professional Conduct 1.7 and consult OSB Formal Ethics Op. No. 2005-160.
4. A lawyer should have adequate time and resources to provide competent representation to every client.

- a. A lawyer should not accept caseloads that by reason of size and/or complexity interfere with the provision of competent representation.
 - b. A lawyer should have access to support services and other resources necessary to provide competent representation.
5. Counsel should understand the difference between seeking relief pursuant to a post-conviction relief petition and a petition for DNA testing pursuant to ORS 138.690.
 6. Counsel should ensure at the outset of appointment that post-conviction is ripe and that the matter is not still on appeal. If a *pro se* petition was filed while the matter was still on direct appeal, counsel should take appropriate measures to ensure that a timely post-conviction petition is properly filed.
 7. Counsel should understand, prior to undertaking representation of any client in post-conviction relief proceedings, that ordinarily any meritorious claim not contained in a first original or amended petition will likely be waived or otherwise unavailable as a ground for relief in a second petition for post-conviction relief, or in subsequent federal habeas corpus litigation. Any lack of diligence, mistake, or other omissions by counsel will ordinarily be borne by the client. Those claims and other pleadings to be signed by counsel must comply with Oregon Rules of Civil Procedure (ORCP) 17 C, requiring a factual basis and support in existing law or in a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
 8. Counsel is bound by the client's definition of their best interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation, in accordance with Oregon Rules of Professional Conduct 1.2 and 1.14.

Standard 1.2 – Client Communication

A lawyer should meet with their client within 30 days of appointment. This meeting need not be in person. A notice of appointment and releases of information should be sent to the client within 14 days of appointment. Contact must be maintained throughout the representation, including before and after filing of the amended petition and to ensure the client can file a motion pursuant to *Church v. Gladden*, if desired.

Commentary:

1. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. In person meetings should take place as needed to prepare the client for any testimony or trial preparation.
2. The lawyer should keep the client informed about the progress of investigation, the development of post-conviction claims, litigation timelines and deadlines, and consult with the client concerning amendments and challenges to the pleadings, discovery, pretrial hearings, and other preparations for trial. This should include providing a clear explanation of the claims included in the amended petition. If the lawyer decides, based on ORCP 17 C or other strategic reasons, not to include a claim that client has requested be included, the lawyer should provide a full explanation to the client.
3. The lawyer should advise the client concerning the consequences of prevailing on a petition for post-conviction relief, including the likelihood—in cases where petitioner has previously entered a plea of guilty pursuant to a plea agreement with the state—that the petitioner would face conviction on additional charges and/or a lengthier period of incarceration upon a new trial. Lawyers should make sure their client is aware of the remedies and claims available in post-conviction proceedings.
4. Counsel should mail client a copy of the trial memorandum and reply memorandum no later than the date they are filed.
5. Counsel should contact client to discuss the trial memorandum prior to trial and, if available, review with the client defendant's trial memorandum and any reply to the trial memorandum.
6. Counsel should ensure client is aware of the trial date and the client's right to attend the trial.

Standard 2 – Obligations of Defense Counsel regarding *Church v. Gladden* Motions

A lawyer must send client a copy of the filed amended petitions and include with it information on how to raise issues under *Church v. Gladden*, 244 Or 308 (1966). The lawyer must be aware of Uniform Trial Court Rules and Supplementary Local Rules regarding the time limitations on filing *Church* motions to properly advise their client.

Commentary:

1. The lawyer should advise the client in writing how to raise a *Church* motion, the format in which the motion should be filed, relevant timelines and deadlines, and the remedies sought.
2. Counsel must not reveal confidences or take an adversarial position in response to *Church* motions. See *Lopez v. Nooth*, 287 Or App 731 (2017).

Standard 3 – Independent Investigation

A lawyer who undertakes to represent a petitioner in a post-conviction proceeding should independently review and investigate the trial proceedings. The review should begin with review of the complete file of trial and appellate counsel and the prosecution file. The lawyer should read the official trial record, obtain all discovery material from the trial lawyer, and meet with the client to explore all aspects of representation and the trial proceedings, including whether an appropriate investigation was conducted pursuant to the OPDC Criminal Performance Standard 3.1.

