Members:

Jennifer Nash, Chair
Susan Mandiberg, Vice Chair
Peter Buckley
Robert Harris
Alton Harvey, Jr.
Philippe Knab
Tom Lininger
Paul Lipscomb

Oregon Public Defense Commission

Nonvoting Members:

Rep. Paul Evans
Sen. Floyd Prozanski

Interim Executive Director:

Kenneth Sanchagrin

Oregon Public Defense Commission Workgroup
Meeting will occur virtually
Thursday, October 2, 2025
5:00 to 6:30pm
*Via Zoom**

Administrative Announcement
This is a public meeting, subject to the public meeting law and it will be recorded. Discussion will only be allowed amongst Commission members and staff for the duration of this meeting. Public comment will not be allowed during this meeting.

AGENDA

Approx. Time	Item	Lead(s)
5:00-5:05	Welcome/Call to Order	Chair Nash
5:05-5:35	**Update/Discussion:** Travel Time and Expert Services	Ralph Amador Kristen McClelland
5:35-5:45	**Update/Possible Action Item:** Criminal Attorney Performance Standards	Steve Arntt
5:45-6:00	**Briefing:** Delinquency Attorney Performance Standards	Steve Arntt
6:00-6:30	**Update/Discussion:** New Key Performance Metrics (KPMs)	Kim Freeman
6:30 (Approximately)	***Adjourn***	

**To join the Zoom meeting, click this link: https://zoom.us/j/92828410895. This meeting is accessible to persons with disabilities or with additional language service needs. Our Zoom virtual meeting*

platform is also equipped with Closed Captioning capabilities in various languages, which agency staff can assist you with setting up ahead of meetings.
Requests for interpreters for the hearing impaired, for other accommodations for persons with disabilities, or for additional interpreter services should be made to info@opdc.state.or.us. Please make requests as far in advance as possible, and at least 48 hours in advance of the meeting, to allow us to best meet your needs. Listed times are an estimate, and the Chair may take agenda items out of order and/or adjust times for agenda items as needed.

Next meeting: ***November 6, 2025, 5-6:30pm via Zoom.***
Meeting dates, times, locations, and agenda items are subject to change by the Commission; future meeting dates are posted at: https://www.oregon.gov/opdc/commission/Pages/meetings.aspx

Note: *Agenda items not addressed or completed during this meeting will be carried over to the next scheduled meeting, unless otherwise directed by the Chair.*

Oregon Public Defense Commission

MEMORANDUM

Date: **October 2, 2025**

To: **Jennifer Nash, Chair**
Susan Mandiberg, Vice Chair
OPDC Commissioners

Cc: **Ken Sanchagrin, Interim Executive Director**

From: **Trial Support and Development Team**

Re: **Draft Criminal Defense Performance Standards**

Nature of Presentation: Update/Possible Action Item

Background:

OPDC staff and Commissioners have reviewed the draft Criminal Performance Standards. During the September Commission meeting, the Commission requested a change from "Best Practices" to "Commentary" throughout.

Additionally, the language in the introduction was strengthened to ensure that readers understand that the commentary does not establish a baseline standard for representation.

Implementation:

Implement upon approval and posting.

Agency Recommendation:

The agency recommends the Commission accept the briefing and approve the standards.

Fiscal Impact:

To be determined once a full implementation and transition plan has been developed. Full implementation of these standards will likely require investments in OPDC infrastructure and staff, to implement training programs and other supports contemplated by these standards. Such

investments are not part of the agency's request budget for 2025-27 and would need to be planned for in future legislative sessions.

Agency Proposed Motion:

OPDC proposes that the Commission motion to approve the Criminal Performance Standards.

Criminal Attorney Performance Standards With Commentary

(DRAFT)

July 2025

Table of Contents

Standards for Representation in Criminal Cases

INTRODUCTION:

Oregon Revised Statute 151.216(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 criminal defense 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 Standards for Representation in Criminal and Juvenile Delinquency Cases. OPDC has adopted those standards to make them specific to criminal casework and has added language that reflects evolving standards of practice. 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 the prior work of the Oregon State Bar and the Oregon Public Defense Commission Criminal Standards Workgroup for the extensive work OPDC drew upon in the development process.

STANDARD 1.1 – ROLE OF DEFENSE COUNSEL

The lawyer for a defendant in a criminal 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.

Commentary:

1. 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.

2. A lawyer is bound by the client's definition of his or her best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation.

3. 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 including any alternative courses of actions to accomplish the client's goal. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

4. 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.

5. An attorney assigned to actively assist a *pro se* criminally accused person should be apprised about the matter and prepared to accept representation in the matter to the extent that the circumstances of the case allow if ethically permissible. OPDC understands that there is inherent difficulty in taking over a case from a *pro se* litigant and maintaining the current case timelines.

STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL

A. A lawyer must be familiar with 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 commentary for providing quality representation in criminal cases.

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

Commentary:

1. In order to remain proficient in the law, court rules and practice applicable to criminal cases, a lawyer should regularly monitor the decisions of Oregon and pertinent Federal appellate courts and the work of the Oregon State Legislature.

2. Lawyers should maintain membership in state and national organizations that focus on educating and training lawyers in criminal law. Lawyers should subscribe to professional listservs, consult available online resources, and attend continuing legal education programs relating to the practice of criminal law. A lawyer practicing criminal law should complete an average of at least 10 hours of continuing legal education training in criminal law each year.

3. A lawyer practicing criminal law should become familiar non-penal consequences of criminal convictions such as those affecting immigration status, driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others. They should pay particular attention to the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction for noncitizen clients.

4. Before undertaking representation in a criminal 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 to more experienced lawyers prior to accepting sole responsibility for more complex criminal cases. More experienced lawyers should mentor less experienced lawyers.

5. A lawyer providing representation in criminal cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Department of Human Services, private treatment facilities and programs, along with other services and programs available as dispositional alternatives to detention and custody.

6. A lawyer for indigent defendants should be familiar with services available to clients who are unhoused, unable to provide for their own food, or are in need of other social services.

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

8. Lawyers representing youth who have been waived into the criminal system should have specialized training and experience in defending juveniles, and training and experience required to handle serious criminal cases. Lawyers representing youth waived into the adult criminal system must be familiar with adolescent brain development, the impact of trauma

on emotional and neurological development, and be trained in communicating with youth in a developmentally appropriate manner. Lawyers representing youth in adult criminal proceedings should be prepared to present mitigating information about their clients as necessary and appropriate, including emotional, social, and neurological development specific to the adolescent client.

STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD

Before accepting appointment as counsel, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a defendant in a criminal matter without hampering their representation of existing clients. If it later appears that 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.

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 DEFENSE COUNSEL AT INITIAL APPEARANCE

A lawyer must be familiar with the law regarding initial appearance, arraignment, and detention. At the initial court appearance in a criminal case, a lawyer should inform the client of the offenses alleged in the charging instrument, and assert and preserve pertinent statutory and constitutional rights of the client on the record. Lawyers should seek release for incarcerated clients at the first appearance.

Commentary:

1. A lawyer should promptly conduct client conflict checks.

2. A lawyer should always endeavor to meet with and interview clients in advance of their first appearance.

3. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.

4. A lawyer should be prepared to preserve the client's rights and demand due process, whether that is a not guilty plea or a demand for preliminary hearing, or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present matter and any other matter:

    a. Right to remain silent under State and Federal Constitutions;
    b. Right to counsel under State and Federal Constitutions;
    c. Right to file challenges to the charging instrument or petition;
    d. Right to file challenges to the evidence;
    e. Right to be notified of and testify at any proceeding before the Grand Jury;
    f. Right to file notices of affirmative defenses; and
    g. Right to a speedy trial.

5. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.

6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.

7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing rights. Prior to waiving formal reading of the charges, the lawyer should ensure that the client can read the charging instrument or has had it read to them.

8. If the adjudicatory judge is assigned at the initial appearance, the lawyer should be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

9. Lawyers should seek release of incarcerated clients at the initial appearance in accordance with standard 2.3.

STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION

A lawyer must conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense, conduct a conflict check, and respond to requests from the client for information or assistance concerning the case. For clients who are in custody, the initial interview should take place no more than 2 business days after assignment to the attorney. For out of custody clients, initial outreach to schedule an initial interview should occur no more than 3 business days after assignment to the attorney.

Commentary:

1. A lawyer should provide a clear explanation, in developmentally appropriate language and using an interpreter as needed, 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 defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation.

3. At the initial meeting, the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, possible sentences if convicted, and should inquire if the client has any immediate needs regarding securing evidence or obtaining release.

4. Prior to all meetings, the lawyer should:

a. Be familiar with the elements of the charged offense(s) and the potential punishment(s);
b. Obtain copies of any relevant documents that are available including any charging documents, recommendations and reports made by agencies concerning pretrial release and law enforcement reports that might be available;
c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release.

5. During an initial interview with the client, a lawyer should:

    a. Obtain information concerning:
        i. The client's ties to the community, including the length of time they have lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;
        ii. The client's history of service in the military, if any;
        iii. The client's physical and mental health, educational, and military service records;
        iv. The client's immediate medical needs, if any;
        v. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
        vi. The ability of the client to meet any financial conditions of release;
        vii. The names of individuals, or other sources, that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;
    b. Provide to the client information including but not limited to:
        i. An explanation of the procedures that will be followed in setting the conditions of pretrial release;
        ii. An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
        iii. 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;

iv. The charges and the potential penalties, as well as potential collateral consequences, of any conviction and sentence;
v. A general procedural overview of the progression of the case, where possible;
vi. Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.

6. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:

    a. The facts surrounding the charges against the client;
    b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
    c. Any possible witnesses who should be located;
    d. Any evidence that should be preserved, specifically including video recordings that might be overwritten;
    e. Where appropriate, evidence of the client's competence to stand trial and mental state at the time of the offense.

7. Frequency and Manner of Client Contact
    a. Lawyers should endeavor to maintain contact with their client at least monthly or as client's communication and availability allows.
    b. As much as possible, visits should be in person. Video visits are acceptable. For sensitive or confidential discussions, the attorney should take reasonable steps to ensure privacy with the client. Lawyers should be aware of when there is a possibility that meetings with clients will be recorded or overheard. Letters to clients are not a substitute for client visits.
    c. Lawyers should conduct client meetings that are culturally sensitive and developmentally appropriate for each individual client.

STANDARD 2.3 – RELEASE OF CLIENT

A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client. Additionally, the lawyer must ensure the client understands the terms and conditions of release.

B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.

Commentary:

1. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

2. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and jail to any special medical or psychiatric and security needs of the client and request that the court order the appropriate officials to take steps to meet such special needs as required.

