EXHIBIT 13

Standards for Counsel in Representing Individuals Pursuant to the Montana Public Defender Act

March 2007

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Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act

I. INTRODUCTION

1. Purpose:

These standards are intended to encourage and allow attorneys representing indigent and all other persons entitled to public legal representation to perform to a high standard of representation and to promote excellence and professionalism in the representation of those persons. The following standards are adopted to foster a legal representation system in which:

A. The public legal representation function, including the selection, funding, and payment of counsel for indigent clients, is as independent from political influence and judicial supervision as possible given the geographic and demographic diversity of the State of Montana;

B. Those persons entitled to public legal representation are adequately represented through a legal services delivery system consisting of defender offices, the active participation of the private bar, or both;

C. Applicants requesting legal services based upon indigence are screened for eligibility based upon uniform standards, then assigned and notified of an appointment as soon as is practically possible;

D. Counsel has sufficient time, confidential space, and confidential electronic communications to converse with the client;

E. Counsel's workload matches counsel's capability;

F. Counsel's ability, training, and experience match the complexity of the case;

G. To the extent possible, the same attorney continuously represents the client until completion of the case;

H. Counsel for a client entitled to public legal representation has parity of resources with opposing counsel and is included as an equal partner in the justice system; and,

I. Counsel is required to obtain continuing legal education and training.

2. Application:

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

B. These standards apply generally to all counsel who represent persons at state expense pursuant to the Montana Public Defender Act. In cases where these standards conflict with or contradict the standards established for representation in certain specific types of cases, the more specific standards shall apply.

3. Discrimination:

A. No government agency or any entity contracting with a government agency, in its selection of an attorney, firm, or agency to provide public legal representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the basis of race, color, religion, national origin, age, marital status, sex, sexual orientation or disability. Government entities, defender offices, contract counsel, and assigned counsel shall comply with all federal, state, and local non-discrimination laws.

II. CASE SELECTION

1. Nature of Case:

A. Counsel may be assigned to represent persons in all cases as described in the Montana Public Defender Act and in any other case deemed appropriate by the Montana Supreme Court.

2. Publicizing of Services:

A. The availability of public defender services should be publicized by the Office of the State Public Defender, regional public defender offices, and local public defender offices. Reasonable efforts should be made to ensure that notices containing information about public defender services and how to access those services are posted conspicuously in police stations, jails and wherever else it is likely to give effective notice.

III. THE ATTORNEY-CLIENT RELATIONSHIP

1. Nature of Representation:

Goal: The paramount obligation of counsel is to provide quality representation and diligent advocacy to the client at all stages of the representation.

A. To provide quality representation and diligent advocacy, counsel must preserve, protect, and promote the client's rights and interests, and be loyal to the client.

B. Public defenders, contract counsel, shall provide services to all clients in a professional, skilled manner consistent with the Montana Rules of Professional Conduct, case law, applicable court rules defining the duties of counsel and the rights of their clients, and these Standards.

2. Initial Contact:

Goal: Counsel shall be made available to indigent defendants at the earliest opportunity.

A. Effective representation should be available to an eligible person upon request of the person, or someone acting on the person's behalf, to a court, a public defender office, or contract counsel as soon as the person is under investigation, arrested, charged with a criminal offense, becomes a party to any litigation in which the person is entitled to public legal representation, or when the interests of justice require representation. This standard does not create a duty of counsel to provide indigent legal representation to a person beyond those duties imposed by statutes and case law.

B. A person not in custody shall be advised of the right to representation and, if eligible, offered the services of counsel at the person's first appearance before a judicial officer. Assigned counsel shall make an appointment at counsel's earliest convenience, prior to the next court appearance, to personally meet with any prospective client. A person in custody who is not represented by retained counsel shall be entitled to consult with a public defender for not less than fifteen minutes prior to his or her first court appearance. If feasible, counsel should offer representation for the initial appearance for the purposes of making a bond argument. When a court incarcerates a person who appears before it and that person requests indigent representation, counsel shall make personal contact with the person within three working days.

C. When it is determined that a person is ineligible for public legal representation, counsel should decline the case and advise the person of how to appeal the determination of ineligibility. However, should immediate service be necessary to protect that person's interests, such service should be rendered until the person has the opportunity to retain counsel. In that event, the Office of the State Public Defender shall be reimbursed for counsel's services at the current hourly rate for contract counsel.

3. Duration of Representation:

Goal: Once a case is assigned to an attorney, continuous and uninterrupted representation by the same attorney is the most effective method of representation.

A. Counsel shall provide continuous and uninterrupted representation to eligible clients from time of entry into the case through final disposition in the trial court. The Appellate Defender's Office shall provide appellate representation before the Montana Supreme Court.

B. In the event that counsel is no longer employed by a public defender office or, counsel's contract has expired, and counsel's employment or contract has not been terminated for good cause, either the Regional Deputy Public Defender or Contract Coordinator, in his or her discretion, may direct that counsel shall continue to represent the client through final disposition of the case at the rate of compensation for assigned counsel set forth in these Standards. Completion of a client's case shall not be required if counsel is unable to continue representation or is relocating to a residence outside the Region. These Standards shall not prohibit counsel from withdrawing from a case in which a court has recognized a conflict of interest for counsel or in which a client is found to be ineligible for indigent legal services.

C. In the event that a court should deem it appropriate to set an evidentiary hearing on a *pro se* petition for post-conviction relief, the Office of the State Public Defender shall assign previously assigned counsel for the petitioner, unless the petition raises an issue of ineffective assistance of counsel. Ineffective assistance of counsel shall be handled by the Office of the Appellate Defender.

4. Termination of Employment:

A. The Office of the State Public Defender Standards, contracts for indigent legal services, and local guidelines for assigned counsel shall include the grounds for termination. Termination of employment or a contract, after any probationary period but before the expiration of the term of employment or contract, shall only be for good cause. Good cause shall include the failure of counsel to render adequate representation to clients, the willful disregard of the rights and best interests of the client, a violation of the Montana Rules of Professional Conduct, or the willful disregard of these Standards. Representation in an individual case establishes an inviolable attorney-client relationship. Therefore, except as otherwise provided by these Standards, removal of counsel from representation should not occur over the objection of the client and counsel.

5. Conflicts of Interest:

Goal: The duty of loyalty to the client is paramount.

A. Organization of the State Public Defender System: The State Public Defender System is made up of eleven Regional Public Defender Offices, the Office of the Appellate Defender, and various local offices and contract attorneys. The Office of the Appellate Defender is independent from all trial division offices.

Each local office is under the direct supervision of a Regional Deputy Public Defender. The Regional Deputy Public Defenders are responsible for directing, coordinating, and evaluating the work of attorneys employed in the local office and any contract attorneys that are also assigned to his or her overall supervision. The Regional Deputy Public Defenders are solely responsible for providing guidance to and determining litigation strategy for attorneys assigned to their supervision.

Each regional office has its own support staff and investigators separate from those employed by any other independent office. Each regional office is physically separate from the others. No supervisor or staff from one independent office has access to files or premises of another independent office. However, a supervisor or staff from a regional office has access to the files and premises of a local office that is under that regional office's supervision. Each regional office has its own phone numbers, facsimile equipment, and computers. Although computer networks will be linked for purposes of reporting statistical information, confidential client information shall be separated by appropriate firewalls or other screening devices.

Neither the Chief Public Defender nor anyone assigned to the State Public Defender System administrative division exercises general control or influence over the handling of individual trial division or appellate division cases, has access to client files or client confidences, has keys to any independent office, or has unsupervised access to the premises of any independent office. The Chief Public Defender, the Training Officer, and the Contract Officer will take cases as assigned. The only other exception to this rule is for major litigation cases in which the State Public Defender's office may provide assistance through its Serious Crimes Litigation Unit. While the Office of the State Public Defender must sign off on all expenditures and coordinate in advance on some expenditures for expert witnesses, certain other investigative assistance, and equipment purchases, these requirements are only to ensure compliance with State disbursement procedures and promote sound fiscal practices; they do not dictate trial strategy, which remains the exclusive province of the Regional Public Defender's Office.

B. State Public Defender System Organization and Conflicts of Interest: Each independent regional office, including any local office under its supervision, is a separate "firm" for purposes of representing clients. Accordingly, a client with a conflict of interest with one regional office may be represented by another regional office. In such an event, the client shall be screened through appropriate devices and procedures from having contact with any confidential information concerning any other case in the conflicting region. A local office may not represent a client in conflict with a client of its regional parent office, or vice versa.

The Office of the Appellate Defender is also a separate "firm" for purposes of client representation. The Office of the Appellate Defender may represent a client in conflict with a client of any regional or local office, or in conflict with any contract attorney. In representing the former client or a trial division office, the Office of the Appellate Defender may take the position that a regional or local office attorney, or a contract attorney, did not provide the client constitutionally effective assistance of counsel.

C. Examination for Potential Conflicts of Interest: Early detection of a potential conflict of interest is crucial to its appropriate resolution. As soon as is practicable following appointment to represent a client, a Regional Public Defender Office must examine its records to determine whether it may have a conflict of interest involving another current or former client, or otherwise. A Regional Public Defender Office must promptly update this examination as it investigates the case and receives discovery, with particular attention paid to finding out if conflicts may exist with anticipated witnesses for the prosecution or defense. In the event that a potential conflict of interest develops, the matter shall be referred to the Training Coordinator, who shall be provided sufficient facts to decide the issue.

Clients and potential witnesses may also have information that will assist in uncovering possible conflicts of interest. Accordingly, each local public defender office should use standard questions for its client intake interviews and witness interviews that are designed to uncover conflicts on forms developed by the State Public Defender's Office.

In a situation in which a public defender's office makes an initial appearance on behalf of codefendants, the clients must be cautioned at the first opportunity not to disclose confidential information concerning the case until a determination can be made if a conflict exists.

D. Policy and Guidance on Potential Conflicts of Interest: It is the policy of the Office of the State Public Defender that all State Public Defender System offices will comply with all legal requirements and ethical guidelines relating to conflicts of interest in the representation of clients. The Rules of Professional Conduct are mandatory authority. To the extent that this Standard may be interpreted as inconsistent with the Rules, the latter controls.

The difficulty in developing case-specific policies is that it is impossible to formulate rules that will apply in every situation. The following guidance contains examples of situations where conflicts are likely to result and others that are probably not conflicts of interest. This is not an exclusive list; however, this list contains many situations expected to arise in cases. Any potential conflicts must be resolved on a case-by-case basis.

E. Codefendants: Public defender offices within a region will not represent codefendants except in rare situations when it is clear that each codefendant's interests

are completely consistent with the others and each codefendant agrees. Even so, the better course of action is to represent only one codefendant. If possible, the regional public defender should keep one of the cases. If the public defender can make a choice of codefendants before obtaining privileged information from either one, the choice should be the codefendant with the most serious or difficult case. Otherwise, the local public defender should keep the first codefendant to which the office is appointed and make arrangements for other counsel for the other codefendant.

F. Simultaneous representation of a defendant and a potential prosecution witness or alleged victim: There will almost always be a conflict of interest in this situation. There may not be a conflict if the prosecution witness's credibility or the alleged victim's character is not at issue, and the prosecution witness' testimony is not a crucial factor in the defendant's case. This issue should always be referred to the Training Coordinator.

G. A former client is a potential prosecution witness or alleged victim: This is not a *per se* conflict of interest, but a conflict will often exist in this situation. There may not be a conflict of interest if the prosecution witness's credibility or the alleged victim's character is not at issue, and the prosecution witness's testimony is not a crucial factor in the defendant's case. In other cases, there may not be a conflict of interest if the local public defender's office has no privileged information about the former client that would be useful in representing the defendant.

H. Investigation reveals that another person may have committed the charged crime and that other person is a former client: This will almost always be a conflict of interest. This presents a conflict of interest if the local public defender's office has privileged information about the former client that would further the theory that the former client is the perpetrator.

I. An employee of the local public defender's office is a potential prosecution witness or an alleged victim: Either situation is a conflict of interest.

J. The defendant was convicted in a previous case while represented by the local public defender's office and has a colorable claim of ineffective assistance of counsel in that case: This presents a conflict of interest as long as the ineffective assistance claim is unresolved.

K. Situations that do not present *per se* conflicts of interest: The following are not *per se* conflicts of interest. However, if the particular situation actually degrades the quality of client representation or creates an appearance from which a reasonable person would doubt that a local public defender's office can exercise independent professional judgment on behalf of a client, a conflict would exist. The individual circumstances control. They include:

a. A dispute between client and attorney or other member of the local public defender's office staff.
b. A client refuses to follow an attorney's advice, unless it involves the commission of a future crime.

c. A client files a grievance against the attorney with the attorney's supervisor or the Office of Disciplinary Counsel. A client should not be allowed to manipulate appointment of counsel by filing a frivolous grievance against an assigned attorney. However, a non-frivolous grievance may create a conflict of interest. A client complaint, even if not creating a conflict of interest, should usually justify the local public defender in changing assigned counsel as a matter of supervisory discretion.
d. An alleged victim or potential prosecution witness has a friend or relative in the local public defender office.
e. A witness for the defense is a present or former client, unless there is a reasonable possibility the testimony could turn adverse to the defendant or the theory of defense may implicate the present or former client.
f. An employee of the public defender office is closely related by blood or marriage, is engaged to be married, or otherwise has a close relationship with an employee of a State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. Appropriate steps must be taken to disclose the relationship, ensure protection of privileged information, and reinforce confidence in the independent judgment and zealous representation of the public defender officer. A "close relationship" would include sharing a household and extended dating.
g. An employee of the public defender office is a former employee of a State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. However, if the former employee of such office participated personally and substantially in a case, the public defender office would have a conflict of interest and be disqualified. If the former employee of such office did not participate personally and substantially in the case, a timely deployed "ethical wall" will prevent disqualification of the public defender office.
h. An employee of the public defender office is a former employee of another public defender office or other law firm that represented clients in conflict with the public defender office where the employee is now employed. This situation sometimes occurs when Public Defender System employees transfer from one public Defender System office to another, and when personnel are hired from law firms that handle criminal or juvenile cases. Apply the same process as above.
i. An employee of the prosecutor's office is a former employee of the public defender's office. Apply the same process as above.
j. A public defender appears before a judge who is a former associate in the public defender office. In such cases, appearances before former associates are proper when there has been full disclosure.
k. An employee of the public defender office is closely related by blood or marriage, or is engaged to be married, to a judge before which the public defender office appears, or otherwise has a close relationship with a judge before which the public defender office appears. A "close relationship" would include sharing a household or extended dating. Such a

relationship must be disclosed in any case where the public defender office appears before the judge and each party given the opportunity to request recusal.

l. A public defender has applied for or been offered a job in a state, county, or city office that has prosecution, law enforcement, or child welfare responsibilities, or is running for election as a prosecutor or law enforcement officer. In such cases, the Office of the State Public Defender may give the public defender and his or her supervisor guidance concerning campaign ethics laws, the public defender's caseload, and other matters to ensure client and public confidence in the continued zealous advocacy by the public defender and the public defender office.

m. A public defender has applied for appointment to a judgeship.

L. Action after identifying a possible conflict of interest: There is no one-size-fits-all solution here, either. However, there are a couple "must do's" and several "maybe should do's" when a possible conflict is uncovered. They include:

a. Seek advice from supervisors and others: A "must do." The first source of advice should be the office supervisor. An office staff meeting is a good vehicle for hashing out these issues. In addition, the Training Coordinator of the Office of the State Public Defender is available to help answer questions of professional ethics.

b. Full disclosure to the client: Another "must do," even if the attorney does not think there is an actual conflict. If the situation doesn't present a real conflict, the attorney should explain that to the client and obtain his or her acknowledgment that continued representation is appropriate. If the client doesn't agree and wants the attorney removed, or isn't mentally competent, the attorney can then make a decision on how to proceed. But, the attorney must never withhold information from the client about any potential conflict. The attorney should document the disclosure and the client's response. The attorney should inform the client of his or her right to file a grievance of the issue and the right to raise the issue to the court.

c. Request for waiver from the defendant or other current client: If there is an actual conflict of interest, the client may want to waive the conflict and retain the attorney after full disclosure of the conflict and what it means to continued representation by counsel. The attorney should document the disclosure and any waiver on the forms provided by the Office of the State Public Defender. The attorney should use sound judgment in deciding whether to ask a current client to waive a conflict. Some conflicts are so serious that the attorney should move to withdraw, even though the client likes the attorney so much that he or she would be willing to waive anything.

d. Request for waiver from a prior client: If, for example, a prior client is a witness or an alleged victim in a current case, the attorney can ask him or her to waive a conflict. This would most likely involve consent for

disclosure of privileged information or use of the conviction for which a public defender office represented the prior client as impeachment or character attack. Again, the attorney should use sound judgment in deciding whether to ask for such a waiver, as some conflicts are so serious that waiver will not remove the appearance of impropriety. *See also Montana Rules of Professional Conduct,* Rules 1.9 (Duties to Former Clients), 4.3 (Dealing with Unrepresented Person). Again, the attorney should document the disclosure and any waiver.

e. Building an "ethical wall": In rare cases, an "ethical wall" may cure a conflict of interest. This type of procedure will always be used when an attorney from another Region comes into a new Region, either to handle a conflict matter or as part of the Serious Crimes Litigation Unit. An "ethical wall" will screen the attorney from information except that necessary for his case. The "ethical wall" shall screen the attorney from both hard copies of other files, as well as any electronic information concerning the other clients, whether in the case management software, email, or other electronic data.

f. Disclosure to the court and prosecutor: If the attorney is confident that the situation doesn't present an actual conflict, the client agrees, and the attorney documented the client disclosure and acknowledgment, then the attorney may not need to disclose the situation to the court and prosecutor. The attorney may not want to inform others if doing so might tip trial strategy, compromise privileged information, reveal attorney work product, or cause undue invasion of someone's privacy. However, if the attorney's instincts indicate that it is too big of an issue to keep under wraps, or might come back to haunt him or her, then it's time to bring in the judge and opposing counsel. Certainly, any actual conflict of interest should be brought to all parties' attention, even if the client is willing to waive it.

g. Making a record: If the matter is disclosed to the court and prosecutor, the attorney must make sure there is a record of it with all parties present. The client's on-the-record waiver or agreement that there is no actual conflict of interest, after full disclosure that is also on the record, will close the door on almost any controversy. If the attorney's position is that there is no conflict, the attorney will be required to elaborate; a simple denial of a conflict is insufficient.

h. Moving to withdraw: If there is an actual conflict and there is no waiver, the office must withdraw. If multiple current clients are in conflict, the attorney may be able to keep one of the cases if he or she identified the conflict early enough. If so, the attorney should try to keep the most serious or difficult case. If that is not feasible, then the attorney should try to keep the first client in the door. Often, however, the conflicts among current clients aren't discovered until the office is well into its representation of all. If so, the office usually must withdraw from all cases. If the attorney must move to withdraw, keep in mind that, as a general rule, the attorney doesn't have to reveal the factual basis for the

conflict. The attorney should resist requests to reveal anything more than is necessary to articulate the conflict and must protect privileged information.

i. Resolve close cases in favor of the most conservative action: If an attorney's instincts indicate something is a potential conflict, then it probably is. If an attorney is uncertain whether a situation presents an actual conflict, then it likely does. If an attorney is ambivalent about telling the court about a possible conflict that he or she thinks was resolved, then the attorney probably should.

