

Obligations of Counsel at Sentencing Hearing

(Excerpt from Standards for Counsel Representing Individuals
Pursuant to the Montana Public Defender Act)

I. Obligations of Counsel at Sentencing Hearing

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

1. Any minimum sentences and any exceptions;
2. Deferred sentences, suspended sentences, and diversionary programs;
3. The effect of confidential criminal justice information;
4. Probation or suspension of sentence and permissible conditions of probation;
5. The potential of recidivist sentencing;
6. Fines, associated fees, court costs;
7. Victim restitution;
8. Reimbursement of attorneys' fees;
9. Imprisonment including any mandatory minimum requirements;
10. The effects of mental disease or defect, or the implication so MCA §46-14-311, 312, "Guilty but Developmentally Disabled"; and,
11. Civil forfeiture implications of a guilty plea.

B. Among your obligations as counsel in the sentencing process are the following:

1. Where the client chooses not to proceed to trial, ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications;
2. 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;
3. Ensure all reasonably available mitigating and favorable information which is likely to benefit the client is presented to the court;
4. 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;
5. 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,
6. Consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever warranted and possible.

C. You must be familiar with the sentencing procedures, including:

1. The effect that plea negotiations may have upon the sentencing discretion of the court;
2. The availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;
3. The use of "Victim Impact" evidence at any sentencing hearing;
4. The right of the defendant to speak prior to being sentenced;

5. Any discovery rules and reciprocal discovery rules that apply to sentencing hearings;
6. The use of any minimum sentences;
7. Any restrictions that may be placed on parole or other early release; and,
8. 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, you should be familiar with:

1. The practices of the officials who prepare the pre-sentence report and the defendant's rights in that process;
2. The access to the pre-sentence report by counsel and the defendant;
3. The prosecution's practice in preparing a memorandum on punishment; and,
4. The use of a sentencing memorandum by the defense.

E. Where appropriate, you should attend any interview with the client, review any pre-sentencing homework, and review the pre-sentence investigation report with the client.

II. Preparation for Sentencing

A. In preparing for sentencing, you should consider the need to:

1. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;
2. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

3. 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;
4. Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing 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.
5. 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;
6. Prepare the client to be interviewed by the official preparing the pre-sentencing report and be present during any such interview. Additionally, you must also review any presentence 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.
7. Inform the client of the sentence or range of sentences you will ask the court to consider; if the client disagrees with you as to the sentence or sentences to be urged upon the court, you must shall inform the client of his or her right to speak personally for a particular sentence or sentences;
8. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, you should specifically request the opportunity to present tangible and testimonial evidence; and,
9. 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.

III. The Prosecution's Sentencing Position

- A. You 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.

IV. The Sentencing Process

- A. You 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. You 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, you should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, you 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, you 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, you 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, you should prepare the client to personally address the court.