3. In all cases, but especially in cases listed in ORS 135.240 (2) and (4), the lawyer should discuss the release process with their client. The lawyer should discuss the advantages and disadvantages that can be gained from having a release hearing including the possibility of taking witness testimony and presenting evidence which can be used at later stages of the case. The lawyer should abide by the client's decision whether or not to request a release hearing.

4. The lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause.

5. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements.

6. At any release hearing, the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.

7. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims and any release compliance monitoring.

8. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client "self-bailing" with funds from an inmate account, posting a security interest in property, or third-party posting requirements.

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 of facts constituting guilt or the client's stated desire to plead guilty or admit guilt. 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 trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. 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, and whenever possible should avoid taking on investigations themselves that could cause them to be a witness in the case. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client and the elements of each charge.

2. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2. Subsequent interviews with the client should be used to identify, at minimum:

    a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;
    b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
    c. Information relevant to the court's jurisdiction;
    d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
    e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.

3. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of 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 defense witness at the trial or 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). The lawyer also has a duty to comply with statutory rights of victims, such as those in ORS 135.970(2) and (3).

4. A lawyer should attempt when reasonable to have their investigator interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.

5. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident. Lawyers should always bring their investigator or another third party who can testify as needed in order to avoid the lawyer making themselves a witness.

6. A lawyer should obtain prior criminal offense and juvenile records of the client and witnesses, and where appropriate their school, mental health, medical, drug and alcohol, and immigration records.

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 must comply with all statutes governing discovery to the prosecution.

STANDARD 3.2 – EXPERTS

A lawyer should immediately and continually evaluate the need for experts in the case and should attempt to obtain any necessary expert for either consultation or testimony or both. A lawyer must be aware of available 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. 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.

2. 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.

3. A lawyer should be familiar with the available experts in fields that routinely arise in criminal cases and should have an available professional network to assist in evaluating and obtaining needed experts.

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

5. A lawyer should understand the difference between an expert used to advise the defense team and an expert used to testify and know how to assure that an advisory expert does not unintentionally shift to a testimonial expert and require disclosure to the prosecution.

6. A lawyer should adequately prepare all trial 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 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 prosecution has engaged in discovery violations.

Commentary:

1. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense 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 defense from disclosure.

2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching, and mitigating evidence. Discovery should include, but is not limited to, the following:

a. Potentially exculpatory, impeaching, and mitigating information;
b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, body camera recordings, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
c. Written communications, including emails, between prosecution, law enforcement, and witnesses;
d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records, and their relevant digital, electronic, and social media postings;
e. Oral or written statements by the client and the circumstances under which those statements were made;
f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
g. Copies of, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
i. Statements and reports of experts and the data and documents on which they are based; and
j. Statements of co-defendants.

3. A lawyer should file motions seeking to preserve evidence where it is at risk of being destroyed or altered.
4. Lawyers should not rely on discovery to provide all information in the case and should not assume that prosecutors are compliant with discovery obligations unless the lawyer has verified the compliance.

STANDARD 4.2 – THEORY OF THE CASE

A lawyer should develop and continually reassess a theory of the client's case 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 case when evaluating strategic choices throughout the course of the representation.

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

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

4. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES

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

Commentary:

1. The decision to file a particular pretrial motion or notice should be made by the lawyer after thorough investigation, discussion with their client, and after considering the applicable law in light of the circumstances of the case.

2. Among the issues the lawyer should consider addressing in pretrial motions are:

    a. The pretrial custody of the accused;
    b. The competency or fitness to proceed the accused (see Standard 5.3);
    c. The constitutionality of relevant statutes;
    d. Whether there are any jurisdictional defects;
    e. Potential defects in the charging process or instrument, including statutes of limitation;
    f. The sufficiency of the charging document;
    g. The severance of charges and co-defendants for trial;
    h. Change of venue;
    i. The propriety and prejudice of any joinder of charges or defendants in the charging instrument.
    j. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;

k. The discovery obligations of both the prosecution and the defense, including:
    1) Motions for protective orders;
    2) *Brady v. Maryland* motions
    3) *Cartwright* motions; and
    4) Motions to compel discovery.
l. Violations of federal and state constitutional or statutory provisions, including:
    1) Illegal searches and seizures;
    2) Involuntary statements or confessions;
    3) Statements obtained in violation of the right to counsel or privilege against self-incrimination;
    4) Unreliable identification evidence;
    5) Unreliable scientific or pseudoscientific evidence;
    6) Speedy trial rights; and
    7) Double jeopardy protections.
m. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts;
n. The Defendant's right to a speedy trial;
o. The right to a continuance in order to adequately prepare and present a defense or to respond to prosecution motions;
p. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
    1) The competency or admissibility of particular witnesses, including experts and children;
    2) The use of prior convictions for impeachment purposes;
    3) The use of prior or subsequent bad acts;
    4) The use of reputation or other character evidence; and
    5) The use of evidence subject to "rape shield" and similar protections.
q. Notices of affirmative defenses and other required notices to present particular evidence;
r. The dismissal of charges on the basis of a civil compromise, in the furtherance of justice and the general equitable powers of the court.

3. 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, including:
    a. The burden of proof, the potential advantages and disadvantages of having witnesses testify under oath at pretrial hearings, and to what extent a pretrial hearing reveals defense strategy to a client's detriment;

b. Whether a pretrial motion may be necessary to protect the client's rights against later claims of waiver, procedural default, or failure to preserve an issue for later appeal;
c. The effect the filing of a motion may have upon the client's speedy trial rights; and
d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS

A lawyer should file all pretrial motions in a timely fashion, should have knowledge of local court rules and should comport with those rules to the extent possible. A lawyer should prepare for a motion hearing much as they would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.

Commentary:

1. Motions should succinctly inform the court of the authority relied upon.

2. When a hearing on a motion requires taking evidence or when the taking of evidence is advantageous to the client's position, a lawyer's preparation should include:

    a. Investigation, discovery, and research relevant to the claims advanced;
    b. Subpoenaing all helpful evidence and witnesses including those also subpoenaed by the Prosecution;
    c. Preparing witnesses to testify; and
    d. Fully understanding the applicable burdens of proof, evidentiary principles, and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination;
    e. A consideration of the record being made for the purposes of trial in addition to the underlying motion.

3. After a hearing during which evidence is taken, an attorney should request the FTR recording of the hearing and have transcriptions made.

4. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.

5. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal and renewing the motion or objection during trial to preserve the matter for appeal.

STANDARD 5.3 – DETERMINING A CLIENT'S FITNESS TO PROCEED

A lawyer must be able to recognize when a client may not be competent to stand trial due to mental health disorders, developmental immaturity, or developmental and intellectual disabilities and take appropriate action. The lawyer's responsibility to evaluate and recognize their client's competence is ongoing throughout the case. Lawyers must take appropriate action to address client's competency as soon as possible.

Commentary:

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

2. When a lawyer has reason to doubt the client's competency to stand trial, the lawyer should request funding for a retained psychological examination of the client as well as gather collateral information related to the client's mental health. The lawyer should consider filing a pretrial motion requesting a competency evaluation only if a private evaluation cannot be obtained.

3. Lawyers should seek prior psychological examinations of the client as well as other records relating to their client's prior commitments, mental health evaluations, or diagnoses. Lawyers may use those records at the lawyer's discretion in any proceeding relating to the client's ability to aid and assist in their own defense.

4. The right to be able to aid and assist in their own defense is a core right of the client. If a lawyer has reason to doubt their client's fitness to proceed, the lawyer has an obligation to take appropriate action to determine the client's fitness. If a lawyer has concerns regarding a client's capacity the lawyer must consider and, if possible, discuss with their client:

    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.

5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert in accordance with Standard 3.2.

6. If a court finds a client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available that will restore the client to fitness.

7. Lawyers should endeavor to be present with the client at any evaluation of the client done by anyone other than the lawyer's retained expert. Lawyers may be present by virtual or telephonic means.

8. Lawyers should keep up to date with developments concerning the Oregon State Hospital, federal litigation involving the State's handling of clients found unfit to proceed, and any legislative changes to the statutory framework of fitness.

9. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a concern about the client's continuing competency to proceed and in order to preserve the matter for appeal.

STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES

During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial 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 pretrial motion if new supporting information is disclosed in later proceedings.

STANDARD 6.1 – EXPLORING DISPOSITION WITHOUT TRIAL

A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices, and consequences

concerning dispositions without trial. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.

Commentary:

1. A lawyer should explore and consider restorative justice options, civil compromise, diversion, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.

2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial 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-trial disposition.

3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or continuing to trial.

4. With the consent of the client, a lawyer should explore with the prosecutor available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.

5. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution. The lawyer must attempt to ensure that the client has adequate time to consider the plea and alternative options. A lawyer should advise client's about their opinion of any plea offers but may not substitute their judgement for that of their client.

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

7. Before conducting negotiations, a lawyer should be familiar with:

    a. The types, advantages, disadvantages, and applicable procedures and

requirements of available pleas, including a plea or admission of guilty, no contest, a conditional plea or admission of guilt that reserves the right to appeal certain issues, trial by stipulation of facts, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);

b. Whether agreements between the client and the prosecution would be binding on the court or on the prison, juvenile, parole and probation, and immigration authorities; and
c. The practices and policies of the particular prosecuting authorities and judge that may affect the content and likely results of any negotiated settlement.

8. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:

    a. Rights that the client would waive when entering a plea or admission disposing of the case without trial;
    b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs, earned time credits, and credit for pretrial detention;
    c. The client's presumptive sentence under the sentencing guidelines if applicable;
    d. The minimum and maximum fines, assessments, court costs, and restitution amounts that may be ordered, as well options for waiving, deferring, or paying fines by installments;
    e. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victim(s), asset forfeiture, and the availability of work programs to pay restitution and perform community service;
    f. Consequences relating to previous offenses;
    g. The availability and possible conditions of, probation, parole, suspended sentence, work release, conditional leave and earned release time;
    h. The availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions, and diversion agreements;
    i. For non-citizen clients, the possibility of adverse immigration consequences;
    j. For non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
    k. The possibility of other consequences of conviction, such as:
        1) Requirements for sex offender registration, relief, and set-aside;

2) DNA sampling, AIDS, and STD testing;
3) Loss of civil liberties such as voting and jury service privileges;
4) Effect on driver's or professional licenses and on firearms possession;
5) Loss of public benefits;
6) Loss of housing, education, financial aid, career, employment, vocational, or military service opportunities; and
7) Risk of enhanced sentences for future convictions.

l. The possible place and manner of confinement, placement, or commitment;
m. The availability of pre-and post-adjudication diversion programs and treatment programs;
n. Standard sentences for similar offenses committed by offenders with similar backgrounds.