M. Joint Defense Agreements: In the event of a multiple defendant case involving a public defender office, or a contract attorney, and any outside counsel, the following guidelines should apply to any joint defense agreements entered into. A joint defense agreement should be in writing, signed by all counsel and clients after consultation, and should provide the following:

a. The agreement must not create any kind of an attorney-client relationship between co-defendants;
b. Information that is shared under the agreement is privileged;
c. Anyone who withdraws from the agreement remains bound by confidentiality as to any information obtained through the joint defense agreement;
d. All parties agree that in the event one withdraws to cooperate with the government, any potential conflict of interest is waived by all parties. Anyone who withdraws from the agreement shall provide notice to all other parties prior to withdrawing, and return all documents provided pursuant to the agreement prior to withdrawing. A log should be kept of all meetings attended under the joint defense agreement, as well as any information and documents shared pursuant to the agreement**;**
e. In the event that any defendant in the agreement testifies at trial, he or she agrees to waive the confidentiality provisions of the joint defense agreement to allow any other remaining party to the agreement to cross-examine him or her on the basis of information he or she has shared through the joint defense agreement;
f. The agreement must recite a procedure for withdrawing from the agreement;
g. All documents provided pursuant to the joint defense agreement must be returned upon the termination of the agreement.

6. Conflicts Coordinator
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IV. ADMINISTRATION OF DEFENDER SERVICES

1. Attorney-Client Communication:

Goal: Regular and confidential communication between attorneys and clients is a necessary part of effective representation.

A. Effective representation of an accused client requires prompt and effective communication with the client. This communication includes personal and telephone contacts with a client in custody.

B. To ensure the privacy essential for confidential communication between counsel, public defender staff, and client, adequate facilities should be available for private discussions in jails, prisons, courthouses, healthcare facilities, and other places where accused clients must confer with counsel.

C. Personnel of jails, prisons, custodial institutions, and healthcare facilities should be prohibited from examining or otherwise interfering with any communication or correspondence between client, defense counsel, or public defender staff relating to legal action arising out of charges or incarceration.

D. Each jail or detention facility should make available an unmonitored and unrecorded toll-free telephone for purposes of allowing indigent clients to contact and confer with counsel and public defender staff on at least a daily basis. Counsel should be allowed personal contact with an incarcerated client at any time upon counsel's request.

E. A public defender office policy, contract for indigent defense services, and individual assignments of counsel shall include a requirement that a client in custody must speak with counsel either in person or by telephone at least weekly, unless otherwise agreed between the client and counsel.

F. The Regional Public Defender Offices shall take appropriate action to ensure these standards are implemented.

2. Delivery of Services:

Goal: Counsel shall strive for excellence in the representation of the indigent client.

A. Counsel representing indigent clients should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of counsel for specific cases should not be made by the judiciary, but should be arranged for by the administrators of the public defender office, assigned counsel, and contract-for-service programs.

B. The Chief Public Defender and his or her staff should be compensated at a rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.

C. The Office of the State Public Defender shall award contracts for indigent legal services only after determining that counsel or the firm chosen can meet the standards set forth herein. Under no circumstances should a contract be awarded based solely on the lowest bid or provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned. Counsel or firms bidding for contracts must demonstrate their ability to meet these standards. While the Office of the State Public Defender may, in the sole discretion of the Chief Public Defender, choose to consult with judges, the Attorney General's Office, city attorneys, county prosecutors, and law enforcement officers in deciding who to select as attorneys to provide services as assigned counsel, those parties may neither select nor prohibit the selection of any counsel or law firm.

D. Contracts for public legal representation services should be awarded for at least one-year terms. Removal of the contracting counsel or firm before the agreed term should be for good cause only. The contract shall define "good cause" as "a failure by contracting counsel to comply with the terms of the contract that impairs the delivery of services to clients, or a willful disregard by contracting counsel of the rights and best interest of clients."

E. Contracts for services must be awarded on a competitive process and must involve the following considerations:

a. The categories of cases in which contracting counsel is to provide services;
b. The term of the contract and the responsibility of contracting counsel for completion of cases undertaken within the contract term;
c. Identification of counsel who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
d. Allowable representation workloads for individual counsel, including the amount of private practice engaged in outside the contract, and measures to address excessive workloads, consistent with these Standards;
e. Minimum levels of experience and specific qualification standards for contracting counsel, including special provisions for complex matters, compliance with standards established by the Montana Supreme Court in capital cases, and compliance with the standards of the Montana Public Defender Commission for capital cases;
f. A policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
g. Reasonable compensation levels consistent with these standards and a designated method of payment;
h. Sufficient support services and provision for reasonable expenses, subject to prior approval as outlined by the Office of the State Public Defender in its policy manual, for paralegal and investigative services, expert

witnesses, and other litigation costs to be paid on an "as needed" basis in addition to the contract compensation;

i. A process for the professional development of assigned counsel, including supervision, evaluation, and training in accordance with standards set by the Montana Public Defender Commission;
j. Protection of client confidences, attorney-client information, and work product related to contract cases, except under a legal court order to divulge, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent attorney in the case;
k. A system of case management and reporting as required by the Office of the State Public Defender;
l. The grounds for termination of the contract by the parties;
m. A requirement that contracting counsel provide for retention of client files in a manner that affords protection of the client's confidentiality interest for three years from the date of conclusion of the matter in the trial court, or until the client is no longer subject to State supervision, whichever is longer.

F. The Chief Public Defender and Regional Public Defenders shall provide for contract oversight and enforcement to assure compliance with these Standards and applicable Montana statutes. For conflict of interest cases, the Conflicts Coordinator shall provide such oversight.

3. Accounting and Billing System:

Goal: A transparent standardized accounting and billing system that maintains client confidentiality is the best way to achieve financial accountability.

4. Performance Evaluations

A. Each attorney employed as a public defender shall have their work performance evaluated on a yearly basis.

B. The evaluation will be conducted by a combination of the Chief Public Defender, and the Training Coordinator, and/or the Regional Deputy Public Defender in the region in which the public defender is employed and/or the Managing Attorney in the office in which the public defender is employed.

C. The performance evaluation shall be done on forms approved by the Office of the State Public Defender.

D. In conducting the evaluation, the evaluators may obtain information from a variety sources including clients, other public defenders, office staff, judicial personnel and faculty from trainings the public defender has attended.

E. The public defender shall be interviewed during the evaluation process.

F. At the conclusion of the process, the evaluation will be reviewed and discussed with the public defender.

G. If the public defender disagrees with the results of the evaluation the public defender has the right to submit a written rebuttal which shall be attached to the evaluation. A permanent employee may file a grievance as provided by state law.

H. Performance evaluations shall remain in the personnel file for the duration of employment and in conformity with state policy.

5. Proficiency Determination for Contract Attorneys

A. Each private attorney providing contact services to the Montana Office of the State Public Defender (OPD) shall undergo a proficiency determination annually.

B. The proficiency determination will be conducted by a combination of the following: the Chief Public Defender, and OPD Training Coordinator, and/or Regional Deputy Public Defender from the region in which the contract attorney renders services, and the OPD Contracts Manager.

C. In conducting the determination, the contract attorney will be observed in court and information may be obtained from clients, the Regional Deputy Public Defender in any region in which the contract attorney renders public defender services, judicial personnel and faculty from training the contract attorney attends during the preceding contract year.

D. The contract attorney will meet with OPD during the determination process.

E. The contract attorney will submit an "experience survey" and update it annually.

F. Upon the completion of the determination process, OPD shall certify the contract attorney's proficiency within all applicable areas of public defense law.

G. A proficiency certification will be signed by the contract attorney , the Chief Public Defender, and the Contracts Manager.

H. If the contract attorney is determined to not be proficient in an area of public defense law, OPD will recommend remedial steps to obtain proficiency. The contract attorney may file an objection with the OPD and meet with the Chief Public Defender.

V. CASELOADS

Goal: Caseloads must not be oppressive, and should match counsel's experience, training, and expertise.

1. Governing Principle:

Counsel caseloads should be governed by the following:

A. Individual Public Defender. Whenever a salaried or contracting counsel determines, in the exercise of counsel's best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases, will lead to furnishing representation lacking in quality or the breach of professional obligations, the attorney is required to inform the Regional Public Defender's Office, who shall inform the Chief Public Defender. The Chief Defender will then inform the Montana Public Defender Commission.

B. Chief Public Defender. Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to furnishing representation lacking in quality or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

2. Caseload Evaluation:

A. The caseload of counsel should allow him or her to give each client the time and effort necessary to ensure effective representation. Regional public defender offices, contract counsel, and assigned counsel should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

B. A "case" consists of all charges against a single defendant arising out of a single event, transaction, or occurrence, or all charges arising out of a series of related incidents charged in a single information or complaint, including collateral matters such as probation violations which do not require a separate dispositional hearing, and should be counted and reported as one case. If a separate probation revocation hearing is required, the probation hearing shall be counted as a separate misdemeanor case. If two or more defendants are charged in a single information or complaint, the charges against each defendant should be counted and reported as separate cases.

C. Caseloads should not exceed the following:

a. 150 felony cases, excluding those in which the death penalty is being sought, per attorney per year; or,
b. 300 misdemeanor cases per attorney per year; or,

c. 250 misdemeanor juvenile offender cases per attorney per year; or,
d. 60 juvenile dependency clients per attorney per year; or,
e. 100 civil commitment cases per attorney per year; or,
f. 25 appeals to the Montana Supreme Court per attorney per year; or,
g. 25 post-conviction matters per attorney per year; or,
h. 12 petitions for *certiorari* to the United State Supreme Court per attorney per year.

D. The standard applicable to each category of cases is not a suggestion or guideline, but is intended to be a maximum limitation on the average annual caseloads of each attorney employed as a public defender. These limits are not intended to be cumulative or aggregated, but should be applied proportionately in the case of an attorney whose caseload includes cases in more than one category. For example, an attorney may not represent defendants in 150 felonies *and* 300 misdemeanor cases per year. Caseloads for attorneys practicing in rural areas may need to be reduced due to substantial amounts of required travel.

E. The Montana Public Defender Commission intends to review this Standard as soon as it is able to accumulate reliable statistical data that reflects the actual case loads (both numerical and hourly) of public defenders employed in each Regional Public Defender Office, and may modify these numerical limits or adopt weighting criteria as it deems appropriate.

VI. QUALIFICATIONS AND DUTIES OF COUNSEL

Goal: Counsel must meet these minimum standards before accepting a case. In order to provide effective representation, counsel must engage in regular and ongoing training.

A. In order to assure that clients receive the effective assistance of counsel to which they are constitutionally and statutorily entitled, counsel providing public legal representation should meet the following minimum professional qualifications:

a. Satisfy the minimum requirements for practicing law in Montana as determined by the Montana Supreme Court;
b. Complete twenty hours of continuing legal education within each calendar year from courses, offered or approved by the Office of the State Public Defender, relating to public defender practice or representing persons whose liberty is at risk as a result of State-initiated proceedings;
c. Comply with all other training requirements established by the Training Coordinator of the Office of the State Public Defender and approved by the Public Defender Commission; including, but not limited to, mental health disabilities, cultural competency, and drug dependency.
d. In order to provide quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its

application in the State of Montana. Counsel has a continuing obligation to stay abreast of changes and developments in the law;

e. The foregoing requirements shall be deemed satisfied if counsel is representing clients pursuant to the Student Practice Rule and is being directly supervised by a supervising attorney who meets the standards required for felony defense set forth below.

B. Additional trial attorneys' qualifications according to type of case:

a. Death penalty representation. Each attorney acting as lead counsel in a death penalty case shall meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003);

b. Juvenile cases. See Standard Number 4;

c. Involuntary commitments. See Standard Number 5, 6, 7, and 11;

d. Abuse and neglect cases. See Standard Number 8;

e. Felony representation. See Standard Number 1;

f. All other cases. Each attorney shall meet the requirements set forth herein and in the Montana Rules of Professional Conduct.

C. Counsel should only request or accept an assignment if counsel is able to provide quality representation and diligent advocacy for the client.

D. Trial Standards for Non-capital Cases.

1. General Duties of Defense Counsel:

A. Before agreeing to act as counsel, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge, and experience to offer effective representation to a defendant in a particular matter. If it later appears that counsel is unable to offer effective representation in the case, counsel should move to withdraw.

B. Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. When appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

C. Counsel has the obligation to keep the client informed of the progress of the case.

D. If a conflict develops during the course of representation, counsel has a duty to notify the client and the court in accordance with the Rules of Professional Conduct and in accordance with the Disciplinary Rules of the State Bar of Montana.

2. Obligations of Counsel Regarding Pretrial Release:

A. Counsel has an obligation to meet with incarcerated defendants as stated previously in these Standards, and shall take other prompt action necessary to provide quality representation, including:

a. Invoking the protections of appropriate constitutional provisions, federal and State laws, statutory provisions, and court rules on behalf of a client, and revoke any waivers of these protections purportedly given by the client, as soon as practicable via a notice of appearance or other pleading filed with the State and court.
b. Attempting to secure the pretrial release of the client.

3. Counsel's Interview with Client:

A. Preparing for the Interview. After being assigned to a case and prior to conducting the initial interview, the attorney should, where possible, do the following:

a. be familiar with the elements of the offense(s) and the potential punishment(s), where the charges against the client are already known; and,
b. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available. In addition, where the client is incarcerated, the attorney should:
    i. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
    ii. 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; and,
    iii. be familiar with any procedures available for reviewing the bail determination.

B. Conducting the Interview. The attorney should, where possible, do the following:

a. The purpose of the initial interview is to acquire information from the client concerning the case, the client, and pre-trial release, and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds, can be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, and prison records, or other records as may be pertinent.
b. Counsel shall complete the interview form provided by the Office of the State Public Defender for use at the initial interview. Information that should be acquired from the client includes, but is not limited to, the following:

i. The client's version of arrest, with or without warrant; whether client was searched and if anything was seized, with or without warrant or consent; whether client was interrogated and, if so, whether a statement given; client's physical and mental status at the time any statement was given; whether any exemplars were provided and whether any scientific tests were performed on client's body or bodily fluids;

ii. The names and custodial status of all co-defendants and the name of counsel for co-defendants, if counsel has been appointed or retained;

iii. The names and locating information of any witnesses to the crime and/or the arrest, regardless of whether these are witnesses for the prosecution or for the defense; the existence of any tangible evidence in the possession of the State, which counsel should take steps to insure is preserved;

iv. The client's ties to the community, including the length of time he or she has lived at the current and former addresses, any prior names or aliases used, family relationships, immigration status if applicable, employment record and history, and social security number;

v. The client's physical and mental health, educational, vocational and armed services history;

vi. The client's immediate medical needs including the need for medication, detoxification programs and/or substance abuse treatment;

vii. 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 or outstanding warrants from other jurisdictions or agencies and also whether he or she is on probation or parole and the client's past or present performance under supervision;

viii. The names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

ix. For clients who are incarcerated, the ability of the client to meet any financial conditions of release;

x. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense, including releases from the client for any records of treatment or testing for mental health or developmental disability; and

xi. The client's citizenship status.