Commentary:

1. Lawyers should be familiar with the ORCP and should use subpoena power, depositions, requests for production of documents, and requests for admission.
2. Lawyers should be familiar with the Uniform Trial Court Rules for post-conviction, including but not limited to witness disclosure timelines.
3. Lawyers should be familiar with the victim's rights provisions of the Post-Conviction Statute.

- a. Lawyers or their investigators cannot approach a victim without providing a clear explanation, preferably in writing, regarding victim's rights;
 - b. Lawyers must obtain court approval to subpoena victims. See ORS 138.627.
4. Lawyers should obtain the services of qualified investigators and mitigators.
5. In most cases, lawyers should obtain:
 - a. The trial attorney file, regardless of the age of the file;
 - b. The district attorney file;
 - c. Any law enforcement files;
 - d. CARES reports and other child reporting agency files;
 - e. The appellate attorney file (if applicable);
 - f. The trial court file and transcript;
 - g. The appellate court file and transcripts (if applicable);
 - h. Client medical records, if applicable;
 - i. Any Oregon Department of Corrections file, if applicable;
 - j. Records from any relevant jail facility in which client was held, including medical files and visitation logs;
 - k. Any Oregon Public Defense Commission file; and
 - l. Files related to a co-defendant or government informant (including district attorney and United States Attorney files).
6. The lawyer should speak with trial counsel and appellate counsel and their investigators regarding issues in the trial that may not be apparent from the face of the record.
7. The lawyer should be familiar with protective orders regarding the use of any records obtained in post-conviction in future prosecutions as well as protective orders related to any necessary child abuse, mental health, or other statutorily required protective orders.
8. Counsel should seek expert witnesses where necessary for the investigation, preparation, and presentation of the case, and be familiar with the process to obtain expert funding from OPDC.

Standard 4 – Asserting Legal Claims

Counsel should be familiar with all legal claims potentially available in post-conviction relief proceedings and assert claims permitted by the facts and circumstances of a petitioner’s case to protect the client’s rights against later contentions that the claims have been waived, defaulted, not exhausted, or otherwise forfeited.

Commentary:

1. A properly pleaded amended petition must generally be filed within 120 days from the date of appointment unless the Court has authorized additional time.
 - a. The lawyer should be aware of any timelines for filing and amending petitions set forth in the Uniform Trial Court Rules, Supplemental Local Rules, and the ORCP.
 - b. The amended petition should encompass all claims properly raised from the discovery obtained at the time of filing unless counsel has a specific strategic reason for not including a claim, has explained this to the client, and has explained to the client how to file a *Church* motion if the client disagrees with the strategic decision.
 - c. The lawyer should review the original *pro se* petition to ensure that the client’s interests are preserved.
2. A lawyer should plead alternative theories to claims so that all avenues of relief are possible (e.g., ineffective assistance of counsel regarding a specific action can, at times, also be pleaded as failing to properly execute the trial strategy).
3. A lawyer should plead any evidence necessary to support the legal claim made. See *Horn v. Hill*, 180 Or App 139, 138-49 (2002) (“Where evidence omitted from a criminal trial is not produced in a post-conviction proceeding . . . its omission cannot be prejudicial.”).
4. A lawyer should plead any relevant exceptions to any procedural bars that might be raised by the defendant, including successiveness, timeliness, or that claims could have been raised on appeal. See *North v. Cupp*, 254 Or 451 (1969) (setting forth exceptions to the trial preservation rule).
5. A lawyer should request to amend the formal petition when the need for new claims or amended claims arises—even if this is during trial—and should make every effort to amend rather than concede error in omitting

the claims in the formal petition. See *Ogle v. Nooth* 365 Or 771 (2019); ORCP 23 B.

6. Petitions should request whatever remedies are proper and just. See ORS 138.520.
7. A lawyer should not argue the law in the petition. See ORS 138.580.

Standard 5.1 – Litigating Claims

Before and during the trial on the petition for post-conviction relief, a lawyer should develop a factual basis through the presentation of evidence to establish the claims asserted in the petition. A lawyer must be sufficiently familiar with the procedural rules of post-conviction to properly file witness disclosures, exhibits, objections, and trial memoranda.