9. A lawyer should identify negotiation goals with the following in mind:

a. Concessions that the client might offer to the prosecution, including an agreement:
1) Not to dispute the merits of some or all of the charges;
2) Not to assert or litigate certain rights or issues;
3) To fulfill conditions of restitution, rehabilitation, treatment, or community service; and
4) To provide assistance to law enforcement in investigating and prosecuting other alleged wrongful activity.

b. Benefits to the client, including an agreement:
1) That the prosecution will recommend a reduced sentence upon conviction compared with the likely sentence after conviction at trial.
2) That the prosecutor will accept a plea to a lesser charge or dismiss remaining charges upon a plea.
3) That the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
4) That the prosecution will not oppose release pending sentence, disposition, or appeal;
5) That the client may reserve the right to contest certain issues;
6) To dismiss or reduce charges immediately or upon completion of certain conditions;
7) That the client will not be subject to further investigation or prosecution for uncharged conduct;
8) That the client will receive, subject to the court's agreement, a specified set or range of sanctions;
9) That the prosecution will take, or refrain from taking, a specified

position with respect to sanctions, and that the prosecution will not present preparation of a pre-sentence report, or in determining the client's date of release from confinement; and

10) That the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release and the provision of pre- or post-adjudication treatment programs.

10. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.
11. A lawyer should not recommend that the client enter a dispositional plea or admission 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 DISPOSITIONAL PLEA OR ADMISSION

A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. A lawyer must not unduly influence the decision to enter a plea and ensure that when a client enters a plea it is done voluntarily. Counsel must ensure the client has an intelligent understanding of the terms, conditions, and consequences of the plea, 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 a duty to explain to the client the advantages, disadvantages, and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.

3. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The

lawyer should explain to the client that the court may in some cases reject the plea.

4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer should request a recess to assist the client.

STANDARD 7.1 – GENERAL TRIAL PREPARATION

A. A trial is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts and competently plan a challenge to the state's case and, where appropriate, presentation of a defense case.

B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.

C. A lawyer should develop, in consultation with the client and members of the defense team, an overall defense strategy for the conduct of the trial.

D. A lawyer must, in advance of trial, subpoena necessary witnesses, and develop outlines or plans for opening, closing, anticipated cross examinations, and direct examinations.

Commentary:

1. A lawyer should ordinarily have the following materials available for use at trial:

    a. Copies of all relevant documents filed in the case;
    b. Relevant documents prepared by investigators;
    c. *Voir dire* questions;
    d. Outline or draft of opening statement;
    e. Cross-examination plans for all possible prosecution witnesses;
    f. Direct examination plans for all prospective defense witnesses;
    g. Copies of defense subpoenas;
    h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
    i. Prior statements of all defense witnesses;
    j. Reports from experts;
    k. The CVs of any experts expected to testify at trial;
    l. Training and other available records for any law enforcement offers who are

expected to testify;

m. A list of all exhibits and the witnesses through whom they will be introduced;
n. Originals and copies of all documentary exhibits;
o. Proposed jury instructions with supporting authority;
p. Copies of all relevant statutes and cases;
q. Evidence codes and relevant statutes and compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
r. Outline or draft of closing argument; and
s. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.

2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses as applicable. The lawyer should consider requesting that witnesses be excluded from the trial.

3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.

4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.

5. Throughout the trial 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 trial proceedings be recorded.

6. A lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing and should take steps to secure appropriate court clothing for client.

7. A lawyer should plan with the client the most convenient system for conferring privately throughout the trial. 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 the course of all trial proceedings.

8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt. A lawyer should discuss the risks of those actions with their client.

9. 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 or required by OPDC and, if so, attempt to obtain approval for the same as soon as possible.

STANDARD 7.2 – VOIR DIRE AND JURY SELECTION

A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.

B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.

Commentary:

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.

3. A lawyer should be familiar with the local culture and local issues that may impact the views of potential jurors.

4. Prior to jury selection, a lawyer should seek to obtain a prospective juror list and should consider the use of a jury questionnaire.

5. A lawyer should develop *voir dire* questions in advance of trial and tailor voir dire questions to the specific case. Among other purposes, voir dire questions should

be designed to serve the following:

a. To elicit information about the attitudes of individual jurors which will provide the basis for peremptory strikes and challenges for cause;
b. To convey to the panel certain legal principles which are critical to the defense case;
c. To preview the case for the jurors to lessen the impact of damaging information which is likely to come to their attention during the trial;
d. To present the client and the defense case in a favorable light, without prematurely disclosing information and the defense case to the prosecutor; and
e. To establish a good relationship with the jury.

6. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries to be able to defend any request to ask particular questions of prospective jurors.

7. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.

8. If the voir dire questions may elicit sensitive answers, a lawyer should consider requesting that questioning be conducted outside the presence of the remaining jurors.

9. A lawyer should challenge for cause all prospective jurors about whom an argument can be made for actual prejudice or bias if it is likely to benefit the client.

10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.

11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

12. When possible, a lawyer should endeavor to have assistance for note taking and juror research before and during the voir dire process.

STANDARD 7.3 – OPENING STATEMENT

An opening statement is a lawyer's first opportunity to present the defense case. The

lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor's opening statement.

Commentary:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.

2. A lawyer's objective in making an opening statement should include the following:

    a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
    b. Identify the weaknesses of the prosecution's case;
    c. Emphasize the prosecution's burden of proof;
    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. Clarify the jurors' responsibilities;
    g. State the ultimate inferences which the lawyer wishes the jury to draw; and
    h. Humanize the client.

3. A lawyer should listen attentively during the state's opening statement to raise objections and note potential promises of proof made by the state that could be used in summation.

4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement or in the defense summation.

5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
    a. The significance of the prosecutor's error;
    b. The possibility that an objection might enhance the significance of the information in the jury's mind;
    c. Whether there are any rulings made by the judge against objecting during the other attorney's opening argument.
6. A lawyer should give an opening statement in all cases whether to a bench or to the

jury. Lawyers may consider deferring opening statements until the beginning of the defense case.

STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE

The essence of the defense is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting, or diminishing the state's case, the theme and theory should determine the lawyer's course of trial.

Commentary:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case. Stipulations to the state's evidence should only be done in circumstances where there are clear benefits to the client.

3. 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.

4. In preparing for cross-examination, a lawyer should:

    a. Consider the need to integrate cross-examination, the theory of the defense, and closing argument into questions for cross examination;
    b. Anticipate those witnesses the prosecutor 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 possible 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 and other information developed about the witnesses;
i. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police 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 state's information that might otherwise be excluded;
m. Avoid asking questions that do not advance a defense theory, that allow the witness to provide unhelpful explanations, or questions that the attorney does not know the answer to.
n. Whenever possible, ask closed ended leading questions.

5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony to raise appropriate objections.

6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution's case, and out of the presence of the jury, a lawyer should move for a judgment of acquittal when appropriate on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion.

STANDARD 7.5 – PRESENTING THE DEFENSE CASE

A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the client.

Commentary:

1. A lawyer should develop, in consultation with the client and defense team, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the

client's interests are best served by not putting on a defense case and instead rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the client all the considerations relevant to the client's decision whether or not to testify.

3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.

4. In preparing for presentation of a defense case, a lawyer should:

    a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena;
    b. Determine the implications that the order of witnesses may have on the defense case;
    c. Consider the possible use of character witnesses;
    d. Consider the need for expert witnesses; and
    e. Consider whether to present a defense based on mental disease, defect, diminished capacity, or partial responsibility and provide notice of intent to present such evidence. A lawyer must consult with the client about the implications of any defenses.

5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.

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. A lawyer should conduct redirect examination as appropriate.

8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.

9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

STANDARD 7.6 – CLOSING ARGUMENT

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client.

Commentary:

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

2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.

3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument throughout trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

    a. Highlighting weaknesses in the prosecution's case;
    b. Describing favorable inferences to be drawn from the evidence;
    c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
    d. Incorporating into the argument:
        1) Helpful testimony from direct and cross-examinations;
        2) Verbatim instructions drawn from the jury charge; and
        3) Responses to anticipated prosecution arguments.

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

5. Whenever possible, a lawyer should moot all or part of closing argument prior to giving the closing in court.

STANDARD 7.7 – JURY INSTRUCTIONS

A lawyer should ensure that instructions to the jury correctly state the law and seek special instructions that provide support for the defense theory of the case.

Commentary:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, a lawyer should provide case law in support of the proposed instructions.

3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.

4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.

5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client and, if necessary, request additional or curative instructions, or move for a mistrial.

6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION

A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing 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.

Commentary:

1. In every criminal case, a lawyer should:

a. Be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition(s) for the alleged offenses(s);
b. Be aware of the client's relevant history and circumstances, including prior military service, physical and mental health needs, immigration status, and educational needs; and be sensitive to the client's sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan;
c. Understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including servicemember status);
d. Understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
e. Be knowledgeable about treatment or other programs that could reduce the length of a client's time in custody;
f. Work with the client to develop an acceptable plan addressing pertinent legal and factual considerations. This plan should be acceptable to the client and supported by a written memorandum. It should seek the least restrictive and burdensome sentence or disposition that can be obtained based upon the facts and circumstances of the case;
g. Where appropriate, obtain assessments or evaluations that support the client's plan;
h. Investigate and prepare to present to a prosecutor, when engaged in plea negotiations or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
i. Ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
j. Be aware of and prepare to address, express or implicit bias that impacts sentencing or disposition; and
k. Review the accuracy of any temporary or final sentencing or disposition order or judgments of the court and move the court to correct any errors that disadvantage the client.

2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:
    a. Be familiar with the law and any applicable administrative rules governing the length of sentence or disposition, including the Oregon Sentencing Guidelines as well as laws that establish specific sentences for certain offenses or for repeat offenders;
    b. Be knowledgeable about potential court-imposed financial obligations, including fines, fees, and restitution, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
    c. Be familiar with the operation of indeterminate dispositions and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
    d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;
    e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition such as the circumstances in which consecutive or concurrent sentences may be imposed or when offenses should merge;
    f. Establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
    g. In cases where prior convictions are alleged as the basis for the imposition of enhanced sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
    h. Determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
    i. Advance other available legal arguments that support the least restrictive and burdensome sentence.

3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:
    a. Determine the effect that plea negotiations may have on the sentencing discretion of the court;
    b. Determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument or proven to a jury beyond a reasonable doubt;
    c. Consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge, or by stipulation;
    d. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
    e. Determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information harmful to the client is deleted from it. Determine whether the client should participate in an interview with the report writer, advise the client concerning the interview, and accompany the client during any such interview;
    f. Determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
    g. Undertake other available avenues to present legal and factual information to a court or jury that might benefit the client and challenge information harmful to the client.