C. Information to be provided to the client includes, but is not limited to, the following:

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

b. an explanation of the charges and the potential penalties;
c. an explanation of the attorney-client privilege and instructions not to talk to anyone, including prisoners, about the facts of the case without first consulting with the attorney;
d. the names of any other persons who may be contacting the client on behalf of counsel;
e. any potential impact of Federal prosecution;
f. an explanation of the procedures that will be followed in setting the conditions of pretrial release;
g. 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;
h. a warning of the dangers with regard to the search of a client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials.

D. Counsel must be alert to potential issues concerning the client's incompetency, mental illness or developmental disability. If counsel or the client raises a potential claim based on any of these conditions, counsel should consider seeking an independent psychological evaluation. Counsel should be familiar with the legal criteria for any plea or defense based on the defendant's mental illness or developmental disability, and should become familiar with the procedures related to the evaluation and to subsequent proceedings. Also:

a. Counsel should be prepared to raise the issue of incompetency during all phases of the proceedings, if counsel's relationship with the client reveals information that presents genuine issues of competency;
b. Where appropriate, counsel should advise the client of the potential consequences of raising questions of competency, as well as the defense of mental disease and defect, both as it relates to guilt and to sentencing. Prior to any proceeding, counsel should consider interviewing any professional who has evaluated the client. Counsel should be familiar with all aspects of the evaluation and should seek additional expert advice where appropriate. Counsel has an issue to raise legitimate issues of competency even over the objection of the client.

E. If special conditions of release have been imposed, such as random drug screening, or other orders restricting the client's conduct have been entered, such as a no contact order, the client should be advised of the legal consequences of failure to comply with such conditions. In the event the court orders routine contact with the attorney is a condition of release, the attorney shall not waive attorney-client privilege as to contact with the client.

F. If counsel is meeting with the client before his assignment to the case pursuant to these Standards, counsel should only obtain information necessary to advise the client

concerning the initial hearing and advise the client not to discuss confidential information concerning the merits of the case.

4. Counsel's Duty in Pretrial Release Proceedings:

A. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, make a proposal concerning conditions of release.

B. 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.

C. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets.

D. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation between counsel and the client. In the event that the client and counsel decided that it would be in the best interests of the client to testify regarding bond, counsel should instruct his or her client not to answer any questions that do not pertain strictly to the issue of bond.

5. Counsel's Duties at Preliminary Hearing:

A. If the client is entitled to a preliminary hearing, counsel should take steps to see that the hearing is conducted in a timely fashion, unless there are strategic reasons for not doing so.

B. In preparing for the preliminary hearing, counsel should become familiar with:
   a. the elements of each of the offenses alleged;
   b. the law of the jurisdiction for establishing probable cause;
   c. factual information which is available concerning probable cause;
   d. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings; and,
   e. the potential impact on the admissibility of any witness' testimony if they are later unavailable at trial.

6. Duty of Counsel to Conduct Investigation:

A. Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client's wish to admit guilt, ensure that the charges and disposition are factually and legally correct and that the client is aware of potential defenses to the charges.

B. Sources of investigative information and relevant procedures may include the following:

a. Arrest warrant, accusation, complaint and/or information, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific charges that have been brought against the accused;
b. The relevant criminal statues and case law precedents should be examined to identify:
   i. the elements of the offense(s) with which the accused is charged;
   ii. the defenses, ordinary and affirmative, that may be available;
   iii. any lesser included offenses that may be available; and,
   iv. any defects in the charging documents, constitutional or otherwise, such as statue of limitations or double jeopardy.
c. Interviewing witnesses. Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses should be conducted in a manner that permits counsel to effectively impeach the witness with statements made during the interview.
d. The police and prosecution reports and documents. Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain CJIN (NCIC or criminal history records from other states) records for the client and for the prosecution witnesses.
e. Physical evidence. Where appropriate, counsel should make a prompt request for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.
f. The scene of the incident. Where appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident, including the same weather, time of day, and lighting conditions.
g. Securing the assistance of experts. Counsel should secure the assistance of experts where it is necessary or appropriate to:
   i. the preparation of the defense;
   ii. adequate understanding of the prosecution's case; or
   iii. rebut the prosecution's case.

7. Formal and Informal Discovery:

A. Counsel should consider seeking discovery, at a minimum, of the following items by written motion:

a. Potential exculpatory information;

b. Potential mitigating information;
c. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
d. All oral and/or written statements by the client, and the details of the circumstances under which the statements were made;
e. The prior criminal record of the client and any evidence of other misconduct that the government may intend to use against the client;
f. All books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
g. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
h. Statements of co-defendants;
i. All investigative reports by all law enforcement and other agencies involved in the case;
j. All records of evidence collection and retained by law enforcement; and,
k. Counsel shall file with the court a receipt of all materials received.

8. Development of a Theory of the Case:

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case and develop strategies for advancing the appropriate defenses on behalf of the client.

9. The Duty to File Pretrial Motions:

A. Counsel should consider filing an appropriate motion whenever there exists a good faith reason to believe that the defendant is entitled to relief which the court has discretion to grant.

B. The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of each case.

C. Counsel should withdraw or decide not to file a motion only after careful consideration and determining whether the filing of a motion may be necessary to protect the defendant's rights, including later claims of waiver or procedural default.

D. Counsel should consider the advisability of disqualifying or substituting the presiding judge. This consideration should include any information about the judge's history in aligning himself with the prosecution on bail issues, motion rulings, trial rulings, any routine refusals of plea bargains, the client's experience with the judge, and any specific dislike of counsel, other public defenders, or public defenders in general.

a. Prior to filing a motion to disqualify or substitute the judge, counsel shall consult with the managing attorney in his office and/or his or her Regional Deputy Dublic Defender.

b. The decision to disqualify a judge shall only be made when it is a reasoned, strategic decision and in the best interest of the client. The final decision rests with counsel.

10. Preparing, Filing, and Arguing Pretrial Motions:

A. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

B. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

a. investigation, discovery, and research relevant to the claim advanced;
b. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
c. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and potential consequences of having the client testify; and
d. familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial.

C. In every case, counsel should examine whether it is appropriate to file a motion to suppress evidence or statements.

D. In every case that proceeds to trial, counsel should file timely and appropriate motions in limine to exclude any improper evidence or prosecutorial practices.

11. Continuing Duty to File Pretrial Motions:

A. Counsel should be prepared to raise during the subsequent proceedings 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. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

12. Duty of Counsel in Plea Negotiation Process:

A. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial and, in doing so, should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

B. Counsel should keep the client fully informed of any continued plea discussion and negotiations and promptly convey to the accused any offers made by the prosecution for a negotiated settlement.

C. Counsel shall not accept any plea agreement without the client's express authorization.

D. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.

13. The Process of Plea Negotiations:

A. In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of the following:

a. the maximum term of imprisonment, fine or restitution that may be ordered, and any mandatory sentence, as well as the possible adverse impact on those with a guilty plea;
b. the possibility of forfeiture of assets;
c. other consequences of conviction including, but not limited to, deportation, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, the loss of the right to hold public office, and potential federal prosecutions;
d. any possible and likely sentence enhancements or parole consequences, and the actual possibility of programs from the Department of Corrections;

B. In developing a negotiation strategy, counsel should be completely familiar with:

a. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to, the following:
   i. not to proceed to trial on merits of the charges;
   ii. to decline from asserting or litigating any particular pretrial motions;
   iii. an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
   iv. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
b. benefits the client might obtain from a negotiated settlement, including, but not limited to, an agreement that provides:
   i. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
   ii. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
   iii. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

iv. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence, or one within a specified range;
v. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;
vi. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, certain information; and,
vii. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the client's place and/or manner of confinement and/or release on parole, and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from incarceration, taking into consideration availability of probation from Department of Corrections.

c. the position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:
i. consider whether interviewing the alleged victim or victims is appropriate and, if so, who the best person to do so is and under what circumstances;
ii. consider to what extent the alleged victim or victims might be involved in the plea negotiations;
iii. be familiar with any rights afforded the alleged victim or victims under Montana law; and,
iv. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.

C. In conducting plea negotiations, counsel should be familiar with:
a. the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, and a plea in which the defendant is not required to personally acknowledge his or her guilt - see North Carolina v. Alford plea;
b. the advantages and disadvantages of each available plea according to the circumstances of the case;
c. whether the plea agreement is binding on the court, prison, and parole authorities; and,
d. possibilities of pre-trial diversion.

D. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and probation department which may affect the content and likely results of negotiated plea bargains.

14. The Decision to Enter a Plea of Guilty:

A. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement, as well as the advantages and disadvantages of the potential consequences of the agreement.

B. The decision to enter a plea of guilty rests solely with the client; counsel should not tempt to unduly influence that decision.

C. If the client is a juvenile being prosecuted as an adult, consideration should be given to the request that a guardian be appointed to advise the juvenile if an adult family member is not available to act in a surrogate role.

D. A negotiated plea should be committed in writing.

15. Entering the Negotiated Plea before the Court:

A. Prior to the entry of the plea, counsel should:
   a. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
   b. make certain that the client receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea;
   c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and,
   d. make certain that if the plea is non-binding, the client is informed that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.

B. Counsel must become familiar with the consequences of a plea or finding of guilty in state court upon any current or future federal prosecution. These consequences include, without limitation, the following:
   a. Federal Lacey Act prosecutions for fish and game violations;
   b. Federal firearms charges, including those resulting in mandatory minimum sentences when firearms are associated with the possession or distribution of dangerous drugs;
   c. The possibility of a separate federal prosecution based upon the same transaction, without the defense of double jeopardy, in charges alleging dangerous drug distribution, possession and sale of drug paraphernalia, bank robbery, fraud, environmental crimes, arson, intimidation, kidnapping, murder, civil rights violations, bribery, and child pornography;

d. The impact of a conviction on the United States Sentencing Guidelines when determining the client's criminal history category;
e. Racketeering Influenced and Corrupt Organization (RICO) prosecutions for engaging in a pattern of conduct which includes state crimes stemming from violence or gambling;
f. Money laundering prosecutions for engaging in financial transactions associated with or involving income derived from certain criminal conduct;
g. Hobbs Act prosecutions for state crimes of intimidation, arson, and violent crimes impeding or affecting interstate commerce;
h. Firearm restrictions on those convicted of felonies and certain misdemeanor convictions;
i. Immigration consequences of convictions of re-entry into the United States after certain felony convictions.
j. Impact of the Adam Walsh Act

C. When entering the plea, counsel should make sure that a written plea agreement containing the full content and conditions of the plea agreement are placed on the record before the court.

D. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

16. Counsel's Duty of Trial Preparation:

A. The decision to proceed to trial with or without a jury rests solely with the client after consultation with counsel. Counsel should discuss the relevant strategic considerations of this decision with the client and maintain a record of the advice provided to the client, as well as the client's decision concerning trial.

B. Where appropriate, counsel should have the following materials available at the time of 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, such as transcripts or police reports; counsel should have prepared transcripts of any audio or video taped witness statements;

i. prior statements of all defense witnesses;
j. reports from defense experts;
k. a list of all defense exhibits and the witnesses through whom they will be introduced;
l. originals and copies of all documentary exhibits;
m. proposed jury instructions with supporting case citations;
n. a list of the evidence necessary to support the defense requests for jury instructions;
o. copies of all relevant statutes and cases; and,
p. outline or draft of closing argument.

C. Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the trial process; counsel should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

D. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial, such as the use of prior convictions to impeach the defendant, and, where appropriate, prepare motions and memoranda for such advance rulings.

E. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review and should ensure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review, unless there are strategic reasons for not doing so.

F. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should ensure that the client has appropriate clothing and that the court personnel follow appropriate procedures so as not to reveal to jurors that the defendant is incarcerated. Counsel should ensure that the client is not seen by the jury in any form of physical restraint.

G. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

H. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

I. Counsel shall take necessary steps to ensure full official recordation of all aspects of the court proceeding.

17. Jury Selection:

A. Preparing for Voir Dire:

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

b. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

c. Prior to jury selection, counsel should obtain a prospective juror list, and the standard jury questionnaires. Counsel should also consider requesting use of a separate questionnaire that is tailored to the client's case.

d. Counsel should develop *voir dire* questions in advance of trial and tailor *voir dire* questions to the specific case. *Voir dire* should be integrated into and advance counsel's theory of the case. Among the purposes *voir dire* questions should be designed to serve are the following:

i. to elicit information about the attitudes of individual jurors, which will inform counsel and client about peremptory strikes and challenges for cause;
ii. to convey to the panel certain legal principles which are critical to the client's case;
iii. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
iv. to present the client and his or her case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and,
v. to establish a relationship with the jury.

e. Counsel should be familiar with the law concerning mandatory and discretionary *voir dire* inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

f. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

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

B. Examination of the Prospective Jurors:

a. Counsel should personally *voir dire* the panel.

b. Counsel should take all steps necessary to protect the *voir dire* record for appeal, including, where appropriate, filing a copy of the proposed *voir dire* questions or reading proposed questions into the record.

c. If the *voir dire* questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the other jurors and that the court, rather than counsel, conduct the *voir dire* as to those sensitive questions.

d. In a group *voir dire*, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

C. Challenging the Jurors for Cause:

Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

18. Opening Statement

A. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

B. Counsel should be familiar with the laws of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

C. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case. It should only be in exceptional circumstances that the opening statement is not made at the first opportunity.

D. Counsel's objective in making an opening statement may include the following:

a. to provide an overview of the defense case;
b. to identify the weaknesses of the prosecution's case;
c. to emphasize the prosecution's burden of proof;
d. to summarize the testimony of witnesses and the role of each in relationship to the entire case;
e. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
f. to clarify the jurors' responsibilities;
g. to state the ultimate inferences which counsel wishes the jury to draw; and,
h. to establish counsel's credibility with the jury.

E. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

F. Whenever the prosecutor oversteps the bounds of proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise.

19. Preparation for Challenging the Prosecution's Case

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

B. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

C. In preparing for cross-examination, counsel should be familiar with the applicable laws and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

D. In preparing for cross-examination, counsel should:

a. consider the need to integrate cross-examination, the theory of the defense, and closing argument;
b. consider whether cross-examination of each individual witness is likely to generate helpful information;
c. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
d. consider a cross-examination plan for each of the anticipated witnesses;
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. have prepared a transcript of all audio or video tape recorded statements made by the witness;
i. where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records, and department regulations for possible use in cross-examining police witnesses;
j. be alert to issues relating to witness credibility, including bias and motive for testifying; and,
k. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

E. Counsel should consider conducting a *voir dire* examination of potential prosecution witness who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

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

G. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion so that counsel may make an informed decision about whether to present a defense case.

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.

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

21. Preparation of the Closing Argument

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

B. Counsel should be familiar with the court rules, applicable statutes and law, and the individual judge's practice concerning time limits and objections during closing argument, as well as provisions for rebuttal argument by the prosecution.

C. In developing closing argument, counsel's argument should reflect his or her theory of the case. Counsel should review 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. incorporating into the argument:
   i. helpful testimony from direct and cross-examinations;
   ii. verbatim instructions drawn from the jury charge; and,
   iii. responses to anticipated prosecution arguments;
d. and the effects of the defense argument on the prosecutor's rebuttal argument.

D. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to, the following:

a. whether counsel believes that the case will result in a favorable verdict for the client;
b. the need to preserve the objection for appellate review; or,
c. the possibility that an objection might enhance the significance of the information in the jury's mind.

22. Jury Instructions

A. Counsel should be familiar with the appropriate rules of court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.

B. Counsel should always submit proposed jury instructions in writing.

C. Where appropriate, counsel 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. Counsel should provide citations to appropriate law in support of the proposed instructions.

D. Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

E. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.

F. During delivery of the charge, counsel 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.

G. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

H. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.

23. Obligations of Counsel at Sentencing Hearing

A. Among counsel's obligations in the sentencing process are the following:
a. where a client chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications;

b. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
c. to ensure all reasonably available mitigating and favorable information which is likely to benefit the client is presented to the court;
d. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
e. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful, or is otherwise improper, is stricken from the text of the pre-sentence investigation report before distribution of the report; and,
f. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever warranted and possible.

24. Sentencing Options, Consequences and Procedures

A. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:

a. any minimum sentences and any exceptions;
b. deferred sentences, suspended sentences, and diversionary programs;
c. the effect of confidential criminal justice information;
d. probation or suspension of sentence and permissible conditions of probation;
e. the potential of recidivist sentencing;
f. fines, associated fees, court costs;
g. victim restitution;
h. reimbursement of attorneys' fees;
i. imprisonment including any mandatory minimum requirements;
j. the effects of mental disease or defect, or the implication of MCA §46-14-311,312, "Guilty But Developmentally Disabled"; and,
k. civil forfeiture implications of a guilty plea.

B. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

a. credit for pre-trial detention and credit against fines imposed;
b. parole eligibility and applicable parole release ranges;
c. place of confinement, level of security, and classification criteria used by Department of Corrections;
d. eligibility for correctional and educational programs;
e. availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;
f. deportation and other immigration consequences;
g. loss of civil rights;

h. impact of a fine or restitution and any resulting civil liability;
i. possible revocation of probation or possible revocation of parole status if client is subject to a prior sentence;
j. suspension of a motor vehicle operator's permit;
k. prohibition of carrying a firearm;
l. other consequences of conviction including, but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, registration as a sex offender and/or violent offender, loss of public housing, and the loss of the right to hold public office; and,
m. potential federal consequences.