Commentary:

1. Lawyers must disclose witnesses pursuant to ORS 138.615 and be aware of and comply with the specific disclosure requirements regarding expert witnesses. Witness disclosures must be made no later than 60 days before trial unless otherwise ordered by the court. UTCR 24.060.
2. Lawyers should be familiar with the case law regarding the use of experts in post-conviction. Experts testifying regarding ineffective assistance of counsel must have been experts at the time of the original trial, available at the time of the original trial, and must indicate they would have testified substantially similarly at the time of the original trial as they would in the post-conviction proceedings. See *Hale v. Belleque*, 255 Or App 653, 681, 298 P3d 596 (2013) (To satisfy a petitioner's burden of proof on a claim that trial counsel was constitutionally inadequate in failing to call a witness to testify, the petitioner must show that (1) the witness would have been available to testify, (2) would have appeared at the time of trial, and (3) would have provided testimony likely to have changed the result of the trial.)
3. If a claim involves the failure to call a witness (expert or lay), lawyers must present evidence, either through declarations or live testimony, of how that witness would have testified at the time of trial and that they were available to testify at the time of trial. See *New v. Armenakis*, 156 Or App

24, 29 (1998) (“Without an affidavit from Gable, there is no evidence about what Gable would have testified to, had he been called as a witness.”).

4. Lawyers should file exhibits in compliance with UTCR 24.040.
5. A lawyer must file a comprehensive trial memorandum. Trial memoranda should include but are not limited to:
 - a. Assertions regarding the facts and arguments regarding the law as to each claim set forth in the petition. Claims not supported in the trial memorandum will likely be dismissed as abandoned.
 - b. Any additional elements set forth in any scheduling order from the court.
6. A lawyer should file a response to the defendant’s trial memorandum unless counsel has specific strategic reasons for not filing a response. This memorandum should include but is not a limited to:
 - a. A rebuttal of the defendant’s arguments;
 - b. A response to the defendant’s objections;
 - c. Objections to defendant’s exhibits, unless otherwise specified by the trial court.

Standard 5.2 – Client’s Presence at Trial

Counsel may not waive client’s right to attend trial unless waiver is authorized under ORS 138.620 and approved by the client.

Commentary:

Counsel should object to any attempt to limit client to solely telephonic appearance unless client directs otherwise. Counsel should be aware of ORS 138.622 and ensure availability of a method of confidential communication during hearing. See *also* ORCP 58 E.

Standard 5.3 – Obligations During Trial

Counsel must subpoena all necessary witnesses—including those necessary to cure hearsay objections—to trial and be prepared to present and argue all active claims. Counsel should offer all necessary exhibits into the record.

Commentary:

1. Counsel should be prepared to argue new claims or alternative claims, if testimony at trial supports them. Counsel should note such claims for the court and request to amend petition to reflect any changes.
2. Counsel should be prepared to argue against defendant's possible responses to any petitioner's trial memorandum.
3. At trial, counsel should re-assert all relief requested.
4. A lawyer should be aware of the elements required to prove their claims and of the burden of production.
5. 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-trial investigation.
6. Counsel should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.
7. Counsel should be familiar with and utilize, where necessary, ORCP 39 I (Perpetuation of testimony after commencement of action), ORCP 38 B(3), and UTCR 5.130 for use in locations that have not adopted the Uniform Interstate Depositions and Discovery Act.

Standard 6 – Obligations of Counsel After Trial

Counsel must ensure that the court has addressed each claim for relief in its judgment. Immediately following the issuance of a judgment, counsel should send a copy of the judgment to the client. If there are adverse rulings, counsel should notify appellate counsel and ensure that a notice of appeal is filed if the client would like to appeal. Following a favorable judgment, counsel must file a certified copy of judgment with the trial court for the underlying conviction and serve a certified copy on the district attorney of the county of the original conviction and sentence. See ORS 138.640.

Commentary:

1. After trial, if the court has not issued a judgment within 60 days the attorney should call the court's attention to the matter, in writing pursuant to UTCR 2.030.
2. If the court provides an opportunity for objections to a judgment prior to publication, counsel should object where appropriate.
3. Following the issuance of a judgment, counsel should send the client a closing letter explaining, among other things, file retention, appellate rights, and any rights to federal collateral review.
4. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC.
5. Following a favorable judgment (in full or in part), counsel should file a supplemental judgment seeking the return of any filing fees and costs assessed and for prevailing party fees. ORS 138.550(1); ORS 20.190(1)(b)(B).