4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:
    a. Inform the client of the applicable sentencing or dispositional requirements, options, and alternatives, including liability for restitution and other court-ordered financial obligations and the methods of collection;
    b. Maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
    c. Obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills,

current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what, if any, relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status, and sources through which the information can be corroborated;

d. Determine with the client whether to obtain a psychiatric, psychological, educational, neurological, or other evaluation for sentencing or dispositional purposes;
e. If the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational, and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
f. Prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
g. Be familiar with and, where appropriate, challenge the validity and reliability of any risk assessment tools;
h. Investigate any disputed information related to sentencing or disposition, including restitution claims;
i. Inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial, or trial on other matters;
j. Ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence that will be submitted to the court at sentencing or disposition;
k. Prepare a written sentencing memorandum where appropriate to address factual or legal issues concerning the sentence;
l. Be prepared to present documents, affidavits, letters, and other information, including witnesses, that support a sentence or disposition favorable to the client;
m. Challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public, or the reformation of the client;
n. When the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, mental health or other treatment services, and permission for the client to surrender directly to the place of confinement;

o. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
p. Take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and
q. Advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court.

STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL

In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the client of, the consequences of a plea of guilty or a plea of no contest on the client's ability to successfully challenge the conviction, sentence, or disposition in an appellate proceeding.

STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW

A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.

Commentary:

1. A lawyer should know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.

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 9.3 – UNDERTAKING AN APPEAL

A lawyer must be knowledgeable about the various types of appeals and their application to the client's case and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. 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. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.

2. If the client chooses to pursue an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal, or referring the case to an appellate attorney or OPDC to have the notice of appeal filed.

3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must 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 a lawyer is representing a client who is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Oregon Public Defense Commission the information necessary to perfect an appeal, pursuant to ORS 137.020(6).

5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES

A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client's interests and choices, and be prepared to zealously advocate for the client.

Commentary:

1. Upon entry of judgment, a lawyer should immediately review any judgment or final order to assure that it accurately reflects terms of sentencing or other disposition favorable to the client that were agreed upon in resolution of the case or pronounced by the court and through inadvertence or error not correctly included in a judgment or final order. Lawyers should seek modification or amendment of any judgment or final order which contains errors disadvantageous to the client;

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment and

must file those motions when requested by the client and allowed by law;

3. Lawyers must be knowledgeable about and litigate issues of restitution arising from the case until a judgment on restitution is entered by the court and should appeal judgments of restitution when applicable according to Standard 9.3;

4. Lawyers should seek court orders or other remedies on behalf of a client if a term of sentencing or other disposition favorable to the client is not followed or implemented by a probation department, Department of Corrections, the Department of Human Services, the Oregon Youth Authority, or other entity having authority over the client in connection with the subject of the representation. Lawyers who are unable to seek such court orders should cooperate with OPDC in order to preserve the client's rights and find suitable counsel for such litigation;

5. Lawyers should be knowledgeable about the ability of clients to reduce the severity of certain felony crimes to misdemeanors and, when merited and requested by a former client, should file and litigate motions for such treatment;

6. To the extent possible a lawyer should cooperate with any appellate or post-conviction counsel to the extent that cooperation benefits the client.

7. Lawyers should, upon request, provide copies of the entire file to the client, appellate, or post-conviction relief counsel.

Oregon Public Defense Commission

MEMORANDUM

Date: **October 2, 2025**

To: **Jennifer Nash, Chair**
Susan Mandiberg, Vice Chair
OPDC Commissioners

Cc: **Ken Sanchagrin, Interim Executive Director**

From: **Trial Support and Development Team**

Re: **Draft Juvenile Delinquency Performance Standards**

Nature of Presentation: Briefing

Background:

OPDC staff and the provider community have drafted Juvenile Delinquency Representation Performance Standards for the Commission's review. These standards are formatted and arranged similar to the Criminal Defense Performance Standards with commentary.

These standards were distributed to and reviewed by the provider community.

Implementation:

Implement upon approval and posting.

Agency Recommendation:

The agency recommends the Commission review the standards and provide feedback prior to final approval.

Fiscal Impact:

To be determined once a full implementation and transition plan has been developed. Full implementation of these standards will likely require investments in OPDC infrastructure and staff, to implement training programs and other supports contemplated by these standards. Such investments are not part of the agency's request budget for 2025-27 and

would need to be planned for in future legislative sessions.

Agency Proposed Motion:

None at this time. These standards will be presented at a future meeting for approval.

Delinquency Attorney Performance Standards

(DRAFT)

September 2025

Table of Contents

INTRODUCTION

Oregon Revised Statute 151.216(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 delinquency defense 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 Standards for Representation in Criminal and Juvenile Delinquency Cases. OPDC has adopted those standards to make them specific to delinquency casework and has added language that reflects evolving standards of practice. 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 the prior work of the Oregon State Bar and to the Oregon Public Defense Commission Delinquency Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 – Role of Defense Counsel

The lawyer for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, always advocating for the youth'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.

Commentary:

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

2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. The lawyer should be knowledgeable about adolescent development and be well-versed in the relevant statutes, case law and local court rules concerning juvenile delinquency cases. The lawyer should be familiar with the applicable standards at every stage of the proceedings and vigorously advocate to protect the youth's due process rights, challenge the prosecution's case, and ensure that any court-ordered services are provided in the least restrictive setting.

3. In juvenile delinquency cases, a lawyer is bound by the youth's definition of their interests and should not substitute the lawyer's judgment for that of the youth regarding the objectives of the representation. A lawyer should explain to the youth and, where appropriate, to the youth's parents or guardians that the lawyer may not substitute a parent or guardian's interests or view of the youth's best interests for those expressed by the youth. Bearing in mind that children may be more susceptible to influence than an adult, a lawyer should ensure that the youth's decisions reflect their actual position. To this end, the lawyer has a duty not to overbear the will of the youth.

4. A lawyer should provide candid advice to the youth regarding the probable success and consequences of pursuing a particular position in the case and give the youth the information necessary to make informed decisions, including making available and reviewing discovery material with the youth. A lawyer should consult with the

youth regarding the assertion or waiver of any right or position of the youth. The lawyer should explain to the youth, in a developmentally appropriate way, which decisions belong to the youth alone and which may be made by the lawyer.

5. A lawyer should consult with the youth on the strategy and means by which the youth's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation. The lawyer should keep the youth fully informed, including reviewing discovery with the youth and provide the youth with information and advice at all junctures of the case to assist the youth with making informed decisions.

6. A lawyer assigned to actively assist a *pro se* accused youth should be apprised about the matter and prepared to accept representation in the matter to the extent that the circumstances of the case allow if ethically permissible. OPDC understands that there is inherent difficulty in taking over a case from a *pro se* litigant and maintaining the current case timelines.

Standard 1.2 – Education, Training and Experience of Defense Counsel

A. A lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular 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 delinquency cases. A lawyer should also be informed of the practices of the specific judge before whom a case is pending.

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

Commentary:

1. To remain proficient in the law, court rules, and practice applicable to delinquency cases, a lawyer should regularly monitor the work of Oregon courts, pertinent federal appellate courts, and the Oregon State Legislature. A lawyer should stay current on changes in case law and statutes applicable to juveniles and apply changes to current practice. Lawyers in delinquency cases must stay current in appellate opinions regarding evidence, juvenile

delinquency law, and applicable changes to criminal procedure and substantive criminal law. A lawyer should stay up to date on the direct and collateral consequences of a juvenile adjudication.

2. A lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases. A lawyer practicing juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year, at least three hours of which should be specific to delinquency defense.

3. Lawyers should be familiar with other non-penal consequences of a delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service or other public service, professional licensing, firearms possession, DNA sampling, HIV testing, among others. A lawyer practicing juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of an adjudication in a delinquency case for noncitizen youths.

5. Before undertaking representation in a juvenile delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including non-lawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a delinquency case. More experienced lawyers should mentor less experienced lawyers.

6. Lawyers in delinquency cases should develop a working knowledge of child and adolescent development, including information concerning emotional, social, and neurological development that could impact effective communication by the lawyer with youths and the defense of charges against the youth. Lawyers in delinquency cases should be familiar with adolescent brain development, the impact of trauma on emotional and neurological development, and should be trained in communicating with youth in a developmentally appropriate manner.

7. Lawyers should recognize when to consult with and retain experts to assist in the youth's defense.

8. A lawyer providing representation in juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Youth Authority, the Department of Human Services, the Juvenile Psychiatric Security Review Board, county Juvenile Department, private treatment facilities, along with other services and programs available as alternatives to detention and dispositional alternatives to custody.

9. Lawyers representing youth in the criminal system must be familiar with the federal sight and sound restrictions for housing youth in custody with adults.-

10. A lawyer for indigent youth should be familiar with services available to youths who are unhoused, unable to provide for their own food, or need other social services.

Standard 1.3 – Obligations of Defense Counsel Regarding Workload

Before accepting appointment as counsel, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a youth in a delinquency matter. If it later appears that 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.

2. A lawyer should evaluate their ability to appear in court with youths 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 Defense Counsel at Initial Appearance

A lawyer must be familiar with the law regarding initial appearance, arraignment, and detention. At the initial court appearance in a delinquency case, a lawyer should inform the youth of the offenses alleged in the petition, and assert and preserve pertinent statutory and constitutional rights of the youth on the record. Lawyers should seek release for detained youths at the first appearance.

Commentary:

1. A lawyer should promptly conduct youth conflict checks.

2. A lawyer should always endeavor to meet with and interview youths in advance of their first appearance.

3. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the youth regarding expected case events and the dates for upcoming court appearances.

4. A lawyer should be familiar with the law regarding initial appearance and juvenile detention.

5. A lawyer should be prepared to enter an appropriate assertion that preserves the youth's rights and demands due process, whether that is a denial of the allegations in a delinquency petition or request for some other further proceeding. A lawyer should make clear that the youth reserves the following rights in the present and any other matter:

    a. Right to remain silent under the State and Federal Constitutions;
    b. Right to counsel under State and Federal Constitutions;
    c. Right to file challenges to the petition;
    d. Right to file challenges to the evidence;
    e. Right to file notices of affirmative defenses; and
    f. Right to a speedy trial.

6. A lawyer should be prepared to object the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the youth during a video arraignment.

7. A lawyer should obtain all relevant documents and orders that pertain the youth's initial appearance. A lawyer should ensure that the youth has all relevant orders, as desired by the youth.

8. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the youth what rights are waived, the nature of the allegations and the potential consequences of relinquishing their rights.

9. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the youth, and be prepared to timely file appropriate documents challenging an assigned judge.