C. Counsel should be familiar with the sentencing procedures, including:
a. the effect that plea negotiations may have upon the sentencing discretion of the court;
b. the availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;
c. the use of "Victim Impact" evidence at any sentencing hearing;
d. the right of the defendant to speak prior to being sentenced;
e. any discovery rules and reciprocal discovery rules that apply to sentencing hearings;
f. the use of any minimum sentences;
g. any restrictions that may be placed on parole or other early release; and,
h. the possibility of any increases in sentencing due to a persistent felony offender notice and any possible challenges to such notice.

D. Where the Court uses a pre-sentence report, counsel should be familiar with:
a. the practices of the officials who prepare the pre-sentence report and the defendant's rights in that process;
b. the access to the pre-sentence report by counsel and the defendant;
c. the prosecution's practice in preparing a memorandum on punishment; and,
d. the use of a sentencing memorandum by the defense.

E. Counsel shall, where appropriate, attend any interview with the client, review any pre-sentencing homework, and review the pre-sentence investigation report with the client.

25. Preparation for Sentencing

A. In preparing for sentencing, counsel should consider the need to:
a. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

b. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
c. Obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and family obligations, as well as sources through which the information provided can be corroborated;
d. Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the any statement to be made to the court, taking into consideration the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial, or trial on other offenses;
e. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
f. Prepare the client to be interviewed by the official preparing the pre-sentencing report and be present during any such interview. Counsel shall also review any pre-sentence investigation report with the client sufficiently in advance of the sentencing hearing to allow adequate time to rebut any inaccurate information in the PSI report.
g. Inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
h. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence; and,
i. Inform the client of the operation of the Sentence Review Division and the procedures to be followed in submitting any possible sentence to them for review, if applicable.

26. The Prosecution's Sentencing Position

Counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, unless there is a sound tactical reason for not doing so.

27. The Sentencing Process:

A. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

B. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

C. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

D. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

E. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, probation or suspension of part or all of the sentence, psychiatric treatment, or drug rehabilitation.

F. Where appropriate, counsel should prepare the client to personally address the court.

28. A Motion for a New Trial:

A. Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

B. When a judgment of guilty has been entered against the client after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

a. The likelihood of success of the motion, given the nature of the error or errors that can be raised; and,
b. The effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

29. The Defendant's Right to an Appeal:

A. Following conviction at trial, counsel should inform the client of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal.

B. Where the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel (where new counsel is handling the appeal) concerning the proceedings in the trial court.

30. Defendant's Right to Apply to the Sentence Review Panel:

Where applicable, counsel should ensure that the client is informed of the procedure available for requesting a review of his or her sentence by the Sentence Review Division of the Montana Supreme Court, as well as the advantages and disadvantages of seeking such review.

31. Defendant's Right Post Conviction Relief

Where applicable, counsel should ensure that the client is informed of the procedure available for requesting post conviction relief, as well as the advantages and disadvantages of seeking such review.

VII. STANDBY COUNSEL IN CRIMINAL CASES.

Goal: To provide standby assistance to criminal defendants who are proceeding pro se while insuring their individual dignity and autonomy. Standby counsel's participation shall never destroy the jury's perception that the defendant is representing himself and the defendant shall personally manage and conduct his own defense. Attorneys providing standby assistance shall comply with the general standards for public defenders as well as these specific standards.

1. Defense counsel acting as standby counsel shall:

A. Permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

B. If the defendant requests assistance, bring to the attention of the defendant matters beneficial to him;

C. Not actively participate in the conduct of the defense unless specifically asked to do so by the defendant.

D. Assist the defendant in overcoming routine procedural or evidentiary obstacles that the defendant has clearly shown he wishes to complete.

E. Help to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.

2. Standby counsel shall be prepared to assume representation of the Defendant at any stage of the proceedings.

VIII. FACILITIES AND SUPPORT SERVICES:

1. Public defender offices should have a budget for operating expenses that provides for a professional quality office, library, and equipment comparable to the prosecutor's office.

2. Public defender office budgets should include funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis, and for the procurement of other necessary services.

3. In all assigned cases, reasonable compensation for expert witnesses necessary to preparation and presentation of the case shall be provided, subject to prior approval by the Office of the State Public Defender. Expert witness fees should be maintained and allocated from funds separate from those provided for legal services.

4. All public defender offices, and all contract attorneys, shall make arrangements to maintain the confidentiality of client information. This includes physical security for confidential documents, exhibits, and electronic communications. Part of this obligation includes requiring outside contractors that may have access to confidential information to sign a confidentiality agreement on a form provided by the Office of the State Public Defender. Examples of personnel who might be required to sign such an agreement are IT personnel who have access to counsel's computer system and janitorial personnel who have physical access to counsel's office.

IX. COMPENSATION.

Goal: Parity of resources with the Prosecution is an essential part of effective representation. This includes parity in salaries for full time staff attorneys and a reasonable hourly rate for contract attorneys.

1. Counsel providing public legal representation and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be equal to those of attorneys and staff in prosecutorial offices in the area. Compensation should be computed as follows:

A. Regional Public Defenders shall be compensated at no less than the rate and with the same adjustments, including experience and longevity, as the salary for the County Attorneys of the largest county in which the Regional Public Defender Office is located, including all retirement funding and benefits.

B. The Chief Public Defender shall be compensated at a rate commensurate with the position's duties and responsibilities, taking into account the compensation paid to prosecutors with similar responsibilities.

C. In contracts for public legal representation, the contracting firm or counsel shall affirmatively represent in its contract that, in compensating counsel providing services pursuant to the terms of the contract, consideration has been given to the rate commensurate with an equally experienced assistant

public defender in that county or the nearest county seat in which a public defender office is located.

2. Contracts not awarded on an hourly basis should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, death penalty cases, and cases resulting in extended trials.

3. When compensating counsel providing services on an hourly basis, the Office of the State Public Defender shall pay at an hourly rate to be established by the Montana Public Defender Commission. The Commission shall review the rate at least annually to determine whether it is a reasonable amount. In the event the rate should be increased, requests shall be made to the appropriate funding authorities for additional funds.

4. Funding shall be sought for Fiscal Year 2008 to increase the contract rate.

X. REPRESENTATION STANDARDS FOR APPELLATE ADVOCACY

Goal: **To actively and effectively represent clients in the appellate process by presenting for appellate review all legal issues that have a reasonable probability of resulting in reversal of the client's conviction or commitment, or improving his or her legal position. Attorneys representing appellants shall comply with the general standards for public defenders as well as these specific Standards.**

1. TRAINING.

A. The attorney will receive a minimum of twenty (20) hours of training specific to the Rules of Appellate Procedure, including acceptable pleadings, deadlines, citations to the record and authority, procedural and substantive legal issues, and applicable rules of professional conduct.

B. Counsel shall reserve regular time to keep current with the statutes, rules, and cases regarding both procedural and substantive legal issues.

C. Counsel shall participate, whether as an instructor or student, in regular training events as directed by the Chief Appellate Defender and shall endeavor to improve professionally to the benefit of his or her clients.

2. HANDLING THE CASE[1]

A. As soon as feasible after conviction or commitment, appellate counsel should confer personally with the appellant to discuss the case. Counsel should explain the meaning and consequences of the court's judgment as well as the right to an appeal and a general outline of the appellate process.

B. Counsel shall, within the time frame set forth in the Rules of Appellate Procedure, request all transcripts and case records.

C. Counsel shall promptly review all transcripts and case records and discuss the matter with trial counsel.

D. After reviewing the record, counsel should confer with the appellant and discuss whether, in his or her professional judgment, there are meritorious grounds for appeal and the probable results of an appeal. Counsel should explain the advantages and disadvantages of an appeal. The decision whether to proceed with the appeal must be the client's own.

[1] These standards assume that trial counsel has filed all appropriate post-trial motions as well as a Timely Notice of Appeal

E. Counsel shall be diligent in expediting the timely submission of the appeal and shall comply with all applicable rules regarding conduct, pleadings, deadlines, and citations to authority.

F. Counsel shall not abandon an appeal solely on the basis of his or her own determination that the appeal lacks merit, but rather should advance any sound basis for changing the law. If, after conscientious analysis, counsel determines that there are no non-meritorious grounds for appeal, counsel should follow the procedures outlined in Anders v. California, 386 U.S. 738 (1967) and §46-8-103 MCA. Counsel shall discuss with the client the termination that counsel has made and give due consideration to the wishes of the client.

G. If counsel, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, and those facts appear on the record, he or she should seek appellate relief for the client on that ground. If counsel is satisfied that a prior attorney did not provide effective assistance and the facts do not appear on the record, counsel should advise the client regarding post-conviction rights and, if the appeal is not successful, file the appropriate post-conviction petitions.

H. After exercising independent professional judgment, which may include omitting issues too weak or tenuous to secure relief or distractive of superior claims, counsel should assert claims which are supported by the record and which will benefit the client if successful.

I. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the briefing and oral argument.

J. Counsel should seek editing assistance and legal feedback from at least one other attorney before filing a brief or a substantial motion. If oral argument is granted, counsel should prepare appropriately, including participating in a moot court session.

K. Counsel shall periodically apprise the client of the progress of the case and copy the client on all pleadings filed or received.

L. When an opinion is issued, counsel shall promptly communicate the outcome to the client and explain remaining remedies, including the right to post-conviction relief, and the scope of further representation. This information, with particular emphasis on applicable deadlines, should be memorialized in a letter to the client.

M. Counsel shall apply professional judgment when determining whether to file a petition for re-hearing or a petition for *certiorari* to the United States Supreme Court. If counsel believes that the client has a valid claim of ineffective assistance of counsel, counsel should conduct the appropriate investigation and file a timely petition for post-conviction relief.

N. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the records, transcripts, files, and other information pertinent to post-conviction proceedings.

XI. REPRESENTATION STANDARDS FOR POST-CONVICTION PROCEEDINGS

GOAL: **To actively and effectively represent clients in post-conviction proceedings by evaluating the case, conducting the appropriate investigation, and presenting all factual and legal issues that have a reasonable probability of resulting in the vacation of the client's conviction or materially improving his or her legal position. Attorneys representing clients in post-conviction proceedings shall comply with the general standards for public defenders as well as these specific Standards.**

1. TRAINING

A. The attorney will receiving a minimum of twenty (20) hours of training specific to the representation of clients in the post-conviction process.

B. Counsel shall become familiar with the applicable statutes and case law including civil, pretrial discovery, and motions rules. Counsel shall be familiar with deadline issues, acceptable pleadings, as well as the procedural and substantive legal issues relating to the post-conviction process.

C. Counsel shall reserve regular time to keep current with the statutes, rules, and cases regarding both procedural and substantive legal issues.

D. Counsel shall participate, whether as an instructor or student, in regular training events and shall endeavor to grow professionally to the benefit of his or her clients.

2. HANDLING THE CASE

A. As soon as feasible after appointment, counsel should confer personally with the client to discuss the case. Counsel should explain the scope of and procedures applicable to the post-conviction process.

B. Counsel shall promptly request all transcripts and case records. Counsel shall request appropriate releases from the client and promptly request complete attorney files. Counsel shall conduct an appropriate investigation and interview relevant witnesses.

C. Counsel shall promptly review all transcripts and case records and discuss the matter with trial counsel as well as appellate counsel and conduct other appropriate investigation into matters that are not of record.

D. After reviewing the record and conducting the appropriate investigation, counsel should confer with the client and discuss, whether in his or her professional

judgment there are meritorious grounds for filing a petition for post-conviction relief, including a petition for DNA testing, and probable results of pursuing this avenue. Counsel should explain the advantages and disadvantages of pursuing post-conviction relief, as provided by these Standards.

E. If counsel, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, counsel should seek post-conviction relief for the client on that ground.

F. After exercising independent professional judgment, which may include omitting issues too weak or tenuous to secure relief or distractive of superior claims, counsel should assert claims which are supported by the record and which will benefit the client if successful.

G. Counsel shall be diligent in expediting the timely submission of the petition for post-conviction relief, keeping in mind the corresponding federal requirements for *habeas corpus* relief, and shall comply with all applicable rules regarding conduct, pleadings, submission of supporting evidence, deadlines, and citations to authority.

H. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the briefing and oral argument.

I. Counsel should seek editing assistance and legal feedback from at least one other attorney before filing a brief or a substantial motion and shall prepare appropriately for hearings, including interviewing and subpoenaing witnesses and locating, obtaining, and preparing to present the appropriate evidence.

J. Counsel shall appear with the client at the client's hearing for post-conviction relief and/or DNA testing. Counsel shall present the witnesses, exhibits, and arguments that, in his or her professional judgment, are most likely to result in relief for the client.

K. Counsel shall periodically apprise the client of the progress of the case and copy the client on all pleadings filed or received.

L. When an opinion is issued, counsel shall promptly communicate the outcome to the client and explain remaining remedies and the scope of further representation. This information, with particular emphasis on subsequent deadlines, should be memorialized in a letter to the client. Counsel has a continuing duty to represent the client on appeal.

M. Counsel shall apply professional judgment when determining whether to file an appeal, a petition for *habeas corpus* relief in federal court, or a petition for *certiorari* to the United States Supreme Court. Any decision shall be reviewed by the Chief Appellate Defender.

N. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

XII. REPRESENTATION STANDARDS FOR SENTENCE REVIEW

GOALS:

To actively and effectively represent clients in the sentence review process by evaluating the case and giving the client appropriate advice as to whether to pursue sentence review and, if the client elects to proceed, to present all information and arguments supporting the imposition of a more favorable sentence. Attorneys representing clients in sentence review proceedings shall comply with the general standards for public defenders as well as these specific Standards.

1. TRAINING:

A. The attorney will receive a minimum of twenty (20) hours of training specific to the representation of clients in the sentence review process.

B. Counsel shall become familiar with the rules of the Sentence Review Division as well as the applicable statutes and case law.

C. Counsel shall become familiar with the range of sentences imposed for a particular offense and the factors that have affected the imposition of a particular sentence within that range, as well as with methods of accessing that information.

2. HANDLING THE CASE:

A. If a client receives a qualifying sentence, trial counsel shall advise the client of the right to sentence review and give the client appropriate advice as to whether to pursue sentence review.

B. Counsel shall advise the client that, upon review and within the limits fixed by law, his or her sentence may be raised, lowered, or remain the same. Counsel shall discuss with the client whether in his or her professional judgment there is a reasonable chance of obtaining a more or less severe sentence. Counsel should explain the advantages and disadvantages of proceeding to sentence review. The decision whether to proceed with the sentence review must be the client's own.

C. If the client decides to proceed to sentence review, counsel shall assist him or her in filing a timely application for sentence review.

D. Counsel shall gather and review all information relevant to the sentencing determination including, pre-sentence reports, and any other records, documents, or exhibits relevant to the review proceedings.

E. Counsel shall conduct an appropriate investigation and interview relevant witnesses.

F. Counsel shall make an evaluation as to whether the client's sentence is more or less harsh than sentences for similar offenses and shall determine what factors distinguish the client's case, either positively or negatively.

G. Counsel shall appear with the client at his or her sentence review hearing and present the witnesses, exhibits, and arguments that, in his or her professional judgment, are most likely to result in a sentence reduction.

XIII. STANDARDS FOR REPRESENTATION OF YOUTH IN YOUTH COURT PROCEEDINGS

GOALS:

A. To zealously defend youth charged with delinquency offenses and to protect their due process rights.

B. To serve the stated interest of the youth, be independent from the court and other participants in the litigation, including the youth's parents or guardians, and be unprejudiced and uncompromised in representing the youth.

C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the youth. Attorneys representing a client subject to youth court proceedings shall comply with the general standards for public defenders providing representation of an adult charged with violations of the criminal law, as well as the specific Standards contained herein.

D. To recognize that youth are at a critical stage of development and that skilled juvenile defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.

1. TRAINING:

A. To be eligible for assignment to represent youth in youth court, counsel shall receive a minimum of twenty (20) hours of training in representing youth in youth court, and complete a minimum of ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing youth in youth court.

B. Counsel shall be knowledgeable in the following areas:

a. Titles 41 (Montana Youth Court Act), 45 (Crimes) & 46 (Criminal Procedure), Montana Code Annotated;
b. Child and adolescent development;
c. The services and treatment options for youth both locally and statewide;
d. The role and makeup of youth placement committees and kids' management authorities (KMAs);
e. Local and state experts who are available to consult on youth court cases as well as perform evaluations of youth;
f. Pre-dispositional and dispositional services and programs available through the court and probation;
g. Brain development and the effect of neglect and trauma on brain development;
h. The juvenile justice and child welfare systems;
i. Substance abuse issues;
j. Mental health issues;

k. Special education laws, rights and remedies;
l. School related issues including school disciplinary procedures and zero tolerance policies.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers and other experts who understand the public defender's advocacy role to investigate the various health and social services that may be available to the youth in the community.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the youth.

