

Practice Standards

December, 2012

Section VI, Qualifications and Duties of Counsel

20. Presenting the Defendant's Case

A. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt. Counsel should also consider the tactical advantage of having final closing argument when making the decision whether to present evidence other than the client's testimony.

B. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

C. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

D. In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

- a. develop a plan for direct examination of each potential defense witness;
- b. determine the implications that the order of witnesses may have on the defense case;
- c. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
- d. consider the possible use of character witnesses;
- e. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
- f. review all documentary evidence that must be presented; and,
- g. review all tangible evidence that must be presented.

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

F. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

G. Counsel should conduct redirect examination as appropriate.

Practice Standards

December, 2012

Section VI, Qualifications and Duties of Counsel

H. At the close of the defense case, counsel should renew the motion for a directed verdict of acquittal on each charged count.