10. Lawyers should seek release of incarcerated youths at the initial appearance in accordance with standard 2.3.

Standard 2.2 – Youth Contact and Communication

A lawyer should personally conduct a youth interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the youth. These meetings should be used to explain the allegations and the nature of the proceedings, meet the ongoing needs of the youth, obtain necessary information from the youth, consult with the youth about decisions affecting the course of the defense, and to respond to requests from the youth for information or assistance concerning the case. For youths who are in custody, the initial interview should take place no more than 2 business days after assignment to the attorney. For out of custody youths, initial outreach to schedule an initial interview should occur no more than 3 business days after assignment to the attorney.

Commentary:

1. A lawyer should provide a clear explanation, in developmentally appropriate language and using an interpreter as needed, of the role of both the youth and the lawyer and demonstrate appropriate commitment to the youth's expressed interests in the outcome of the proceedings. A lawyer should elicit the youth's point of view and encourage the youth's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. To maintain privileges and assure that the youth knows the communication is confidential, a lawyer should not allow parents or other people to participate in the initial meeting with the youth.

3. At the initial meeting, the lawyer should review the allegations facing the youth and be prepared to discuss the necessary elements of the charges and the procedure the youth will be facing in subsequent court appearances, and should inquire if the youth has any immediate needs.

4. Prior to all meetings, the lawyer should:

    a. Be familiar with the elements of the charged offense(s) and the potential disposition alternatives;
    b. Obtain copies of any relevant documents that are available. This includes any charging documents and recommendations and reports made by agencies including but not limited to reports regarding pre-adjudication detention and any law enforcement reports that might be available;
    c. Be familiar with the legal procedure the youth will encounter and be prepared to discuss the process with the youth; and

d. If the youth is in custody, be familiar with the different types of pre-adjudication release conditions the court may set and whether private or public agencies are available to act as a custodian for the youth's release. The lawyer should also be prepared to discuss the process of ongoing detention review.

5. During an initial interview with the youth, a lawyer should:
   a. Obtain information concerning:
      i. The youth's ties to the community including any placement options for a youth being held in detention;
      ii. The youth's physical and mental health history including any past or current treatment providers, including getting youth and parents (if necessary) to sign releases for records;
      iii. The youth's educational history, including asking about any special education history. Youth and parents (if necessary) should be asked to sign releases for all educational records;
      iv. The youth's immediate medical needs and whether those needs are currently being met;
      v. The youth's mental health needs, including information regarding current medications; the lawyer should ensure that detention facilities have the youth's current prescriptions and that the youth has access to medications while in detention;
      vi. The youth's past involvement with the juvenile system, including but not limited to prior foster care or residential placements, any prior failures to appear for court appearances, any prior runaways, whether the youth is currently on supervision by the juvenile department or Oregon Youth Authority, and the youth's past or present performance under supervision;
      vii. The names of individuals or other sources that counsel can contact to verify information or who would have information about the youth and the youth's permission to contact those individuals;
      viii. Information concerning the youth's arrest, including information regarding any searches or seizures by law enforcement, statements made to law enforcement and the circumstances surrounding such statements, and identification procedures. It is ideal to obtain this information as close in time to the events as possible, as the youth's memory may fade with time;
      ix. Information concerning potential witnesses, video evidence, and any other evidence that requires immediate action to preserve;
      x. Information concerning youth's history that would impact their social, emotional, and neurological development and whether youth's trauma history and brain development impacted the youth's actions and thought-processes;
   b. Provide the youth information including but not limited to:
      i. An explanation of the procedures that will be followed in setting the conditions of pre-adjudication release;

ii. An explanation of the lawyer-youth privilege, including exceptions to the privilege, and instructions not to talk with anyone about the facts of the case without the lawyer present;
iii. The allegations and potential disposition alternatives, as well as potential collateral consequences of any adjudication and disposition;
iv. A general procedural overview of the progression of the case, where possible;
v. Advice that communication with people other than the defense team is not privileged – including parents/guardians – and a warning that if the youth is in custody that communications may be monitored;
vi. Discussion of who, if anyone, the youth would like the lawyer to communicate with about the youth and their case and clear limits concerning the type of information that may be shared and with whom.

6. A lawyer should use any contact with the youth as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but it not limited to:
   a. The topics enumerated in Subsection (a)(6), above;
   b. Any threats or promises made by law enforcement not previously disclosed;
   c. Evidence or assessments of the youth's competence to stand trial and mental state at the time of the offense.

Standard 2.3 – Release of Youth

A. A lawyer has a duty to seek release of the youth from detention under the conditions most favorable and acceptable to the youth.

B. Release should be sought at the earliest opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.

Commentary:

1. If the youth is in detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. Where detention continues, the lawyer should move for release if appropriate.

2. If the court will not consider release at initial appearance, the lawyer should request a detention release hearing and decision within the statutory time requirements. The lawyers should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider.

3. In preparation for the detention hearing the lawyer should discuss statutory release criteria with the youth and prepared to address the court regarding these

factors including residence, school attendance, employment, compliance with release conditions such as no contact with alleged victims, and any release compliance monitoring. The lawyer should work with the youth, the youth's parents or caretakers, and the juvenile department to develop an appropriate release plan. The lawyer should seek out services and supports, as appropriate, to augment an appropriate release plan.

4. Where the youth is incarcerated and unable to obtain pretrial release, counsel should alert the court and detention facility to any special medical or psychiatric and security needs of the youth and request that the court order the appropriate officials to take steps to meet such special needs as required.

Standard 3.1 – Investigation

A lawyer has the duty to conduct an independent review of the case, regardless of the youth's admissions or statements to the lawyer of facts constituting an admission or the youth's stated desire to make an admission. Where appropriate, the lawyer should engage in a full investigation, which should be conducted promptly and should include all information necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to advise the youth as to the possibility and consequences of adverse adjudication. 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, and whenever possible should avoid taking on investigations themselves that could cause them to be a witness in the case. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. A lawyer should obtain copies of all petitions pending against the youth and should examine them to determine the specific allegations that have been brought against the youth.

2. A lawyer should conduct multiple meetings or interviews with the youth to elicit the necessary information as described in Standard 2.2. The meetings should be tailored to meet the developmental needs of the youth, including the need to accommodate for learning differences or attention difficulties. All meetings need to proceed at the pace determined by the youth, especially youth with attention deficiencies. The interview should be used to identify:

    a. Additional sources of information concerning the incidents or events giving rise to the allegations and to any defenses;

b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments or the prosecution, which may affect the youth's rights or the admissibility of evidence;
c. Information relevant to the court's jurisdiction;
d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition;
e. The youth's mental health needs and the need for expert evaluations, including evaluations to assess youth's ability to aid and assist in their defense;
f. Information relevant to youth's social, educational, and mental health history, including history of involvement with social services and any other information relevant to mitigation; and
g. Information relevant to disposition and potential consequences of adverse adjudication.

3. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the youth. 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 defense witness at the trial or 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). The lawyer also has a duty, where appropriate, to comply with statutory rights or victims, such as those embodied in ORS 419C.273 and 419C.276ORS 135.970(2) and (3).

4. A lawyer should attempt to interview all law enforcement officers involved in the investigation of the case and taking the youth into custody and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.

5. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.

6. A lawyer should obtain school, mental health, medical, drug and alcohol, immigration, prior criminal offense records, juvenile records, and child welfare records of the youth and witnesses.

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 must comply with all statutes governing discovery to the prosecution.

Standard 3.2 – Experts

A lawyer should immediately and continually evaluate the need for experts in the case and should attempt to obtain any necessary expert for consultation or testimony or both. A lawyer must be aware of available 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. Lawyers should consider using engagement letters for any expert used on their case that clearly outline the lawyer's expectations of the expert, privilege rules, and an understanding of the expert's duty of confidentiality.

2. A lawyer should be aware of the appeals process if OPDC denies funding the lawyer believes is reasonably required for the case.

3. A lawyer should be familiar with the available experts in fields that routinely arise in delinquency cases and should have an available professional network to assist in evaluating and obtaining needed experts.

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

5. A lawyer should understand the difference between an expert used to advise the defense team and an expert used to testify and how to assure that an advisory expert does not unintentionally shift to a testimonial expert and require disclosure to the prosecution.

6. A lawyer should adequately prepare all trial 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 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 prosecution has engaged in discovery violations.

Commentary:

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

2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the youth is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:

    a. Potentially exculpatory, impeaching and mitigating information;
    b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
    c. Written communications, including emails, between prosecution, law enforcement and witnesses;
    d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records, and their relevant digital, electronic, and social media postings;
    e. Oral or written statements by the youth and the circumstances under which those statements were made;
    f. The youth's prior juvenile records and evidence of any other misconduct that the prosecution may intend to use against the youth;
    g. Copies or, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
    h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
    i. Statements and reports of experts and the data and documents on which they are based; and
    j. Statements of co-youth.

3. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

4. A lawyer should consider issuing subpoenas where necessary to obtain favorable evidence and should file motions as necessary to obtain otherwise protected or confidential information necessary for the youth's defense (such as video and documentary evidence from child abuse centers, alleged victims' counseling records, child welfare records related to the allegations, and any other protected records relevant to the youth's defense).

5. A lawyer should review all discovery with the youth and be prepared to answer all youth's questions and explain the relevance of the discovery to the case.

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

Standard 4.2 – Theory of the Case

A lawyer should develop and continually reassess a theory of the youth's case that advances the youth's goals and encompasses the realities of the youth's situation.

Commentary:

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

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

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

4. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the youth.

Standard 5.1 – Pretrial Motions and Notices

A lawyer should research, prepare, file, and argue appropriate pretrial motions and notices. A lawyer must be knowledgeable of all motion and notice deadlines that may apply to their case. Lawyers may not miss filing deadlines.

Commentary:

1. The decision to file a particular pretrial motion or notice should be made by the lawyer after thorough investigation, discussion with their client, and after considering the applicable law under the circumstances of the case.