C. Counsel shall advise the youth of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall advocate the youth's express wishes and shall not substitute his or her judgment about what is in the best interests of the youth. The primary role of counsel is to represent the perspective of the youth alone and not that of the youth's best interests or of the youth's parents or guardian. Appointment of a guardian-ad-litem to investigate the best interests of the child is a matter within the exclusive province of the court.

E. Counsel shall ensure that children do not waive appointment of counsel. Counsel should be assigned at the earliest possible stage of the youth court proceeding. Furthermore, counsel shall actively represent the youth at all stages of the proceeding. When the public defender becomes aware of the assignment, the public defender shall meet with the youth as soon as possible and sufficiently before any scheduled hearing or proceeding, including the probable cause or detention hearing, to permit effective preparation.

F. When meeting with the youth for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other healthcare facility, counsel shall explain that he or she is not a member of the facility staff. Counsel shall inform the youth their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others, including the youth's parent or guardian, in order to preserve the attorney-client confidentiality. Counsel shall also inform the youth that he or she has a right to remain silent.

G. Counsel shall maintain the attorney-client privilege with the understanding that the attorney represents the youth alone and not the youth's parents or guardians. The potential for a conflict of interest between the accused juvenile client and his or her parents should be clearly recognized and acknowledged. Counsel should inform the

parent that he or she is counsel for the youth and that in the event of a disagreement between a parent or guardian and the youth, counsel is required to serve exclusively the interest of the youth.

H. During the conference, counsel shall:

a. Explain the charges and possible dispositions;
b. Explain the youth court process, timelines, and the role of all the parties involved, such as judge, prosecutor, probation staff, guardian ad-litem, counsel, youth and parent;
c. Inform the youth and parent not to make statements to anyone concerning the offense;
d. Obtain signed releases by the youth and parent for medical and mental health records, school records, employment records, and other necessary records. Counsel should advise the youth of the potential use of this information and the privileges that attach to this information;
e. Obtain information from the youth concerning the facts of arrest and charges and whether there were any statements made, witnesses, co-defendants, and other relevant information.

I. If the youth is detained, counsel must focus upon obtaining information relevant to the determination of pre-adjudication conditions of release. Such information should generally include:

a. Youth's residence and length of time at the residence;
b. Youth's legal custodian and physical custodian with names, addresses, and phone numbers;
c. Mental and physical health and employment background, if any;
d. School placement, status, attendance, and whether the youth qualifies for special education;
e. Whether the youth or the youth's family had previous contact with the youth court system and the outcome of that contact;
f. Adults possibly willing to assume responsibility for the youth;
g. Useful social information, including the youth's home behavior, school performance, involvement with special education services, past or present employment, and other information concerning the youth's ability to stay out of trouble if released, and the parent's ability to control and discipline the youth.

J. If counsel is unable to communicate with the youth because of language or other disability, counsel shall secure the assistance of such experts as are necessary to communicate with the youth.

K. Whenever the nature and circumstances of the case permit, counsel should explore the possibility of informal adjustment under § 41-5-130, MCA.

L. Counsel shall actively prepare the youth for any interview with the youth probation officer and accompany the youth at any such interview.

M. If the court requires the posting of a bond, counsel should discuss with the youth and his or her parent or guardian the procedures that must be followed. Where the youth is not able to obtain release under the conditions set by the court, counsel should consider pursuing modifications of those conditions.

3. HANDLING THE CASE:

A. In preparation for the probable cause hearing, counsel should:
   a. Review all evidence to identify relevant and meritorious pretrial motions;
   b. Be fully informed of the rules of evidence, court rules, and the law with relation to all stages of the hearing process; be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the adjudicatory hearing;
   c. Be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review;
   d. Be aware of the confidentiality provisions that pertain to youth court proceedings;
   e. Prepare the youth and, when appropriate, the youth's parent or guardian, for the proceeding by explaining the process and that the probation officer may contact them to get information; stress the importance of providing the probation officer with factually accurate information.

B. During the probable cause hearing, counsel should use the testimony at the hearing as a discovery tool and elicit as much information as possible about the facts and circumstances of the case.

C. If probable cause is found, counsel shall argue for the least restrictive placement for the youth pending arraignment.

D. Counsel shall promptly investigate the case. Regardless of whether the youth wishes to admit guilt, counsel shall ensure that the charges in the disposition are factually and legally correct and that the youth is aware of any potential defense to the charges.

E. When conducting the investigation, counsel should:
   a. Obtain the arrest warrant, petition, and copies of all charging documents in the case to determine the specific charges that have been brought against the youth;
   b. Obtain the police reports and any other records, documents, and statements;
   c. Research relevant law to determine the elements of the offenses charged and defenses available; interview all witnesses favorable and adverse and obtain any criminal or juvenile history of the witnesses;
   d. Ascertain if there is physical evidence and make prompt requests to examine and view the crime scene if possible;

e. Determine whether an expert is needed to assist in preparation of the defense or to rebut the prosecution's case.

F. In preparation for the adjudicative hearing, counsel should review all statements, reports, and other evidence to determine whether motions are appropriate.

G. At the adjudicative hearing, counsel shall, where it benefits the youth, examine
and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence.

H. Counsel shall offer evidence favorable to the youth's case and present lay and expert witnesses, if available.

I. Prior to engaging in plea negotiations, counsel must ensure that the youth and parent understand the concept of plea bargaining in general, as well as the details of any specific plea offer made to him or her.

J. Counsel should make it clear to the youth that the ultimate decision to enter the plea has to be made by the youth.

K. Counsel should investigate and candidly explain to the youth the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication of delinquency.

L. Counsel should also ascertain and advise the youth of the court's practices concerning disposition, recommendations, and withdrawal of pleas or admissions.

M. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the youth's situation. Such advice should not be based solely on the youth's acknowledgement of guilt or solely on a favorable disposition offer.

N. The youth shall be kept informed of the status of the plea negotiations.

O. Where counsel believes that the youth's desires are not in the youth's best interest, counsel may attempt to persuade the youth to change his or her position. If the youth remains unpersuaded, however, counsel should assure the youth that he or she will defend the youth vigorously.

P. Notwithstanding the existence of ongoing plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to an adjudicatory hearing on the merits.

Q. Counsel should make sure that the youth is carefully prepared to participate in the procedures required and used in the particular court.

R. Counsel must also be satisfied that the plea is voluntary, that the youth understands the nature of the charges, that there is a factual basis for the plea or admission, that the witnesses are or will be available, and that the youth understands the right being waived.

S. Counsel must consider whether an admission will compromise the youth or the youth's family's public assistance or immigration status. If it does, the youth may need to reconsider the decision to plead.

T. Counsel should be aware of the effect the youth's admission will have on any other court proceedings or related issues, such as probation or school suspension.

U. In preparation for the disposition hearing, counsel should:
   a. Explain to the youth and parent or guardian, if applicable, the nature of the dispositional hearing, the issues involved, and the alternatives open to the court;
   b. Explain fully and candidly the nature, obligations, and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the youth's responsibilities under the proposed dispositional plan.

V. Counsel should be familiar with and consider:
   a. The dispositional alternatives available to the court and any community services that may be useful in the formation of a dispositional plan appropriate to the youth's circumstances;
   b. The official version of the youth's prior records, if any;
   c. The position of the probation department with respect to the youth;
   d. The prosecutor's sentencing recommendation;
   e. Using a creative interdisciplinary approach by collaborating with educational advocates, social workers, and civil legal service providers;
   f. The collateral consequences attaching to any possible disposition;
   g. Any victim impact statement to be presented to the court;
   h. Requesting a continuance for disposition at a later date; and,
   i. Securing the assistance of psychiatric, psychological, medical, or other expert personnel needed for the purposes of evaluation, consultation, or testimony with respect to the formation of a dispositional plan.

W. Counsel shall provide the youth with continuous legal representation throughout the youth court process including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement, and sealing of records.

X. If counsel withdraws from representation of a youth following adjudication and disposition, counsel shall make all reasonable efforts to ensure that the youth is well represented in matters that stem from the youth's adjudication. This includes ensuring a smooth transfer of responsibility to new counsel or monitoring of the detention status, probation, treatment, and services provided an adjudicated youth.

4. YOUTH WHO ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT:

A. To be eligible for assignment to represent youth who are prosecuted either under Section 41-5-206, MCA (filing in district court prior to formal proceedings in youth court) or Section 41-5-1602, MCA, (extended jurisdiction juvenile prosecution), counsel shall be qualified to represent adults charged with similar offenses and shall, in addition, have received a minimum of ten (10) hours of training and a minimum of five (5) hours of supervised on-the-job training on the handling of juvenile transfer cases.

B. In preparing for the transfer hearing or for a designation of extended jurisdiction, counsel of record shall:

a. Be aware of the statutory findings the court must make before transferring jurisdiction and the case law governing these findings;
b. Fully advise the youth of his or her right to a hearing and the possible consequence of transfer to youth court or remaining in the district court;
c. Investigate the offense with which the youth is charged sufficiently to address the question of whether the nature of the offense warrants prosecution in district court;
d. Investigate the issue of community protection by interviewing the youth's agents, teachers, counselors, psychologists, community members, probation officers, religious affiliates, employers, or any others who have knowledge of the youth and can speak to his or her lack of dangerousness;
e. Investigate the needs and stated interest of the youth, as well as the youth's circumstances;
f. Provide the youth with full information and legal advice sufficient for the youth to make decisions concerning the transfer issue;
g. Prepare to present evidence and testimony to prevent transfer, including testimony by people who can provide helpful insight into the youth's character and who have a positive personal and/or professional view of the youth; and,
h. Consider obtaining an independent evaluation from a defense expert.

XIV. REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR INVOLUNTARY COMMITMENT – MENTAL ILLNESS

GOALS:

A. To actively and professionally serve as a zealous advocate for the respondent who is the subject to a commitment proceeding for a mental disorder under §53-21-116, MCA.

B. To abide by specific mandatory standards of representation for Public Defenders as attorney for the respondent in an involuntary commitment proceeding.

C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.

D. To exercise independent and professional judgment in carrying out the duties assigned by the Court and to participate fully in the case on behalf of the respondent.

E. The term "involuntary commitment" in the following standards includes involuntary commitment and proceedings to extend the involuntary commitment period.

1. TRAINING AND COMPETENCY:

A. A public defender assigned to represent a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law as well as the mental health system.

B. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of twenty (20) hours of training and complete a minimum of ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities including the Montana State Hospital. Counsel shall utilize training and support provided by the Office of the State Public Defender.

C. Counsel shall have basic knowledge of the classification of mental disorders and the ability to read and understand medical terminology related to mental disorders, developmental disabilities, chemical dependence and alcoholism. Counsel shall be familiar with the medications used to treat mental disorders, developmental disabilities, and alcoholism. Counsel shall be aware of how a particular mental disorder, developmental disability, chemical dependence or alcoholism will affect attorney-client communications and should recognize that communications may require special efforts on the part of counsel.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore various mental health and social services that may be available to the respondent in the community.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the respondent.

C. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall help the respondent find his or her objectives by advising him or her about the probability of success in pursuing these options. If the respondent expresses a desire to seek voluntary mental health treatment or related social services, counsel must give the respondent the necessary and appropriate advice and assistance to pursue those desires.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, not the perspective of the respondent's relatives, friends or guardian. In addition, counsel will not substitute his or her judgment about what is in the best interest of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

F. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an emergency detention or involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled emergency detention proceeding or involuntary commitment hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

G. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other health care facility, counsel shall make it clear to the respondent that he or she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel shall also inform the respondent that he or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

H. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

a. The circumstances surrounding the filing of an involuntary commitment or emergency detention petition;

b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the involuntary commitment petition or emergency detention;
c. Any information about past psychiatric hospitalization and treatment;
d. Information to aid the exploration of alternatives to commitment;
e. The name of a mental health professional of respondent's choice to conduct an independent evaluation.

I. During the conference, counsel shall also:
a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the psychiatric examination and judicial hearing procedures;
b. Explain the respondent's rights in the commitment process, including the right to treatment, the right to refuse treatment, and the right to an independent evaluation;
c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
d. Explain the respondent's option to accept voluntary treatment, the procedures of exercising that option, and the legal consequences of voluntary admission to a mental health facility, including whether the respondent is willing to accept voluntary treatment in a mental health facility or other settings;
e. Obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney and with mental health professionals if the respondent is willing and able to give informed consent to voluntary mental health care or related social services as an alternative to involuntary commitment;
f. Discuss the desirability of a court hearing with the respondent; and,
g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records or incident reports.

J. After being notified of the appointment, counsel shall, in preparation of any scheduled hearing, do the following:
a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction, as well as case law and court rules;
b. Thoroughly review the petition, detention order, or other documents used to initiate proceedings, the screening report, the prehearing examination reports, the medical records of the respondent, the facility records of any facility in which the respondent has recently resided, and any other document relevant to the proceedings;
c. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition or emergency detention, including the petitioners, the police officers who detained the respondent, the psychiatrists, social workers, and other

persons who have examined or treated the respondent during the current involuntary commitment or emergency detention proceedings, previous mental health treatment providers, if any; the respondent's family, guardian or acquaintances; and any persons who may provide relevant information or who may be supporting or adverse witnesses at an emergency detention or involuntary commitment hearing;

d. Facilitate the exercise of the respondent's rights to be examined by a professional person of the respondent's choice;
e. Discuss with the respondent the various medications that the respondent has been prescribed to address the respondent's mental illness, including the effectiveness of the medication, and the long-term effects and side effects of each.

K. Counsel must ensure that a respondent's consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to all respondents as part of counsel's efforts to make respondents aware of all options available to them.

L. If the respondent indicates that he or she would consent to voluntary treatment, counsel shall:

a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary patient status, he or she was agreeing to enter or remain in a mental health facility or begin or continue to receive mental health services; and,
b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

M. If counsel has determined that the respondent's consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceeding.

N. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the conversion to voluntary patient status was made knowingly and voluntarily, he or she shall investigate the circumstances of the respondent's stated desire to voluntarily receive treatment.

3. COURT PROCEEDINGS:

A. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

B. Counsel should ensure that the respondent may exercise his or her right to a jury trial. Counsel shall inform the respondent of his or her right to a jury trial and explain the benefits and detriments of a jury trial and a hearing in front of the judge alone. Counsel shall immediately notify the court if respondent chooses a jury trial. If the respondent waives his or her right to a jury trial, counsel shall establish that the waiver is knowing and voluntary.

C. Counsel shall ensure that a respondent actively participates in every stage of the involuntary commitment process. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, emergency detention, commitment, conditional release, revocation or modification of a trial visit, outpatient or community commitment, or an extension of the commitment period, and how the court will determine the length of commitment.

D. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing, except when attending would seriously jeopardize the respondent's mental or physical condition and an alternative location for the hearing in surroundings familiar to the respondent would not prevent such adverse effects upon the respondent's mental condition.

E. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

F. If, at the time of hearing, a respondent is under the influence of psychotropic or other prescribed medications, counsel should consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

G. Counsel should zealously and effectively engage in all aspects of trial advocacy.

H. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings, such as hospital and medical records.

I. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for detention or commitment have been met. Thus, in emergency detention proceedings, counsel shall seek to bifurcate the determination of whether there is probable cause for an emergency detention and the determination of the least restrictive setting for that detention. In involuntary commitment proceedings, counsel shall seek to bifurcate the determination of whether the respondent requires commitment and the post trial disposition hearing if it will advantage the respondent. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal

charges so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

J. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether the case for detention or commitment is based on dangerousness to self or to the person or property of others;
b. Whether there is any real factual basis for the determination of dangerousness;
c. The probability of dangerous behavior in the future;
d. How well the respondent is currently functioning and whether any indications of poor functioning are due to the respondent's social situation or to mental disorder;
e. Whether there is any useful purpose to hospitalization and whether possible alternatives exist or have been explored;
f. Whether mental health examinations and screenings were thorough;
g. Whether the respondent had recently been exhibiting abnormal or unusual behavior; and,
h. The factual basis of conclusory opinions about the respondent's suitability for detention or commitment under the applicable legal standards.

K. Counsel should be aware of the basis for and file a motion to seek release from custody in the form of a *writ of habeas corpus* when appropriate.

L. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent mental health expert who has examined the respondent, if possible.

M. After discussions with the respondent and with his or her consent, counsel shall present all favorable evidence available regarding appropriate alternatives to involuntary commitment including, but not limited to, voluntary mental health treatment and commitment to community-based mental health treatment and care.

N. Whether or not the commitment hearing, the post trial dispositional hearing, the detention proceeding, or the detention placement determination are bifurcated, counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding or part of the proceeding that constitutes the post trial dispositional hearing or detention placement determination.

O. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana State Hospital. Counsel should explore and consider offering evidence of the respondent's compliance with treatment, success in community treatment programs, and family support in the community.

P. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of an involuntary medication order. Counsel should explore and consider offering evidence regarding the medications that the respondent has found to be effective, as well as those medications which have not been effective or cause significant long-term or side effects.

Q. Counsel should consider the condition of the respondent in determining the degree to which the hearing procedures should conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel should argue strict application for the burden of proof and the law; at all times, counsel should endeavor to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

R. Counsel should provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered the involuntary commitment, counsel shall advocate for an appropriate treatment and discharge plan to be developed which is reasonably designed to achieve the end sought in the commitment order. The treatment plan should be tailored to the respondent's needs. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported by the record. The treatment plan should include the following elements;

a. All assessments of the respondent's problems and needs;
b. A brief description of the nature and effects of service and treatment already administered to the respondent;
c. A description of services and treatment to be administered, their possible side effects, and feasible alternatives, if any;
d. The identities of agencies and specific individuals who will provide the services and treatment in the future;
e. The settings in which the services and treatment will be provided;
f. A time table for attaining the goals or benefits of treatment or care to be administered;
g. A statement of the criteria for transition to less restrictive placements or for conditional or unconditional discharge from involuntary mental health services and treatment, as well as the date for transfer or discharge; and,
h. A statement of the least restrictive conditions necessary to achieve the purposes of hospitalization.

S. The discharge plan should include the following:

a. An anticipated discharge date;
b. Criteria for discharge;
c. Identification of the facility staff member responsible for discharge planning;
d. Identification of the community-based agency or individual who is assisting in arranging post-discharge services;

e. Referrals for financial assistance needed by the patient upon discharge; and,
f. Other information necessary to ensure an appropriate discharge and adequate post-discharge services.

T. Counsel who represented a respondent preceding and during a court hearing should make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains an involuntary patient or subject to a conditional release.

U. If counsel who represented the respondent during the commitment proceeding does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, court ordered release to alternative placement or treatment, and other available legal actions to contest commitment, as well as continued representation in proceedings to revoke conditional release, to extend conditions of release or the commitment period in a more restrictive setting, and other legal proceedings to extend commitment.
b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

XV. REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR INVOLUNTARY COMMITMENT SERIOUS DEVELOPMENTAL DISABILITY

GOALS:

A. To actively and professionally serve as a zealous advocate for the respondent who is the subject of a proceeding for commitment or re-commitment as an individual with a serious developmental disability under §53-20-112, MCA.

B. To abide by mandatory standards of representation for public defenders as attorney for the respondent in an involuntary commitment proceeding.

C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.

D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the respondent.

E. In the following standards, "involuntary commitment" refers to both involuntary commitment and recommitment proceedings.

1. TRAINING AND COMPETENCY:

A. A public defender assigned to represent a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law as well as the developmental disabilities and mental health systems.

B. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of twenty (20) hours of training and complete a minimum of ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities including the Montana Developmental Center and community service providers and group homes within the area served by the public defender. Counsel shall utilize training and support provided by the office of the public defender.

C. Counsel shall have basic knowledge of the classification of developmental disorders and the ability to read and understand medical terminology related to developmental disabilities, mental illness, and co-occurring disorders or dual diagnosis. Counsel shall be familiar with the medications used to treat mental disorders and developmental disabilities. Counsel shall be aware of how a particular developmental disability, mental disorder, chemical dependency, or alcoholism will affect the attorney-client communications and shall recognize that communications may require assistance or special efforts on the part of counsel.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore developmental health and social services that may be available to the respondent in the community.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the respondent.

C. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall help the respondent determine the respondent's objectives by advising the respondent about the probability of success in pursuing those options.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, and not the perspective of the respondent's relatives, friends, or guardian. In addition, counsel shall not substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

F. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

G. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other health care facility, counsel shall make it clear to the respondent that he/she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve attorney-client confidentiality. Counsel should inform the respondent that he or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

H. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

a. The circumstances surrounding the filing of the involuntary commitment;
b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the petition;
c. Information about past treatment either in the community or at the Montana Developmental Center or any past psychiatric hospitalization;

d. Information to aid the exploration of alternatives to commitment;
e. The name of a developmental disabilities expert of respondent's choice to conduct an independent evaluation.

I. During the conference, counsel shall also:
a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the examination conducted by the residential facility screening team and judicial hearing procedures;
b. Explain the respondent's rights in the commitment process, including the right to treatment and the right to refuse treatment;
c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
d. Explain the respondent's option to accept voluntary health care or other services, the procedures to exercise that option, and the legal consequences of voluntary acceptance of such services; discuss whether respondent is willing to accept those voluntary services;
e. As an alternative to involuntary commitment, obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney if the respondent is willing and able to give informed consent to voluntary health or other services;
f. Discuss the desirability of a court hearing with the respondent; and,
g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records and incident reports.

J. After being notified of appointment to the case, counsel shall, in preparation of any scheduled hearing, do the following:
a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction, as well as case law and court rules;
b. Thoroughly review the petition or other documents used to initiate the commitment proceedings, the report of the residential facilities screening team, the report by the QMRP or other case manager, prehearing examination reports, the medical records of the respondent, and the facility records of any facility in which the respondent has recently resided and any other document relevant to the proceedings;
c. Consider the advisability of seeking the services of a qualified mental retardation professional;
d. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition:
i. The petitioners;
ii. The developmental disabilities professional, community services providers, facility staff, social workers, case managers, mental health professionals, and other persons who have examined or

treated the respondent during the current involuntary commitment proceedings;

iii. Previous service providers, if any;

iv. The respondent's family, guardian or acquaintances;

v. The responsible person and the person's advocate, if any; and,

vi. The persons who may provide relevant information or who may be supporting or adverse witnesses at a commitment hearing.

e. Facilitate the exercise of the respondent's right to be examined by a professional person of the respondent's choice.

K. Counsel must ensure that a respondent's consent to receive voluntary services is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary services and care to all respondents as a part of counsel's efforts to make respondents aware of all options available to them.

L. If the respondent indicates that he or she would consent to receive voluntary services, counsel shall:

a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary status, he or she was agreeing to enter or remain in services voluntarily; and

b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion

M. If counsel has determined that the respondent's consent to receive voluntary services is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the voluntary commitment proceeding.

3. COURT PROCEEDINGS:

A. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

B. Counsel should ensure that a respondent actively participate in every stage of the involuntary commitment proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, commitment, or recommitment, and the length of commitment.

C. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing except in the following extraordinary cases:

a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;

b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

D. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

E. If at the time of hearing, a respondent is under the influence of prescribed medications, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

F. Counsel shall zealously and effectively engage in all aspects of trial advocacy.

G. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings such as hospital and medical records.

H. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for commitment have been met. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal charges, if any, so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

I. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether the case for commitment is based upon self-help deficits so severe so as to require total care;
b. Whether there is a real factual basis for the determination of these deficits that would prevent safe and effective habilitation in community-based services;
c. Whether the case for commitment is based on imminent danger to self or others;
d. Whether there is any real factual basis for the determination of imminent danger;
e. The probability of dangerous behavior in the future;
f. Whether any indications of poor functioning are due to the respondent's social situation or to a mental disorder;
g. Whether the information and the interpretation of that information relied upon by the residential facility screening team was accurate;
h. Whether health examinations and screenings were thorough;
i. Whether the respondent had recently been exhibiting abnormal or unusual behavior; and,

j. The factual basis of conclusory opinions about the respondent's suitability for commitment under the applicable legal standards.

J. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent developmental disabilities expert who has examined the respondent if possible.

K. After discussions with the respondent and with his or her consent, counsel shall present all evidence available that is favorable to the respondent regarding appropriate alternatives to involuntary commitment, including, but not limited to, the ability of the respondent to be served in the community, including the respondent's history of successful placement in the community, the availability of community-based services or other mechanisms to support the respondent in the community, including powers of attorney, guardianship or conservatorship.

L. Counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding.

M. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana Developmental Center. Counsel shall explore and consider offering evidence of the respondent's compliance with treatment, success in community treatment programs, and family and other support in the community.

N. Counsel shall consider the condition of the respondent in determining the degree to which the hearing procedures shall conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel shall argue strict application for the burden of proof and the law and at endeavor at all times to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

O. Counsel shall provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered involuntary commitment, counsel shall advocate for an appropriate individualized treatment plan to be developed, including a post-institutionalization plan which contains all the elements required by law and is tailored to the respondent's needs and is reasonably designed to maximize the resident's abilities and enhance the resident's ability to cope with the environment. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported by the record. The plan should include the following elements:

a. All assessments of the respondent's specific limitations and needs;

b. A description of intermediate and long range habilitation goals, with a projected timetable for their attainment;
c. A statement of and an explanation for the plan of habilitation necessary to achieve the habilitation goals of the resident;
d. A specification of the professionals and other staff members who are responsible for the particular resident's attaining these rehabilitation goals;
e. Criteria for release to less restrictive settings for habilitation, based on the resident's needs including criteria for discharge and a projected date for discharge.

P. Counsel who has represented a respondent preceding and during a court hearing shall make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains committed.

Q. If counsel who represented the respondent during the commitment proceedings does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, recommitment proceedings and other available legal actions to contest commitment;
b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

XVI. REPRESENTATION OF A MINOR WHO IS VOLUNTARILY COMMITTED TO A MENTAL HEALTH FACILITY UNDER §53-21-112, MCA

GOALS:

A. To actively and effectively represent minor children in proceedings where they or, if under the age of 16, their parents or guardian, have consented to mental health services treatment under §53-21-112, MCA, in an effective and professional manner throughout all phases of the representation.

B. To abide by specific mandatory standards of representation for public defenders as attorney for the minor.

C. To serve the stated interests of the minor, to be independent from the court and other participants in the litigation, including the minor's parents or guardian, and to be unprejudiced and uncompromised in representing the minor.

D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the minor.

1. TRAINING AND COMPETENCY:

A. A public defender assigned to represent minors who have been voluntarily admitted to mental health services under §53-21-112, MCA, shall have a thorough understanding of involuntary commitment case law, statutes, and rules, as well as the mental health system.

B. To be eligible for assignment to represent minors who have been voluntarily admitted, counsel shall receive a minimum of five (5) hours of training, or the equivalent thereof, as certified by the Training Officer, completed the necessary hours for involuntary commitment training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of youth treatment facilities. Counsel shall utilize training and support provided by the Office of the State Public Defender.

C. Counsel shall be familiar with the public defender standards for representation of a respondent in a proceeding for involuntary commitment.

D. Counsel shall have basic knowledge of the classification of mental disorders and the ability to read and understand medical terminology related to mental disorders, developmental disabilities, alcoholism, and chemical dependency. Counsel shall be familiar with the medications used to treat mental disorders, developmental disabilities, alcoholism, and chemical dependency. Counsel shall be aware of how the minor's age, or a particular mental disorder, developmental disability, alcoholism, or chemical

dependency will affect attorney-client communications and should recognize that communications may require special efforts on the part of counsel.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the minor's case and explore the range of mental health and social services that may be available to the minor in the minor's community.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the minor.

C. Counsel shall advise the minor of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall help the minor determine his or her objectives by advising him or her about the probability of success in pursuing those options. If the minor expresses a desire to seek voluntary mental health treatment in a particular setting or related social services, counsel must give the minor the necessary and appropriate advice and assistance to pursue those desires.

E. Counsel shall advocate the minor's express wishes. The primary role of counsel is to represent the perspective of the minor alone, and not the perspective of the minor's relatives, friends, or guardian. This is true regardless of the age of the minor. In addition, counsel will not substitute his or her judgment about what is in the best interest of the minor. To the extent that a minor is unable or unwilling to express personal wishes, counsel must presume that the minor wishes to reside in the least restrictive environment.

F. Counsel shall meet with the minor as soon as possible after notification of his or her assignment to represent the minor. This meeting shall be conducted in private and shall be held sufficiently before any scheduled legal proceeding to permit effective preparation and allow pre-hearing assistance to the minor.

G. When meeting with the minor for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other healthcare facility, counsel shall make it clear to the minor that he or she is not a member of the facility staff. Counsel shall inform the minor that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve the attorney-client confidentiality. Counsel shall also inform the minor client of the right to remain silent prior to the commencement of any court-ordered examination and that the minor cannot be examined without the presence of counsel.

H. During the conference, counsel shall obtain the following:
   a. The circumstances that brought about the attorney's assignment, including the voluntary admission, the minor's age at admission, the extent to which the minor's parents or guardian participated in that decision, and the reason that the minor asked for counsel if that request brought about the assignment;
   b. The names, addresses, and telephone numbers of all persons with knowledge of those circumstances;
   c. Any information about the minor's past mental health treatment;
   d. Information to aid the exploration of the minor's choices for treatment;
   e. The name of a mental health professional of the minor's choice to conduct an independent evaluation.

I. During the conference, counsel shall also:
   a. Explain what is happening and why, including a description of the judicial hearing if one is pending;
   b. Explain the minor's rights in that process as well as the minor's rights regarding voluntary admission to mental health services; and
   c. Explain that the minor may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender.

J. Immediately after being assigned, counsel should review the file and should inform other parties and other counsel of his or her assignment and that, as counsel of record, he or she should receive copies of any pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.

K. Immediately after being assigned, counsel should meet with the minor adapting all communications to the minor's level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the minor about the court system, the proceedings, and counsel's responsibilities. Counsel should elicit and assess a minor's views and concerns of the case.

L. Counsel shall encourage and support the minor in maintaining contact with family members and friends if the minor so desires and when doing so would benefit the minor.

M. Counsel should thoroughly explain to the minor the requirements for a valid voluntary admission to a mental health facility under §53-21-111, MCA, and discuss all practical and legal considerations that flow from their admission.

N. If counsel believes it to be appropriate, counsel should seek to have a medical evaluation of the minor done by a qualified physician of the minor's choosing, and preserve said examination for further use on behalf of the minor.

O. Counsel should conduct thorough, continuing and independent investigations, including reviewing the minor's social service records, mental health records, if applicable, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

P. If the public defender was assigned to the case because there is an upcoming legal proceeding, such as an involuntary commitment proceedings, counsel will follow the appropriate public defender standards as well as these Standards.

Q. Counsel must ensure that a minor's consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to the client.

R. If the minor indicates that he or she would consent to voluntary treatment, counsel shall:

a. Determine whether the minor was indeed aware that by electing to receive voluntary patient status, he or she was agreeing to enter or remain in mental health services; and,
b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

S. If counsel has determined that the minor's consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceeding.

T. When, due to the minor's disability, the effect of medication, or other factors, counsel is unable to determine that the consent to voluntary patient status was made knowingly and voluntarily, he or she shall investigate the circumstances of the minor's stated desire to voluntarily receive treatment.

3. HANDLING THE CASE:

A. In preparation for court hearings, counsel must thoroughly prepare for trial, the examination of both law and expert witnesses, submission of trial briefs and stipulations, and all evidentiary considerations.

B. At any court proceedings, counsel should present and cross examine witnesses, offer exhibits as necessary, introduce evidence where appropriate, make arguments on the minor's behalf, and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the minor's decisions about the representation with respect to each issue on which the minor is competent to direct counsel. Counsel should pursue the minor's expressed objectives.

C. Counsel should participate in and, when appropriate, initiate negotiations and settlement discussions if authorized by the client. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

D. Counsel should determine and advocate for, on behalf of the minor, the least restrictive alternatives to meet the needs and wishes of the minor.

E. After the initial disposition of the case, counsel should discuss the end of the legal representation with the minor and discuss all avenues of appeal and other assistance in the future on behalf of the minor.

F. When counsel's representation terminates, counsel shall cooperate with the minor and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

G. Counsel should provide continuity in representation for the minor. Counsel shall advocate for an appropriate treatment and discharge plan to be developed. The treatment plan should be tailored to the minor's needs. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported. The treatment plan should include the following elements:

a. All assessments of the minor's problems and needs;
b. A brief description of the nature and effects of service and treatment already administered to the minor;
c. A description of services and treatment to be administered, their possible side effects and feasible alternatives, if any;
d. The identities of agencies and specific individuals who will, in the future, provide the services and treatment;
e. The settings in which the services and treatment will be provided;
f. A time table for attaining the goals or benefits of treatment or care to be administered;
g. A statement of the criteria for transition to less restrictive placements, as well as the date for transfer or discharge; and,
h. A statement of the least restrictive conditions necessary to achieve the purposes of treatment.

H. The discharge plan should include the following:

a. An anticipated discharge date;
b. Criteria for discharge;
c. Identification of the facility staff member responsible for discharge planning;
d. Identification of community-based agency or individual who is assisting in arranging post discharge services;
e. Referrals for financial assistance needed by the patient upon discharge; and,
f. Other information necessary to ensure an appropriate discharge and adequate post discharge services.

I. Counsel who has represented a minor pursuant to §53-21-112, MCA, should make every effort to maintain responsibility for the minor's legal representation so long as the respondent remains a minor subject to a voluntary admission or involuntary commitment.

J. If counsel who represented the minor does not continue to represent the minor, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the minor's admission pursuant to §53-21-112, MCA. Specific objectives include:

a. A smooth transfer of responsibility to new counsel who assumes representation of the minor, including representation in matters including the periodic review of the minor's status; and,
b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

XVII. REPRESENTATION OF PARENTS IN DEPENDENT/NEGLECT CASES

GOALS:

A. To actively, professionally, and zealously advocate for parents whose children are the subject of actions under the Child Abuse and Neglect laws of Montana and afford them every legal opportunity to preserve their parental rights.

B. To serve the state interest of the client and be independent from the court and other participants in the litigation, including the client's parents or guardians, and be unprejudiced and uncompromised in representing the client. Attorneys representing parents shall comply with the general standards for public defenders as well as these specific standards.