2. Among the issues the lawyer should consider addressing in pretrial motions are:

    a. The pre-adjudication custody of the youth;
    b. The competency or fitness to proceed of the youth (see Standard 5.3);
    c. The constitutionality of relevant statutes;
    d. Potential defects in the charging process or instrument;
    e. The sufficiency of the charging document;
    f. The severance of charges or co-youth for trial;
    g. Change of venue;
    h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
    i. The discovery obligations of both the prosecution and the defense, including:
        i. Motions for protective orders;
        ii. *Brady v. Maryland* motions; and
        iii. Motions to compel discovery.
    j. Violations of federal or state constitutional or statutory provisions, including:
        i. Illegal searches or seizures;
        ii. Involuntary statements or confessions;
        iii. Statements obtained in violation of the right to counsel or
        iv. privilege against self-incrimination;
        v. Unreliable identification evidence;
        vi. Unreliable scientific or pseudoscientific evidence;
        vii. Speedy trial rights; and
        viii. Double jeopardy protections.
    k. Requests for—and challenges to denials of—funding for access to reasonable and necessary resources and experts;
    l. The right to a continuance to adequately prepare and present a defense or to respond to prosecution motions;
    m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
        i. The competency or admissibility of particular witnesses, including experts and children;
        ii. The use of prior convictions for impeachment purposes;
        iii. The use of prior or subsequent bad acts;
        iv. The use of reputation or other character evidence; and
        v. The use of evidence subject to “rape shield” and similar protections.
    n. Notices of affirmative defenses and other required notices to present particular evidence;
    o. The dismissal of charges on the basis of civil compromise, best interests of a youth, in the furtherance of justice, or the general equitable powers of the court.

3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:
   a. The burden of proof, the potential advantages, and disadvantages of having witnesses testify under oath at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a youth's detriment;
   b. Whether a pretrial motion may be necessary to protect the youth's rights against later claims of waiver, procedural default, or failure to preserve an issue for later appeal;
   c. The effect the filing of a motion may have upon the youth's speedy trial rights; and
   d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

Standard 5.2 – Filing and Arguing Pretrial Motions

A lawyer should file all pretrial motions in a timely fashion, should have knowledge of local court rules, and should comport with those rules to the extent possible. A lawyer should prepare for a motion hearing just as they would prepare for trial, including preparing for the presentation of evidence, exhibits, and witnesses.

Commentary:

1. Motions should succinctly inform the court of the authority relied upon.

2. When a hearing on a motion requires taking evidence, or when the taking of evidence is advantageous to the youth's position, a lawyer's preparation should include:

   a. Investigation, discovery, and research relevant to the claims advanced;
   b. Subpoenaing all helpful evidence and witnesses including those also subpoenaed by the prosecution;
   c. Preparing witnesses to testify;
   d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the youth of other witnesses testify and be subject to cross examination; and
   e. A consideration of the record being made for the purposes of an adjudication proceeding in addition to the underlying motion.

3. After a hearing during which evidence is taken an attorney should request the FTR recording of the hearing and have transcriptions made.

4. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.

5. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal, and renewing the motion or objection during trial to preserve the matter for appeal.

Standard 5.3 – Pretrial Determination of Youth's Fitness to Proceed

A lawyer must be able to recognize when a youth may not be competent to stand trial due to mental health disorders, developmental immaturity, and developmental or intellectual disabilities, and take appropriate action. The lawyer's responsibility to evaluate and recognize their client's competence is ongoing throughout the case. Lawyers must take appropriate action to address youth's competency as soon as possible.

Commentary:

1. A lawyer should assess whether the youth'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. When a lawyer has reason to doubt the youth's competency to stand trial, the lawyer should request funding for a retained psychological examination of the youth as well as gather collateral information related to the youth's mental health. The lawyer should consider filing a pretrial motion requesting a competency evaluation only if a private evaluation cannot be obtained. The lawyer should discuss the issue of competency with the youth and explain the purpose of a competency evaluation, along with the potential outcomes of a competency evaluation.

3. Lawyers should seek prior psychological examinations of the youth as well as other records relating to their client's prior commitments, mental health evaluations, or diagnoses. Lawyers may use those records at the lawyer's discretion in any proceeding relating to the youth's ability to aid and assist in their own defense.

4. The right to be able to aid and assist in their own defense is a core right of the youth. If a lawyer has reason to doubt their client's fitness to proceed the lawyer has an obligation to take appropriate action to determine the youth's fitness. If a lawyer has concerns regarding a youth's capacity the lawyer must consider and, if possible, discuss with their client:

a. His or her obligations under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-youth relationship, to the extent possible, with a youth 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 youth or referral to other agencies.

5. If the lawyer decides to proceed with a competency hearing, they should secure the services of a qualified expert in accordance with Standard 3.2.

6. Lawyers should keep up to date with developments concerning the Oregon State Hospital, federal litigation involving the State's handling of youths found unfit to proceed, and any legislative changes to the statutory framework of fitness.

7. If a court finds a youth incompetent to proceed, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth. A lawyer should maintain contact with the youth during the restorative services process, including being present for any evaluations, as appropriate to achieve youth's stated interest.

8. If a court finds a youth incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available that will restore the youth to fitness.

9. If a court finds a youth is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a concern about the youth's continuing competency to proceed and in order to preserve the matter for appeal.

Standard 5.4 – Continuing Obligations to File or Renew Pretrial Motions or Notices

A lawyer should be prepared to raise any issue which is appropriately raised pretrial 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 pretrial motion if new supporting information is disclosed in later proceedings.

Standard 6.1 – Exploring Disposition without Trial

A lawyer has the duty to explore with the youth the possibility, advisability, and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without trial. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the youth's express authorization.

Commentary:

1. A lawyer should explore and consider restorative justice options, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a dependency case, alternative dispositions including conditional postponements, motions to dismiss in the interests of justice, negotiated admissions or disposition agreements, and other non-trial dispositions.

2. A lawyer should explain to the youth the strengths and weaknesses of the prosecution's case and the defense case, the benefits and consequences of considering a non-trial disposition, any investigation which has been or could be conducted, and discuss with the youth any options that may be available to the youth and the rights the youth gives up by pursuing a non-trial disposition.

3. A lawyer should assist the youth in weighing whether there are strategic advantages to be gained by making an admission or continuing to trial.

4. With the consent of the youth, a lawyer should explore with the prosecutor and the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-admission dispositions and recommendations that will be made about disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the youth, including advocating for some benefit for the youth in exchange for an admission.

5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the youth's express authorization. The lawyer must attempt to ensure that the youth has adequate time to consider the plea and alternative options. A lawyer should advise youths about their opinion of any plea offers but may not substitute their judgement for that of their client.

6. A lawyer must keep the youth fully informed of continued negotiations and convey to the youth any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the youth has adequate time to consider the proposed admission and

alternative options. The terms of any proposed settlement must be explained to the youth in a clear, developmentally appropriate manner and the lawyer should exercise care that the youth understands the terms of the settlement as well as the consequences of the proposed settlement. The lawyer should also ensure that the youth has the opportunity to consult with trusted adults regarding the proposed admission and alternative options and should, with permission, explain to the trusted adult the terms of the settlement.

7. A lawyer should continue to take steps necessary to preserve the youth's rights and advance the youth's defenses even while engaging in settlement negotiations.

8. Before conducting negotiations, a lawyer should be familiar with:

    a. The types, advantages and disadvantages, and applicable procedures and requirements of available admissions to juvenile court jurisdiction, including an admission of being within the jurisdiction of the court, no contest, a conditional admission of jurisdiction that reserves the right to appeal certain issues, and an admission in which the youth is not required to acknowledge guilt (*Alford* plea);
    b. Whether agreements between the youth and the prosecution would be binding on the court or on the juvenile, parole and probation, and immigration authorities; and
    c. The practices and policies of the particular prosecuting authorities, juvenile authorities, and judge that may affect the content and likely results of any negotiated settlement.

9. A lawyer should be aware of, advise the youth of, and, where appropriate, seek to mitigate the following, where relevant:

    a. Rights that the youth would waive when making an admission disposing of the case without a trial;
    b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, and probation or post-confinement supervision.
    c. The minimum and maximum fines and assessments, court costs that may be ordered as well as options for waiving, deferring, or paying fines by installments, and any restitution that is being requested by the victim(s);
    d. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victims, asset forfeiture, and the availability of work programs to pay restitution and perform community service;
    e. Consequences related to previous offenses;
    f. The availability and possible conditions of conditional postponement, probation, and parole;
    g. The availability and possible conditions of alternative dispositions and formal accountability agreements;

h. For non-citizen youth, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
i. For non-citizen youths, the possibility of adverse immigration consequences;
j. For non-citizen youths, the possibility of criminal consequences of illegal re-entry following adjudications and deportation;
k. The possibility of other consequences of adjudication, such as:
    i. Requirements for sex offender registration, relief, and set-aside;
    ii. DNA sampling, AIDS, and STD testing;
    iii. Effect on driver's or professional licenses and on firearm possession;
    iv. Loss of public benefits;
    v. Loss of housing, education, financial aid, career, employment, vocational, or military service opportunities; and
    vi. Risk of enhanced sentences for future adult convictions, including familiarity with the Oregon Sentencing Guidelines;
m. The possible place and manner of confinement, placement or commitment;
n. The availability of pre- and post-adjudication diversion programs and treatment programs;
o. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

    a. Concessions that the youth might offer to the prosecution, including an agreement:
        i. Not to contest jurisdiction;
        ii. Not to dispute the merits of some or all of the charges;
        iii. Not to assert or litigate certain rights or issues;
        iv. To fulfill conditions of restitution, rehabilitation, treatment, or community service;
        v. To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
    b. Benefits to the youth, including an agreement:
        i. That the prosecution will recommend a reduced sentence upon adjudication compared with the likely sentence after adjudication at trial;
        ii. That the prosecutor will accept a plea to a lesser charge or dismiss remaining charges upon a plea;
        iii. That the prosecution will agree to continue juvenile court jurisdiction;
        iv. That the prosecution will not oppose release pending disposition or appeal;
        v. That the youth may reserve the right to contest certain issues;
        vi. To dismiss or reduce charges immediately or upon completion of certain conditions;
        vii. That the youth will not be subject to further investigation or prosecution for uncharged conduct;

viii. That the youth will receive, subject to the court's agreement, a specified set or range of sanctions; or
ix. That the prosecution will take, or refrain from taking, a specified position with respect to sanctions.

11. A lawyer has the duty to inform the youth of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the youth the advantages, disadvantages, and potential consequences of the settlement or disposition. A lawyer should discuss with the youth whether the youth wishes to counter the proposed settlement and promptly convey any counter-offer to the prosecution.

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

Standard 6.2 – Entry of Admission to Jurisdiction

A decision to enter an admission to the allegation(s) rests solely with the youth. The lawyer must not unduly influence the decision to enter an admission and must ensure that the youth's acceptance of the negotiated admission is voluntary and knowing and reflects an intelligent understanding of the admission and the rights the youth will forfeit.

Commentary:

1. A lawyer has the duty to explain to the youth the advantages, disadvantages, and consequences of resolving the case by admitting to the allegations.

2. A lawyer has the duty to explain to the youth the nature of the hearing at which the youth will enter the admission and the role that the youth will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the youth that the court may in some cases reject the admission.

3. If during the admission hearing, the youth does not understand questions being asked by the court, the lawyer must request a recess to assist the youth.