1. TRAINING:

A. To be eligible for assignment to represent parents in these court proceedings, counsel shall receive a minimum of sixteen (16) hours of training in representing parents of which at least four (4) hours were devoted to the Indian Child Welfare Act.

B. Counsel shall be knowledgeable in the following areas:

a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children with special needs;
b. The causes and available treatments of child abuse;
c. Child welfare and family preservation services available in the community and the problems they are designed to address;
d. Services the State will and won't routinely pay for;
e. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
f. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
g. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
h. Child and adolescent development;
i. Brain development and the affect of trauma on brain development;
j. Substance abuse issues;
k. Mental health issues; and
l. Disability issues.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the various health and social services that may be available to the parent in the community.

B. Counsel shall advise the parent of all available options, as well as the practical and legal consequences of those options.

C. If the client is a parent whose location is unknown, all standard means, such as telephone book, internet, and putative father registry, shall be used to locate the parent. Other parents who are available shall be consulted as to the location of the missing parent.

D. Counsel shall actively represent the client at all stages of the proceeding. When the public defender becomes aware of the assignment, the public defender shall meet with the client as soon as possible and sufficiently before any scheduled hearing or proceeding, including the show cause hearing, to permit effective preparation.

E. When meeting with the parent for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other healthcare facility, counsel shall make it clear to the minor that he or she is not a member of the facility staff. Counsel shall inform the parent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel shall also inform the parent that he or she has a right to remain silent.

F. During the conference, counsel shall:

a. Explain the issues and possible dispositions;
b. Explain the court process, timelines, and the role of all the parties involved, such as judge, prosecutor, guardian ad-litem, and parent;
c. Inform the parent not to make statements to anyone concerning the case without prior consultation with counsel;
d. Obtain signed releases for medical and mental health records, employment records, and other necessary records. Counsel should advise the client of the potential use of this information and the privileges that attach to this information;
e. Obtain information from the client concerning the facts and whether there were any statements made, witnesses, and other relevant information.

G. If counsel is unable to communicate with the client because of language or disability, counsel shall use the experts necessary to ensure the ability to communicate with the client.

3. HANDLING THE CASE:

A. Counsel should seek the most expedient and timely resolution of the proceeding possible while providing effective and zealous advocacy for the client. Counsel should only seek the continuance of any phase of the proceedings if it is necessary to effectively advocate for the client.

B. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in such proceedings, such as reports from agency employees, as well as substantive law in these proceedings.

C. In preparation for any proceedings such as show cause, adjudicatory or termination, counsel should:

a. Review the petition and all other evidence;
b. Prepare the client for the proceeding, explain the issues involved, and the alternatives open to the judge;
c. If the child has already been removed from the home, determine the basis for the removal;
d. Determine the actions taken by the State to investigate other possible actions to protect the child without removal, such as locating a non-custodial parent or relative, identifying services to address the needs of the parent and child, including intensive home-based services, and other services, such as disability support services.
e. Review all statements, documents, reports, and documentary evidence, including medical records, if any, and discuss these documents with the client;
f. Familiarize himself or herself with relevant law; and,
g. Interview all witnesses, favorable and adverse.

D. During any proceedings, counsel shall, where it benefits the client:

a. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
b. Offer evidence favorable to the client's case, if available; and,
c. Determine whether an expert is needed to assist in preparation of the parent's case.

E. During the show cause hearing, counsel shall examine witnesses as to:

a. Whether the agency has made all reasonable efforts to explore services that will allow the child to remain safely at home and avoid protective placement of the child;
b. Whether there are other responsible relatives or adults available who may be able to care for the child or provide additional supervision;
c. The accuracy of the facts contained in the petition or affidavit in support of intervention; and,

d. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.

F. In preparation for an adjudicatory hearing, counsel shall:

a. Determine what actions the client has taken since the preliminary proceeding, if there was one, to address the concerns of the state as to the safety of the child, and discuss with the client the treatment or other services to which the client would voluntarily agree;
b. Investigate whether the agency made reasonable efforts to prevent the need for placement and safely reunify the family, such as identifying services available to protect the child without removal, in-home baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services, and whether the agency has taken prompt steps to evaluate relatives as possible caretakers.

G. At the adjudicatory hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses, and challenge other non-testimonial evidence regarding:

a. The accuracy of the facts presented by the State to prove abuse or neglect of the child;
b. Factual basis of opinions presented by the State to prove abuse or neglect of the child;
c. Whether the agency failed to provide services that would have allowed the child to stay safely in the home;
d. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation. In addition, after consultation with the client, counsel shall consider offering evidence to the court of treatment or services in which the client would voluntarily participate to obviate the need for a treatment plan or, if a treatment plan is ordered, to include in the treatment plan. Counsel shall challenge conditions in the treatment plan that are not justified or supported by the record.

H. Prior to making admissions or stipulations or agreeing to voluntarily place the child or relinquish any right to visitation with the child, counsel must:

a. Ensure that the client understands the consequences of such a decision;
b. Make it clear to the client that the ultimate decision to make the admission or voluntarily place the child has to be made by the client;
c. Investigate and candidly explain to the client the prospective strengths and weaknesses of the case, including the availability of the State's witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication;
d. Be satisfied that the admission is voluntary, that there is a factual basis for the admission, and that the client understands the right being waived; and,

e. Be aware of the effect the client's admission will have on any other court proceedings or related issues.

I. Counsel's recommendation on the advisability of an admission should be based on a review of the complete circumstances of the case and the client's situation.

J. Where counsel believes that the client's desires are not in the client's best interest, counsel may attempt to persuade the client to change his or her position. If the client remains unpersuaded, however, counsel should assure the client he or she will defend the client vigorously.

K. Notwithstanding the existence of ongoing negotiations with the State, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to a hearing on the merits.

L. In preparation for a disposition hearing, counsel should:

a. Determine what actions the client has taken since the adjudicatory proceedings to address the concerns of the State as to the safety of the child;
b. Investigate what the agency has done to explore services that will allow the child to remain safely at home; and,
c. Determine what sort of disruption that the removal of the child has caused the child and the family.

M. In the disposition hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether, if the agency objects to placing the child with the parent, the agency sufficiently explored and provided services that would have allowed the child to reside safely in the parent's home;
b. Whether the agency appropriately considered the non-custodial parent or other family members as caretakers; and,
c. The factual basis of the agency's recommendations for placement outside of the home.

N. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.

O. In preparation for a permanency hearing,and, if parental rights have not been terminated, counsel should:

a. Keep in contact with the client and determine what actions the client has taken to address the concerns of the State as to the safety of the child;
b. Investigate what the agency has done to explore services that will allow the child to live safely with the parent; and,
c. Determine what sort of disruption the removal of the child has caused the child and the family.

P. In preparation for a parental rights termination proceeding, counsel should:
   a. Determine what actions the client has taken to address the concerns of the State as to the safety of the child;
   b. Investigate what the agency has done to explore services that will allow the child to remain safely in the home; and,
   c. Determine what sort of disruption that the removal of the child has caused the child and the family.

Q. In a parental rights termination proceeding, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:
   a. Whether the statutory grounds for termination have been met;
   b. Whether termination is in the best interest of the child;
   c. Whether the agency made reasonable efforts to prevent the need for termination and safely reunify the family, such as identifying services available to protect the child without removal, in-home baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services;
   d. Whether the treatment plan, if one was required, was appropriate.

XVIII. REPRESENTATION OF A RESPONDENT IN A GUARDIANSHIP OR CONSERVATORSHIP PROCEEDING

GOALS:

A. To advocate zealously and professionally for the respondent who is the subject of a guardianship or conservatorship proceeding.

B. To abide by mandatory and specific standards of representation for public defenders as attorney for the respondent in a guardianship or conservatorship proceeding.

C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.

D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the respondent.

E. Ensure that a guardianship, if ordered, encourages the development of maximum self-reliance and independence of the respondent, and is ordered only to the extent that the respondent's actual mental and/or physical limitations require.

1. TRAINING AND COMPETENCY:

A. A public defender assigned to represent respondents in a guardianship or conservatorship proceeding should have a thorough understanding of the law governing guardianship or conservatorship proceedings, as well as the social services, health care services, and other supports or legal arrangements, including powers of attorney, trusts, and advanced directives that, if employed, may obviate the need for guardianship or conservatorship.

B. To be eligible for assignment to represent respondents in guardianship or conservatorship proceedings, counsel shall receive a minimum of four (4) hours of training, or the equivalent thereof as certified by the Training Officer, completed the necessary hours for involuntary commitment in the duties, skills, and ethics of the representation of respondents. Counsel shall utilize training and support provided by the Office of the State Public Defender.

C. Counsel shall have basic knowledge of various mental and physical illnesses and disabilities, including mental illness and developmental disabilities, the features of those disabilities and illnesses, and the available treatments. Counsel should also have the ability to read and understand medical terminology related to these disabilities.

Counsel should be aware of how a particular disability, illness or condition will affect the attorney-client communications and shall recognize communications may require additional efforts on the part of counsel. Counsel should also have familiarity with people with disabilities who function independently using alternative and less intrusive supports such as powers of attorney, trustees, and payees.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore various social and health care services that may be available to the respondent in the community.

B. Counsel's role of advocate and advisor must be based on the knowledge of the range of services available to the respondent.

C. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options. If for any reason counsel believes that the respondent may have difficulty understanding or retaining information, counsel shall also provide this information in written format or any other alternative format that would assist the respondent to understand and retain the information and provide the same information to any advisor the ward authorizes to receive the information.

D. Counsel shall help the respondent determine his or her objectives by advising him or her about the probability of success in pursuing those options. If the respondent expresses a desire to seek social services or other support that would obviate the need for guardianship or conservatorship, or would support the respondent to the extent that only limited guardianship or conservatorship would be warranted, counsel must give the respondent the necessary and appropriate advice and assistance to pursue those desires.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent and not to substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel shall advocate the position that best safeguards and advances the respondent's interests in liberty.

F. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to a guardianship or conservatorship proceeding case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearings to permit effective preparation and allow pre-hearing assistance to the respondent, including but not limited to, allowing time to interview the respondent.

G. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a healthcare or residential facility, counsel shall make it clear to the respondent that he or she is not a member of the facility staff. Counsel shall inform the respondent

that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel should inform the respondent that he or she has the right to remain silent prior to the commencement of and during any court ordered examination and that the respondent cannot be examined without the presence of counsel.

H. During the conference, counsel should obtain the respondent's version of the facts of the case, including:

a. The circumstances surrounding the filing of a guardianship or conservatorship petition;
b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the guardianship or conservatorship petition;
c. Any information about past hospitalization and treatment;
d. Information about past guardianships, conservatorships, payeeships, valid or void durable powers of attorney, or other forms of substituted judgment to which the respondent may have been subject;
e. Information to aid the exploration of alternatives to guardianship or conservatorship;
f. Preferences for a guardian or conservator and any past conflicts or financial relationships between the person or persons seeking to be appointed guardian or conservator and the respondent;
g. The income and assets that the respondent is aware that he or she owns, any concerns that the respondent has about the management of those assets, any gifts or transfers in trust to the proposed guardian or conservator or others that the respondent has made at any time within the last ten years, any provisions the respondent has made for the transfer by gift or inheritance of his or her assets to anyone, any obligation or desire the ward has to support others, any wishes the ward has for the priority in the use of his or her assets and any other information that may help counsel understand the ability of the ward to understand, identify, direct the management of and select the natural successors in interest to his or her assets. If the respondent has a deteriorating condition, counsel should consider tape recording or otherwise preserving this conversation in detail, including when, where, and with whom it occurred.

I. During the conference, counsel shall also:

a. Explain what is happening and why, including the basis on which the guardianship or conservatorship is sought, and offer a description of the court appointed physician's examination, the visitor's interview, and judicial hearing procedures;
b. Explain the respondent's rights in the process;
c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender and the financial ramifications of each choice;

d. Explain the respondent's option to accept community services or supports as well as the legal options, including powers of attorney, use of payees, the formation of trusts, or the issuance of advance directives that may obviate the need for guardianship or conservatorship, the procedures of exercising these options and the legal consequences of these decisions;
e. Obtain his or her consent to enter into negotiations for settlement of the case with the petitioner if the respondent is willing and able to receive services or supports, or enter into other legal arrangements as an alternative to guardianship or conservatorship;
f. Discuss the desirability of a court hearing with the respondent; and,
g. Request the respondent's written or oral permission to obtain access to relevant records.

J. After being formally appointed, counsel shall, in preparation of any scheduled hearing, do the following:

a. Become thoroughly familiar with the statutory requirements governing guardianship and conservatorship in the jurisdiction as well as case law and court rules;
b. Thoroughly review the petition or other documents used to initiate the proceedings, the visitor's report, the court appointed physician's report, the medical records of the respondent, and any other document relevant to the proceedings;
c. Attempt to interview all persons who have knowledge of the circumstances surrounding the guardianship or conservatorship proceeding petition, including, but not limited to, the following:
    i. The petitioner(s);
    ii. The proposed guardian(s);
    iii. The health care professionals or social workers, who have recently examined or treated the respondent;
    iv. Previous treatment providers, if any;
    v. The respondent's family, friends, partners, or acquaintances; and,
    vi. Persons who may provide relevant information or who may be supporting or adverse witnesses at a hearing.
d. Obtain a medical examination of the respondent sufficiently thorough to rule out treatable health conditions that may be responsible for any cognitive impairments or behavioral deficits.

K. Counsel must ensure that a respondent's consent to voluntary services or supports, or to entering into legal arrangements as an alternative to guardianship or conservatorship, is known and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of each as part of counsel's efforts to make the respondent aware of all options available to him or her.

L. If the respondent indicates that he or she would consent to voluntary services or supports, or to entering into legal arrangements as an alternative to guardianship or conservatorship, counsel shall:

a. Ascertain whether the respondent was indeed aware of the consequences of electing to do so; and,
b. Make certain that this agreement was not the product of threats, unrealistic promises, or other forms of coercion.

M. If counsel has determined that the respondent's consent to voluntary services or supports, or to entering into legal arrangements, is not knowingly and uncoerced, counsel shall immediately take steps to arrange such services or draft such legal documents and to request dismissal of the guardianship or conservatorship proceeding.

N. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the consent to voluntary services or supports, or to entering into legal arrangements, was made knowingly and voluntarily, he or she shall investigate the circumstances of the respondent's stated desire.

3. COURT PROCEEDINGS:

A. Counsel should seek the most expedient and timely resolution of the guardianship or conservatorship proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the proceeding if it is necessary to effectively advocate for the respondent.

B. Counsel should ensure that the respondent may exercise his or her right to a jury trial. Counsel shall inform the respondent of his or her right to a jury trial and explain the benefits and detriments of a jury trial, and a hearing in front of the judge alone. Counsel shall immediately notify the court if the respondent chooses a jury trial. If the respondent waives his or her right to a jury trial, counsel shall establish that the waiver is knowing and voluntary.

C. Counsel shall ensure that a respondent actively participates in every stage of the guardianship or conservatorship proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings.

D. Counsel shall avoid using his or her authority to waive the respondent's presence at the hearing except in the following extraordinary cases:
a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

E. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to

waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

F. If at any time of the hearing a respondent is under the influence of prescribed medications, counsel should consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

G. Counsel should zealously and effectively engage in all aspects of trial advocacy.

H. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in guardianship or conservatorship proceedings, such as medical records, legal records arising in attorney-client conversations, wills, advance directives, durable powers of attorney, oral gifts, transfers in trust, and financial records, among others.

I. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for incapacity of the ward have been met. Thus, counsel shall seek to bifurcate the determination of the ward's incapacity with the determination of the identity of the guardian or conservator.

J. During the guardianship or conservatorship hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether the case for guardianship or conservatorship is based on:
    i. The respondent's lack of sufficient understanding or capacity to make or communicate responsible decisions concerning the respondent's personal care including safe living arrangements;
    ii. The impairment of the respondent's judgment so that the respondent is not capable of realizing and making rational decisions regarding medical or mental health treatment or handling day to day financial matters, or complex business or contract maters; or,
    iii. The respondent's susceptibility to exploitation.
b. Whether there is any real factual basis for the petition;
c. How well the respondent is currently functioning and whether any indications of poor functioning are due to the respondent's social situation, income, or factors other than the prospective incapacity;
d. Whether possible alternatives have been explored, including community supports through Meals on Wheels, in-home care, personal care attendants, visiting nurses, durable powers of attorney, payeeship, and trusts, among others;
e. Whether a limited or temporary guardianship or conservatorship or protective order has been explored;
f. Whether health examinations were thorough;
g. Whether the respondent had recently been exhibiting abnormal or unusual behavior;

h. The factual basis of conclusory opinions about the respondent's incapacity;
i. Whether the proposed guardian or conservator is qualified to serve in that role;
j. Whether the respondent approves of the proposed guardian or conservator; and,
k. Whether the proposed guardian or conservator has a conflict of interest based on past gifts, transfers, disputes, financial or familial relationships, business dealings or partnerships, proposed inheritance, or otherwise.

K. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the respondent's incapacity under the applicable legal standards.

L. After discussions with the respondent and with his or her consent, counsel shall present all evidence available regarding appropriate alternatives to full guardianship or conservatorship, including, but not limited to, voluntary community support and health care services and legal arrangements including powers of attorney, trusts, and advance directives.

M. Counsel shall offer all evidence available that is favorable to the respondent regarding the least restrictive guardianship, such as a limited guardianship, temporary guardianship, or protective order.

N. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of appointing a full guardian, the most restrictive guardianship available.

O. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of the limitation of any civil or political rights of the respondent, including, but not limited to, the right to make medical decisions, including end of life decisions, the right to privacy, including the right to make family decisions including marriage, parenting, and relationships, the right to association, the right of free speech and expression, the right to make or change a will, and the right to vote.

P. Counsel should consider the condition of the respondent in determining the degree to which the hearing procedures should conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel should argue strict application for the burden of proof and the law and, at all times, endeavor to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record and the law.

Q. Counsel should provide continuity in representation for the respondent throughout the guardianship or conservatorship process. If the court orders a guardianship or conservatorship, counsel shall make every attempt to ensure that the order explicitly and narrowly defines the rights restricted by the guardianship and conservatorship.

R. Counsel shall also make every attempt to ensure that the guardianship or conservatorship order is fashioned to encourage the development of maximum self-reliance and independence of the respondent and is only as broad as is necessary given the respondent's actual mental and/or physical limitations.

S. Counsel shall seek to submit testimony or other evidence regarding the ward's preferred living situations, preferred treatment options, the sale or disposition of his or her home, cars, ranch, business or other assets of significant value. To the extent feasible, counsel should make the wishes of the ward clear to the court and the appointed guardian or conservator to provide direction in the future management of the ward or the ward's estate.

T. Counsel shall also request that the court calendar an immediate ninety (90) day inventory, annual accountings, guardian annual reports, and other matters, including court review and approval of any anticipated sale or dispersal of significant assets of the respondent, especially plans to "spend down" those assets to qualify the respondent for governmental benefits, to ensure that should a guardian or conservator be appointed, the guardian or conservator does not proceed without appropriate court supervision. In addition, counsel shall request that the court prohibit the guardian from receiving compensation from the ward or ward's estate unless the guardian has provided prior notice to the court and all interested parties of the rate of compensation, and for what services the compensation will be paid.

XIX. REPRESENTATION OF PERSONS IN A PROCEEDING TO DETERMINE PARENTAGE UNDER THE UNIFORM PARENTAGE ACT (§40-6-119, MCA)

GOALS:

A. To actively and effectively represent clients in proceedings to determine parentage under §40-6-119, MCA, in an effective and professional manner throughout all phases of the case.

B. To serve the interest of the client and to be independent from the court and other participants in the litigation and be unprejudiced and uncompromised in representing the client.

C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf on the client.

1. TRAINING AND COMPETENCY:

A. Absent a knowing and intelligent waiver by the party represented, all attorneys who represent parties in proceedings under the Parentage Act must receive a minimum of two (2) hours of training specific to the representative of punitive parents under the Act.

B. All attorneys must have a working knowledge of the Uniform Parentage Act, statutes, and rules, as well as cases interpreting and applying them.

C. In addition to basic legal knowledge, the attorney must have and continue to develop basic trial skills, basic advocacy skills, relevant motion practice, and a sufficient understanding of writ and appellate practice to advise a client whether and how to seek such remedies and to protect the record in the District Court.

2. HANDLING THE CASE:

A. Counsel should accept the appointment with the full understanding of the issues and functions to be performed. If counsel considers parts of the appointment to be confusing or incompatible with his or her ethical duties, counsel should inform the court of the conflict and ask the court to clarify or change the terms of the appointment.

B. Immediately after being appointed, counsel should review the file and should inform other parties and other counsel of his or her appointment, and that as counsel of record he or she should receive copies of pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.

C. Immediately after being appointed, counsel should meet with the punitive parent, adapting all communications to the client's level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the client about the court system, the proceedings, and counsel's responsibilities. Counsel should illicit and assess a client's views and concerns of the case.

D. Counsel should develop a theory or strategy of the case to implement at hearings, including presentation of factual and legal issues.

E. Counsel should conduct thorough, continuing, and independent investigations, including reviewing the client's social service records, mental health records, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

F. Counsel should conduct exhaustive discovery including, where necessary, depositions, written interrogatories, production of documents, subpoena *duces tecum*, physical examinations, and requests for admissions.

G. In preparation for court hearings, counsel needs to complete exhaustive trial preparation, witness preparation of both lay and expert witnesses, preparation of trial briefs and stipulations, and all evidentiary considerations.

H. Counsel should stay apprised of other court proceedings affecting the client, the parties, and other household members.

I. Counsel should attend meetings involving issues within the scope of the case and take any necessary and appropriate action to expedite the proceedings.

J. Counsel should participate in and, when appropriate, initiate negotiations and settlement discussions. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

K. Counsel should file or make petitions, motions, responses, or objections when necessary.

L. At any court proceedings, counsel should present and cross-examine witnesses and offer exhibits as necessary and, where appropriate, introduce evidence and make arguments on the client's behalf and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the client's decisions about the representation with respect to each issue on which the client is competent to direct counsel. Counsel should pursue the client's expressed objectives, unless the client's objectives violate counsel's ethical duties or responsibilities as an officer of the Court.

M. After the initial disposition of the case, counsel should discuss the end of the legal representation with the client and discuss all avenues of appeal and other assistance in the future on behalf of the client.

N. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

XX. REPRESENTATION OF PARENTS OR A GUARDIAN IN A PROCEEDING FOR THE INVOLUNTARY COMMITMENT OF A DEVELOPMENTALLY DISABLED PERSON

GOALS:

A. To actively and effectively represent the parents or guardian of a disabled person in a proceeding for the involuntary commitment of that person and to provide for the protection of their procedural rights pursuant to §53-20-112, MCA.

B. To serve the best interests of the parents or guardian and to be independent from the court and other participants in the litigation and be unprejudiced and uncompromised in representing them.

C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the parents or guardian.

1. TRAINING AND COMPETENCY:

A. All attorneys representing parents or guardians of a disabled person who are the subject of a petition for involuntary commitment must have completed the minimum hours of training for involuntary commitment and developmentally disabled respondents, before being assigned the representation of such parents/or guardian.

B. Counsel should be familiar with all relevant statutes, rules, and case laws regarding and related to involuntary commitments in Montana.

C. In addition to basic legal knowledge, the attorneys must have and continue to develop basic trial skills, basic advocacy skills, relevant motion practice, and a sufficient understanding of writ and appellate practice to advise the parents or guardians whether and how to seek such remedies and to protect the record in the District Court.

D. Counsel should be familiar with the public defender standards for representation of a respondent in a proceeding for involuntary commitment.

2. HANDLING THE CASE:

A. Counsel should accept the appointment with the full understanding of the issues and functions to be performed. If counsel considers parts of the appointment to be confusing or incompatible with his or her ethical duties, counsel should inform the court of the conflict and ask the court to clarify or change the terms of the appointment.

B. Immediately after being appointed, counsel should review the file and should inform other parties and other counsel of his or her appointment, and that as counsel of record he or she should receive copies of pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.

C. Immediately after being appointed, counsel should meet with the parents or guardian of the respondent, adapting all communications to their level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the parents or guardian about the court system, the proceedings, and counsel's responsibilities. Counsel should illicit and assess the parents or guardians views and concerns of the case.

D. Counsel should be aware of and protect all of the procedural rights guaranteed under §53-20-112, MCA, including:

a. The right to be present at any hearing held pursuant to §53-20-101;
b. Offer evidence and cross-examine witnesses at any hearing; and,
c. Have the respondent examined by a professional person of his or her choice.

E. Counsel should thoroughly explain to the parents or guardian the contents of the petition for commitment and discuss all practical and legal considerations that flow from the petition.

F. If the petition provides a medical report, counsel should ascertain whether the physician indicates on the report his or her qualifications and that those qualifications are appropriate to make the recommendation regarding capacity or incapacity contained in the report.

G. If counsel believes it to be appropriate, or the parents or guardian request it, counsel should seek to have a medical evaluation of the disabled person completed by a professional person of their choice, and preserve said examination for further use on behalf of the respondent.

H. Counsel should conduct thorough, continuing, and independent investigations, including reviewing the respondent's social service records, mental health records, if applicable, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

I. Counsel should determine whether or not the respondent has an existing trust or durable power of attorney which may be relevant.

J. Counsel should be knowledgeable about all other alternatives and types of medical treatment for the respondent's disability and of the type and duration of treatment requested by the petition.

K. In preparation for court hearings, counsel needs to complete exhaustive trial preparation, witness preparation of both lay and expert witnesses, preparation of trial briefs and stipulations, and all evidentiary considerations.

L. Counsel should stay apprised of any other court proceedings affecting the respondent, the parties, or other household members.

M. If the client is a parent whose location is unknown, all standard means, such as telephone book, internet, and punitive father registration, shall be used to locate the parent. Other parents or guardians who are available should be consulted as to the location of the missing parent. Counsel should use all due diligence in locating said missing parent.

N. At any court proceedings, counsel should present and cross-examine witnesses and offer exhibits as necessary, introduce evidence where appropriate, and make arguments on the parents' or guardian's behalf and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the parents' or guardian's decisions about the representation with respect to each issue on which the parents or guardians are competent to direct counsel. Counsel should pursue the parents or guardians expressed objectives, unless their objectives violate counsel's ethical duties or responsibilities as an officer of the court.

O. Counsel should participate in and, when appropriate, initiate negotiations and settlement discussions. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

P. Counsel should determine and advocate for, on behalf of the parents or guardians, whatever treatment alternatives meet the wishes of the parents or guardians. If counsel has reason to believe that the parents or guardians legitimate interests require investigation, counsel should request appropriate alternatives as may be allowed by the court.

Q. After the initial disposition of the case, counsel should discuss the end of the legal representation with the parents or guardians and discuss all avenues of appeal and other assistance in the future on their behalf.

a. When counsel's representation terminates, counsel shall cooperate with the parents or guardians and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

XXI. REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR INVOLUNTARY COMMITMENT – ALCOHOLISM

GOALS:

A. To actively and professionally act as a zealous advocate for the respondent who is the subject of a proceeding for commitment as an individual with alcoholism under §53-24-301 and 302, MCA.

B. To abide by mandatory standards of representation for Public Defenders as attorney for the respondent in a referral or an involuntary commitment proceeding.

C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.

D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the respondent.

E. In the following standards, an involuntary commitment refers to both involuntary commitment and recommitment proceedings.

1. TRAINING AND COMPETENCY:

A. A public defender assigned to represent a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law, as well as the specifics of §53-24-303 and 304, MCA, and of the chemical dependency and mental health systems.

B. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of eight (8) hours of training and complete supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities, including the Montana Chemical Dependency Center, community service providers, and sober living group homes within the area served by the public defender. Counsel shall utilize training and support provided by the Office of the State Public Defender.

C. Counsel shall have basic knowledge of alcoholism and chemical dependence and the ability to read and understand medical terminology related to chemical dependence, addiction, alcoholism, and the medical and recovery treatment models.

Counsel shall be familiar with the medications used to treat alcoholism, addiction, and chemical dependence. Counsel shall be familiar with the roles of intervention, treatment, voluntary abstinence, and support groups in long-term abstinence and recovery. Counsel shall be aware of how chemical dependence, addiction, or active alcoholism will affect attorney-client communications and shall recognize that effective communication may require special efforts on the part of counsel.

D. Counsel should be familiar with other resources for persons who are addicted to alcohol or other drugs available either within the area served by the public defender or reasonably accessible by respondents. Included in these resources are recovery programs, such as twelve step recovery programs, public and private medical and treatment facilities. Counsel should be familiar with the local recovery community and locate resources and supports for respondents.

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers, chemical dependency counselors, mental health professionals, and health care professional who understand the public defender's advocacy role to investigate the respondent's case and explore treatment, self-help, and support groups, as well as social services that may be available to the respondent in the community.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to respondent.

C. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall help the respondent determine the respondent's objectives by advising the respondent about the probability of success in pursuing those options. If the respondent expresses a desire to seek voluntary treatment or related social services, counsel must given the respondent the necessary and appropriate advice and assistance to pursue those desires.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, and not the perspective of the respondent's relatives, friends or guardians. In addition, counsel shall not substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

F. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

G. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation if appropriate. If the first meeting takes place in a healthcare or a detention facility, counsel shall make it clear to the respondent that he or she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that confidentiality. Counsel shall also inform the respondent that he or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

H. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

a. The circumstances surrounding the filing of the involuntary commitment;
b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the petition;
c. Information about past treatment at any public or private treatment facility, medical detoxification facility, or any past psychiatric hospitalization;
d. Information to aid the exploration of alternatives to commitment;
e. The name of a chemical dependency expert or addictions medicine specialist of respondent's choice to conduct an independent evaluation.

I. During the conference, counsel shall also:

a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the examination conducted by the physician and judicial hearing procedures;
b. Explain the respondent's rights in the commitment process, including the right to treatment, the right to refuse treatment, and the right to an examination by a licensed physician of the respondent's choice;
c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
d. Explain the respondent's option to accept voluntary treatment, the procedures to exercise that option, and the legal consequences of voluntary admission to a treatment facility; discuss whether the respondent is willing to accept voluntary treatment in a treatment facility;
e. Obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney and with chemical dependency professionals if the respondent is willing and able to give informed consent to voluntary care of related social services as an alternative to involuntary commitment;
f. Discuss the desirability of a court hearing with the respondent; and,
g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records and incident reports.

J. After being notified of appointment to the case, counsel shall, in preparation of any scheduled hearing, do the following:

a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction as well as case law and court rules;
b. Thoroughly review the petition or other documents used to initiate the commitment proceedings, any affidavits or statements in support thereof, the certificate of the examining physician, pre-hearing examination reports, the medical records of the respondent, the facility records of any facility in which the respondent has recently resided and any other document relevant to the proceedings.
c. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition:
    i. The petitioner(s);
    ii. The certifying physician, facility staff, social workers, mental health professionals, and other persons who have examined or treated the respondent during the current or any known previous involuntary commitment proceedings;
    iii. Previous service providers, if any;
    iv. The respondent's family, guardian or acquaintances;
    v. Any law enforcement, emergency response or intervention personnel who may have previously been involved with respondent;
    vi. Any persons who may provide relevant information or who may be supporting or adverse witnesses at a commitment hearing.
d. Facilitate the exercise of the respondent's right to be examined by a professional person of the respondent's choice.

K. Counsel must ensure that the respondents consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to all respondents as a part of counsel's efforts to make respondents aware of all options available to them.

L. If the respondent indicates that he or she would consent to voluntary treatment, counsel shall:

a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary status, he or she was agreeing to enter or remain in a health care facility; and,
b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

M. If counsel has determined that the respondents consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceedings.

N. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the conversion to voluntary patient status was

made knowingly and voluntary, he or she shall investigate the circumstances of the respondent's stated desire to voluntarily receive treatment.

3. COURT PROCEEDINGS:

A. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

B. Counsel should ensure that a respondent actively participates in every stage of the involuntary commitment proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, commitment, or recommitment, and the length of commitment.

C. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing except in the following extraordinary cases:

a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

D. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

E. If, at the time of hearing, a respondent is under the influence of prescribed medications, drugs of abuse of alcohol, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

F. Counsel shall zealously and effectively engage in all aspects of trial advocacy.

G. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings, such as hospital and medical records.

H. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for commitment have been met. Counsel shall plan

objections to the admissibility of evidence regarding previous commitment and pending criminal charges, if any, so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

I. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether there has been shown by clear and convincing evidence a real factual basis for determination that respondent is an alcoholic who habitually lacks self-control as to the use of alcoholic beverages;
b. Whether there has been shown by clear and convincing evidence real factual basis for determination that respondent has threatened, attempted, or inflicted physical harm on another and, unless committed, respondent is likely to inflict physical harm on another;
c. Whether there has been shown by clear and convincing evidence a real factual basis for the determination or is incapacitated by alcohol of imminent danger;
d. The factual basis of conclusory opinions about the respondent's suitability for commitment under the applicable legal standards; and,
e. Whether there has been shown by clear and convincing evidence a real factual basis to determine that the department is able to provide adequate and appropriate treatment for the respondent and that the treatment is likely to be beneficial.

J. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent addictions medicine expert, physician or chemical dependency counselor who has examined the respondent, if possible.

K. After discussions with the respondent and with his or her consent, counsel shall present all evidence available that is favorable to the respondent regarding appropriate alternatives to involuntary commitment, including, but not limited to, the availability of private treatment resources, the respondent's history of successful placement in the community, the availability of community-based services or other mechanisms to support the respondent in the community.

a. Counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceedings;
b. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana Chemical Dependency Center or other approved public treatment facility. Counsel shall explore and consider offering evidence of the respondent's compliance with previous treatment, success in community treatment programs, and family and other support in the community.

L. Counsel shall consider the condition of the respondent in determining the degree to which the hearing procedures shall conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel shall argue strict application for the burden of proof and the law and, at all times, endeavor to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

M. Counsel shall provide continuity in representation for the respondent throughout the involuntary commitment process.

N. Counsel who has represented a respondent preceding and during a court hearing shall make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains committed.

O. If counsel who represented the respondent during the commitment proceeding does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, recommitment proceedings, and other available legal actions to contest commitment; and
b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

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