Standard 7.1 – General Trial Preparation

A. A juvenile adjudicatory hearing (herein referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state's case and, where appropriate, presentation of a defense case.

B. A lawyer should develop, in consultation with the youth and members of the defense team, an overall defense strategy for the conduct of the trial.

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

Commentary:

1. A lawyer should ordinarily have the following materials available for use at trial:

    a. Copies of all relevant documents filed in the case;
    b. Relevant documents prepared by investigators;
    c. An outline or draft of opening statement;
    d. Cross-examination plans for all possible prosecution witnesses;
    e. Direct examination plans for all prospective defense witnesses;
    f. Copies of defense subpoenas;
    g. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
    h. Prior statements of all defense witnesses;
    i. Reports from experts;
    j. The CVs of any experts expected to testify at trial;
    k. Training and other available records for any law enforcement offers who are expected to testify;
    l. A list of all exhibits and the witnesses through whom they will be introduced;
    m. Originals and copies of all documentary exhibits;
    n. Copies of all relevant statutes and cases;
    o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
    p. Outline or draft of closing argument; and
    q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.

2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process, and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies

for challenging evidence. The lawyer should be prepared to address objections to defense testimony. The lawyer should be prepared to raise affirmative defenses as applicable. The lawyer should consider requesting that witnesses be excluded from the trial.

3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the youth. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.

4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.

5. Throughout the trial process, a lawyer should advise the youth as to suitable courtroom dress and demeanor.

6. A lawyer should plan with the youth the most convenient system for conferring privately throughout the trial; where necessary, a lawyer should seek a court order to have the youth available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter or translator for the youth during all trial proceedings.

7. Throughout preparation and trial, a lawyer should consider the potential effects that actions may have upon disposition if there is a finding that the youth is within the jurisdiction of the court. A lawyer should discuss the risks of those actions with their client.

8. 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 youth or required by OPDC and, if so, attempt to obtain approval for the same as soon as possible.

Standard 7.2 – Opening Statement

An opening statement is a lawyer's first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial and should raise and, if necessary, preserve for appeal any objections to the prosecutor's opening statement.

Commentary:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.

2. A lawyer's objective in making an opening statement may include the following:

    a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
    b. Identify the weaknesses of the prosecution's case;
    c. Emphasize the prosecution's burden of proof;
    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 judge to draw; and
    g. Humanize the youth.

3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.

4. A lawyer should consider incorporating the promises of proof the prosecutor makes during opening statement in the defense summation.

5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting or requesting a mistrial unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

    a. The significance of the prosecutor's error;
    b. The possibility that an objection might enhance the significance of the information in the judge's mind;
    c. Whether there are any rulings made by the judge against objecting during the other attorney's opening statement.

6. A lawyer should give an opening statement in all cases unless there is a strong tactical reason not to. Lawyers may consider deferring opening statements until the beginning of the defense case.

Standard 7.3 – Confronting the Prosecution's Case

The essence of the defense is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting, or diminishing the state's case, the theme and theory should determine the lawyer's course of action.

Commentary:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motion for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

3. 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.

4. In preparing for cross-examination, a lawyer should:

    a. Consider the need to integrate cross-examination, the theory of the defense, and closing argument into questions for cross examination;
    b. Anticipate those witnesses the prosecutor 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's testimony;
    f. Be alert to possible 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 and other information developed about the witnesses;
    i. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police 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 state's information that might otherwise be excluded;
    m. Avoid asking questions that do not advance a defense theory, that allow the witness to provide unhelpful explanations, or questions that the attorney does not know the answer to.
    n. Whenever possible, ask closed ended leading questions.

5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony to raise appropriate objections.

6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution's case, a lawyer should move for a judgment of acquittal on each count alleged, when appropriate. The lawyer should request, when necessary, that the court immediately rule on the motion.

Standard 7.4 – Presenting the Defense Case

A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the youth.

Commentary:

1. A lawyer should develop, in consultation with the youth and defense team, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the youth's interests are best served by not putting on a defense case and instead rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the youth all of the considerations relevant to the youth's decision whether or not to testify.

3. A lawyer should be aware of the elements of any affirmative defense and know whether the youth bears a burden of persuasion or a burden of production.

4. In preparing for presentation of a defense case, a lawyer should:

    a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
    b. Determine the implications that the order of witnesses may have on the defense case;
    c. Consider the possible use of character witnesses;
    d. Consider the need for expert witnesses; and
    e. Consider whether to present a defense based on mental disease, defect, diminished capacity, or partial responsibility, and provide notice of intent to

present such evidence and consult with the youth about the implications of an insanity defense.

5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.

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. A lawyer should conduct redirect examination as appropriate.

8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.

9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Standard 7.5 – Closing Argument

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the youth.

Commentary:

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

2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.

3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
   a. Highlighting weaknesses in the prosecution's case;
   b. Describing favorable inferences to be drawn from the evidence;
   c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
   d. Incorporating into the argument:
      i. Helpful testimony from direct and cross-examinations;
      ii. Verbatim instructions drawn from the applicable adult criminal jury charge; and
      iii. Responses to anticipated prosecution arguments.

4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object or request a mistrial unless tactical considerations suggest otherwise.

5. A lawyer should ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Standard 8 – Obligations of Counsel Concerning Disposition

A lawyer must work with the youth to develop a theory of disposition and an individualized disposition plan that is consistent with the youth's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the youth for such an outcome.

Commentary:

1. In every delinquency case, a lawyer should:
   a. Be knowledgeable about the applicable law governing the length and conditions of any applicable disposition, the pertinent dispositional procedures, and inform the youth at the commencement of the case of the potential disposition for the alleged offenses;
   b. Be aware of the youth's relevant history and circumstances, including physical and mental health needs, and educational needs, and be sensitive to the youth's sexual orientation or gender identity to the extent this history or circumstance impacts dispositional plan;
   c. Understand and advise the youth concerning the availability of deferred dispositions, conditional discharges, early termination of probation, informal dispositions, alternative disposition including conditional postponement and diversion agreements, and formal accountability agreements;
   d. Understand and explain to the youth the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any disposition in a case, including the effect of an adjudication on a sentence for any subsequent crime or act that would be a crime if committed by an adult;
   e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities, including group homes, foster case, residential treatment programs, or mental health treatment facilities that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth that could reduce the length of a youth's time in custody or in out-of-home placement;
   f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contacts with the Juvenile

Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the youth;

g. Develop a plan in conjunction with the youth, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome disposition which can reasonably be obtained based upon the facts and circumstances for the case and that is acceptable to the youth;
h. Where appropriate, obtain assessments or evaluations that support the youth's plan;
i. Investigate and prepare to present to a prosecutor when engaged in plea negotiations or to the court at disposition available mitigating evidence and other favorable information that might benefit the youth at disposition;
j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the youth in determining the disposition to be imposed;
k. Be aware of and prepare to address explicit or implicit bias that impacts disposition; and
l. Review the accuracy of any temporary or final disposition order of judgments of the court and move the court to correct any errors that disadvantage the youth.

2. In understanding the disposition applicable to a youth's case, a lawyer should:
   a. Be familiar with the law and any applicable administrative rules governing the length of disposition and be familiar with the juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
   b. Be knowledgeable about potential court-imposed financial obligations, both direct and in-direct, including restitution and payments for treatment services, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
   c. Be familiar with the operation of indeterminate disposition and the law governing credit for pretrial detention, time limits on post-disposition juvenile detention and out-of-home placement, as well the length of time and usual conditions of juvenile parole;
   d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a juvenile adjudication on a youth's immigration status or other collateral consequences of concern to the youth e.g., civil disabilities, sex-offender registration, disqualification for types of employment, consequences related to the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing and enhanced sentences or dispositions for future convictions or adjudications;
   e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to disposition; and
   f. Advance other available legal arguments that support the least restrictive and burdensome sentence.

3. In understanding the applicable dispositional hearing procedures, a lawyer should:
   a. Determine the effect that admission negotiations may have on the disposition discretion of the court;
   b. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the youth, to present evidence favorable to the youth and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
   c. Undertake other available avenues to present legal and factual information to the court that might benefit the youth and challenge information harmful to the youth.

4. In advocating for the least restrictive or burdensome disposition for a youth, a lawyer should:
   a. Inform the youth of the applicable dispositional requirements, options, and alternatives, including liability for restitution and other potential financial obligations and the methods of collection and consequences of non-payment;
   b. Maintain regular contact with the youth before the dispositional hearing and keep the youth informed of the steps being taken in preparation of disposition and work with the youth to develop a theory for the disposition phase of the case;
   c. Obtain from the youth and others information such as the youth's background and personal history, prior juvenile record, employment history and skills, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history and treatment, and what, if any, relationship there is between the youth's acts that would be crimes if committed by an adult and the youth's medical, mental health, or substance abuse issues and the sources through which the information can be corroborated;
   d. Determine with the youth whether to obtain a psychiatric, psychological, educational, neurological, or other evaluation for dispositional purposes;
   e. If the youth is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the youth and request that the evaluator address the youth's emotional, educational, and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
   f. Prepare the youth for any evaluations or interviews conducted for disposition purposes;
   g. Be familiar with and, where appropriate, challenge the validity and reliability of any risk assessment tools;
   h. Investigate any disputed information related to disposition, including restitution claims;
   i. Inform the youth of the youth's right to address the court at disposition and, if the youth chooses to do so, prepare the youth to personally address the court,

including advice of the possible consequences that admission of responsibility may have on an appeal, retrial, or trial on other matters;

j. Ensure the youth has adequate time prior to disposition hearing to examine any dispositional report, or other documents and evidence that will be submitted to the court at disposition;
k. Prepare a written disposition plan that the lawyer and the youth agree will achieve the youth's goals;
l. Be prepared to present documents, affidavits, letters, and other information including witnesses that support a disposition favorable to the youth;
m. As supported by the facts and circumstances of the case and youth, challenge any conditions of probation or parole that are not reasonably related to the adjudicated acts, the protection of the public or reformation of the youth;
n. Be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
o. After the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition, or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
p. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
q. Take any other steps that are necessary to advocated fully for the disposition requested by the youth and to protect the interests of the youth; and
r. Advise the youth about the obligations and duration of disposition conditions imposed by the court, and the consequences of failure to comply with orders of the court. Where appropriate, counsel should confer with the youth's parents regarding the disposition process to obtain their support for the youth's proposed disposition.

Standard 9.1 – Consequences of Plea on Appeal

In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the youth of, the consequences of an admission to juvenile court jurisdiction on the youth's ability to successfully challenge the conviction, juvenile adjudication, sentence, or disposition in an appellate proceeding.

Commentary:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction, or a no contest plea on the various forms of appeal.

2. During discussions with the youth regarding a possible admission, plea of guilty, or no contest, a lawyer must inform the youth of the consequences of such a plea on any potential appeals.

3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional admission, that affect the possibility of appeal.

Standard 9.2 – Preservation of Issues for Appellate Review

A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the youth and apprise the youth of which issues have been preserved for review.

Commentary:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.

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

Standard 9.3 – Post Sentencing and Disposition Procedures

A lawyer should be familiar with procedures that are available to the youth after disposition. A lawyer should explain those procedures to the youth, discern the youth's interests and choices, and be prepared to zealously advocate for the youth.

Commentary:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. A lawyer should ensure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians, or custodians.

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.

3. The lawyer should be versed in relevant case law, statutes, court rules, and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and to review, reopen, modify, or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, or welfare

is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Standard 9.4 – Maintain Regular Contact with Youth

A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.

B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.

Commentary:

1. The lawyer should assure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement, and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the youth's record expunged or to obtain relief from sex offender registration.

2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the youth of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

3. To stay in regular contact with an adjudicated youth, a lawyer should have contact with the youth at least quarterly and before any court hearings.

Standard 9.5 – Representing a Youth Pursuant to ORS 419C.615

A lawyer appointed to represent a youth in a claim for juvenile post adjudication relief pursuant to ORS 419C.615 should be familiar with and able to meet the performance standards set forth in the Oregon State Bar Performance Standards for Post-Conviction Relief Practitioners.

A lawyer appointed to represent a youth in a claim for juvenile post adjudication relief pursuant to ORS 419C.615 should be sufficiently familiar with youth development and the standards for representation of youth in delinquency matters to identify possible shortcomings in the representation or process.

Counsel should conduct a thorough and independent investigation of the validity of the underlying adjudication, disposition, and, when applicable, appellate proceedings. Counsel's investigation should examine the entire delinquency case for evidence of a substantial denial of state or federal constitutional rights in the trial level or appellate proceedings.

Counsel should ordinarily not have represented the petitioner during the underlying delinquency case or direct appeal since the post-adjudication proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel.

Commentary:

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

    a. Counsel should be familiar with the type of claims that may be raised in post-adjudication relief proceedings, and understand that most direct-appeal-like, record based claims, are not cognizable.
    b. Counsel should understand that a "collateral" basis for post-adjudication relief, by statutory and common sense understanding, will ordinarily not be entirely established by the previously compiled record of the case, and must be supported by factual and legal grounds that arise outside the record.
    c. Counsel should not accept appointment in a post-adjudication relief proceeding unless he or she is prepared, knowledgeable, and skilled to undertake a comprehensive extra-record investigation.

2. Juvenile post-adjudication relief is a critical chance to present new evidence that was not part of the original adjudication. Counsel representing youths in these cases should consider:

    a. whether the youth was mentally fit during the case;
    b. misconduct by police or prosecutors;
    c. judicial error or misconduct;
    d. mistaken or flawed eyewitness accounts;
    e. false or unreliable testimony from informants;
    f. forced or pressured confessions;
    g. errors in forensic testing and analysis;
    h. poor representation by the youth's trial or appeals lawyer; and
    i. whether an admission was made voluntarily and with full understanding.

3. Counsel's investigation should include a thorough review of all available transcripts of the proceedings in the delinquency case. Counsel should seek to obtain, review, and transcribe any necessary portions of the proceedings that were not already transcribed.

4. Counsel should obtain and review other relevant records and documents, including the complete file of trial counsel and appellate counsel in the delinquency case, and, where appropriate, files and records of investigators and experts who worked with trial counsel, prosecutorial and police files and records, and records of the trial and appellate courts. Where appropriate, counsel should interview trial and appellate counsel. Trial and appellate counsel should cooperate with post adjudication counsel's investigation to the extent ethically permitted.

Standard 10.1 – Representing Youth in Waiver Proceedings: Specialized Training and Experience Necessary

Specialized training and experience are prerequisites to providing effective assistance of counsel to youths facing waiver motions and possible adult prosecution.

Counsel must be familiar with relevant statutes and case law regarding the interplay between adult and juvenile prosecution, including waiver factors enumerated ORS 419C.349(2)(b). Counsel must be aware of the timing and process of waiver hearings and required findings for waiver of the juvenile court's jurisdiction.

Commentary:

1. Counsel should be knowledgeable and aware of the extent to which adult and juvenile facilities provide young youth's legally mandated safety protections, medical and mental health care, rehabilitative treatment, and mandatory education services to which they are entitled;

2. Counsel should be aware of timelines for youth to be committed to juvenile or adult facilities;

3. Counsel should be knowledgeable of sentencing alternatives in both adult court and for waived youth convicted in adult court;

4. Counsel should pursue specialized training, including in the areas of child and adolescent development, to ensure the requisite level of knowledge and skill to represent a youth in a transfer hearing or in adult court, and be familiar with developmental issues that may affect competence to stand trial; and

5. When the youth will be tried in adult court, counsel has the responsibility of educating the adult court stakeholders, including new defense counsel, if applicable, of the special developmental considerations of youth. Counsel must use child development research and case law supporting the lessened culpability of adolescent offenders in arguing intent, capacity, and the appropriateness of rehabilitative sentencing options.

Standard 10.2 – Informing the Youth of the Possibility of Adult Prosecution and the Potential Consequences

Counsel must fully advise the youth of the procedures that may lead to adult prosecution and the various ways that the state could proceed.

Commentary:

1. Counsel should strive to use developmentally appropriate language when advising the youth about the youth's case;

2. Counsel must be well versed in the procedures that could lead to adult prosecution as well as the consequences of an adult prosecution;

3. Counsel must explain the consequences of prosecution in adult court, including the extent of possible sentencing decisions, as well as collateral consequences. Counsel should advise which venue would be most likely to achieve the youth's expressed interest;

4. As part of counsel's obligation to inform the youth about the Waiver proceedings, counsel should discuss with the youth, at a minimum:
   a. Factors the court uses to determine whether to try youth as adult;
   b. Use of physical, psychological, or other evidence considered by the court at a waiver hearing;
   c. The disadvantages along with the advantages of proceeding in adult court;
   d. The potential to negotiate a plea that would allow the youth to remain in juvenile court or receive a more lenient sentence in adult court; and
   e. The potential, where it exists, of a change of counsel should the court waive juvenile jurisdiction over the case.

Standard 10.3 – Conducting Investigation for Youths Facing Waiver and Possible Adult Prosecution

Counsel must conduct timely and thorough investigation of the circumstances of the allegations and the youth's background in any case where the youth is facing a waiver petition under ORS 419C.349.

Commentary:

1. Counsel must understand the factors that weigh for and against waiver to adult court and must investigation the case accordingly;

2. Counsel should compile and coordinate all evidence and information bearing on the waiver decision;

3. Counsel should retain a licensed investigator to conduct a thorough investigation into the factual circumstances of the underlying charges as well as a mitigation specialist to investigate and develop the factual record pertaining to youth's history and development;

4. Counsel should obtain records and evidence bearing on the waiver decision, which may include:
   a. Past juvenile delinquency records;
   b. Child welfare records;
   c. School records;
   d. Detention records;
   e. Mental health and medical records;
   f. Other relevant records related to youth's history and development, including relevant family history and circumstances; and
   g. Interviews of people with personal knowledge of the youth.

5. Counsel should arrange for independent evaluations, including but not limited to psychological evaluations related to the specific waiver criteria and retain experts as necessary and appropriate to challenge the evidence in the state's case, educate the court regarding juvenile development and brain science, and support youth's case at a waiver hearing.

   a. Counsel should provide defense evaluators with relevant records or materials to assist the expert's work on the case;
   b. Counsel should advise youth on the advantages and disadvantages of discussing the underlying allegations with any defense evaluator(s), including the potential use of such statements at the waiver proceeding and any subsequent proceedings;
   c. Counsel should advise youth on whether to invoke his or her constitutional right to remain silent during an evaluation regarding the underlying allegations and any other areas of potential juvenile or criminal liability;
   d. If counsel and youth decide that invocation of the right to remain silent is in youth's best interest as to any topic, counsel must be present during the evaluation to invoke such rights; and
   e. Counsel should prepare youth for his or her meeting with the evaluator.

6. If the state intends to proceed with an independent psychological evaluation of youth for the purpose of the waiver hearing, counsel must, at a minimum:

a. Advise the youth as to the advantages and disadvantages of participating in the evaluation, including advising youth whether to discuss the underlying allegations with the evaluator or whether to invoke youth's constitutional right to remain silent as to the charges or other potential topics carrying potential juvenile or criminal liability;
b. Prepare youth for the meeting with the state's evaluator;
c. Counsel must be present in person during any evaluation or meeting between the youth and the state's evaluator, even if counsel does not intend to invoke youth's rights;
d. Counsel should invoke youth's constitutional right to remain silent, as appropriate, during the evaluation;
e. Counsel should advocate for appropriate breaks for youth, as needed, during the evaluation; and
f. Counsel should decide, with input from the youth, whether to provide records or mitigation materials bearing on the youth's history and development to the state's expert to aid in the evaluation.

7. Counsel should be familiar with the legal issues relating to waiver including case law and research regarding adolescent development. Counsel should develop cogent arguments that support the youth's expressed interests.

8. Counsel must advocate for the youth's expressed interests regarding jurisdiction with prosecutors and other stakeholders in advance of a waiver proceeding.

Standard 10.4 – Advocate Against Waiver to Adult Court

Counsel must, when in the youth's expressed interests, endeavor to prevent adult prosecution of the youth.

Commentary:

At a waiver hearing, counsel should:

1. Present testimony and evidence that supports the juvenile court retaining jurisdiction over the case, including but not limited to: presentation of expert testimony, presentation of mitigation evidence, lay witness evidence or testimony, challenges to the underlying factual basis for the petition, and any other evidence that relates to the court's required findings under ORS 419C.349.

2. Counsel should file appropriate pre-hearing motions, including but not limited to, a hearing memorandum outlining the relevant legal issues and facts to be considered by the court at the hearing, motions to suppress evidence, and evidentiary or constitutional motions specific to waiver hearings.

3. Counsel must be prepared to challenge the state's evidence, including cross examination of any expert witnesses called by the state.

4. Counsel should present a cogent and well-organized closing argument to the court founded in the law and the facts of the case and zealously advocating against waiver of juvenile court's jurisdiction.

Standard 10.5 – Obligations Following a Determination to Prosecute the Youth in Adult Court

Commentary:

1. Counsel should be aware of federal and state limitations on youth placement in adult facilities and, as appropriate and consistent with the youth's wishes, advocate for appropriate placement.

2. If the case is waived to adult court and the youth is assigned a different lawyer, counsel should work closely with the new attorney to ensure a smooth transition of the case.