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II. Standards for Counsel Representing Individuals Pursuant to the Nepal Pilot Public Defender program

II REPRESENTATION STANDARDS FOR APPELLATE ADVOCACY

Standards for Counsel Representing Individuals Pursuant to the Nepal Pilot Public Defender Act

Procedures, Conduct and temporary Court Rules

I. INTRODUCTION

A. Purpose:

These standards are intended to encourage and allow attorneys representing indigent and all other persons entitled to representation at government expense 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:

1. 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 the Country of Nepal;
2. 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;
3. 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;
4. Counsel has sufficient time, confidential space, and confidential electronic communications to converse with the client;
5. Counsel's workload matches counsel's capability;
6. Counsel's ability, training, and experience match the complexity of the case;
7. To the extent possible, the same attorney continuously represents the client until completion of the case; **(a policy decision needs to be made as to whether**

this means at a specific court level, or through all needed appeals)

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

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

B. Application:

1. 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.

2. These standards apply generally to all counsel who represent persons at state expense pursuant to the Nepal pilot Public Defender program. 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.

C. Discrimination:

No attorney providing services under this pilot program shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or disability.

II. CASE SELECTION

A. Nature of Case:

1. Counsel may be assigned to represent persons in all criminal cases where the defendant is subject incarceration, and meets the specified income requirements.

B. Publicizing of Services:

1. The availability of public defender services should be publicized by the Public Defender's Office, with the assistance of ARD. 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

A. Nature of Representation:

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

1. 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.
2. Public Defenders, shall provide services to all clients in a professional, skilled manner.

B. Initial Contact:

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

1. 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, or a public defender office, as soon as the person is, arrested, or charged with a criminal offense.
2. A person, not in custody, shall be advised of the right to representation, if eligible, at the person's first appearance before a judicial officer and offered the services of counsel. 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.
3. When it is determined that a person is ineligible for publicly provided 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 interest, such service should be rendered until the person has had the opportunity to retain counsel. In that event, the Public Defender's Office shall be reimbursed for counsel's services at the current hourly rate for similar counsel.

C. Duration of Representation:

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

1. Counsel shall provide continuous and uninterrupted representation to eligible clients from time of entry into the case through final disposition in the trial court .(or court of appeals/supreme court as determined by the PDB)
2. In the event the counsel is no longer employed by a public defender office, new counsel shall be assigned.

D. Conflicts of Interest:

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

1. *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 public defender office examine its records to determine whether it may have a conflict of interest involving another current client, a former client, or otherwise.
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.

2. *Policy and Guidance on Potential Conflicts of Interest:* It is the policy of the Public Defender pilot program that all public defenders will comply with all legal requirements and ethical guidelines relating to conflicts of interest in the representation of clients.

A. Attorney-Client Communication:

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

1. Effective representation of an accused requires prompt and effective communication with the client. This communication includes personal and telephone contacts with a client in custody.
2. To ensure the privacy essential for confidential communication between counsel, public defender staff, and client, adequate facilities should be available for private discussions between counsel, or public defender staff and clients in jails, prisons, courthouses, healthcare facilities, and other places where accused persons must confer with counsel.
3. Personnel of jails, prisons, custodial institutions, and health care 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.
4. Each jail or detention facility should make available an unmonitored and unrecorded toll-free phone 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. If such communication facility is not available, counsel should make reasonable efforts to meet in person with his/her client.

B. Delivery of Services:

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

1. 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 chief public defender.
2. The Chief Defender and 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 public prosecutors office.

4. Contracts for legal defense services should be awarded for at 6 months, initially, and for terms of 1 year if the program continues thereafter.. Removal of the contracting counsel short of 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”.

6. The Chief Public Defender and Regional Public Defenders shall provide for contract oversight and enforcement to assure compliance with these standards and applicable laws and Statutes. For conflict of interest cases, the Conflict Coordinator shall provide such oversight.

CASELOADS

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

A. Governing Principle:

Counsel caseloads should be governed by the following:

1. Individual Counsel. 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 to the breach of professional obligations the attorney is required to inform the Regional Public Defender’s Office, who shall inform the Chief Defender. The Chief Defender will then inform the Public Defender Board.

2. Chief 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 to the breach of professional obligations, the chief public defender is required to inform the Public Defender Board who shall take all reasonable steps to alleviate, including but not limited to seeking funding to hire additional attorneys as needed.

B. Caseload Evaluation:

1. The caseload of counsel should allow each counsel to give each client the time and effort necessary to ensure effective representation. Assigned counsel should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

2. 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.

3. Caseload should not exceed the following:

a. 150 Felony (serious) cases 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,

the above are US standards, they should be revised to be consistent with Nepali laws

4. 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 case loads of each lawyer employed as a public defender. These limits are not intended to be cumulative or aggregated. Caseloads for attorneys practicing in rural areas may need to be reduced due to substantial required travel.

5. The Public Defender Boards shall 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

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. These standards shall come into effect at the expiration of the contracts of the initial stipendiary lawyers who are brought into the pilot program

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

a. Satisfy the minimum requirements for practicing law in Nepal as determined by the Nepal Supreme Court;

b. Complete the Public Defender Certification Program

c. Have been admitted to the Bar of Nepal for a minimum of 5 years. (this provision shall not apply to any stipendiary lawyer hired for the initial phase of the pilot program provided they exercise their duties competently, and have approval of the Public Defender Board.)

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

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

A. General Duties of Defense Counsel:

1. 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.
2. 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.
3. Counsel has the obligation to keep the client informed of the progress of the case.
4. 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 Conduct and Court.

B. Obligations of Counsel Regarding Pretrial Release:

1. Counsel has an obligation to meet with incarcerated defendants as stated Standard above, and shall take other prompt action necessary to provide quality representation including:
 - a. Counsel shall invoke the protections of appropriate constitutional 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. Counsel has an obligation to attempt to secure the pretrial release of the client.

C. Counsel's Interview with Client:

1. Preparing for the Interview. Prior to conducting the initial interview after being assigned to a case the attorney should, where possible:
 - 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.

2. Conducting the Interview:

a. The purpose of the initial interview is to acquire information from the client concerning the case, the client and pretrial 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, be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, prison and other records as may be pertinent.

b. Counsel shall complete the interview form provided by the Public Defender's Board for use at the initial interview. Information that should be acquired from the client, includes, but is not limited to:

i. The client's version of arrest, ; whether client was searched and if anything was seized,
ii, whether client was interrogated and if so, was a statement given; client's physical and mental status at the time the statement was given; whether any exemplars were provided and
whether any scientific tests were performed on client's body or body fluids;

iii. The names and custodial status of all codefendants and the name of counsel for codefendants (if counsel has been appointed or retained);

iv. 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 public prosecutor (when appropriate, counsel should take steps to insure this evidence is preserved);

v. 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

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

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

viii. 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. The ability of the client to meet any financial conditions of release (for clients who are incarcerated); and

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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 for treatment or testing for mental health or developmental disability;

xi. The client's citizenship status.

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

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;

For clients who are incarcerated:

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. warn the client of the dangers with regard to the search of client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials.

4. Counsel must be alert to a potential issues concerning the client's incompetency, mental illness or developmental disability

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, 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, 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.

5. If special conditions of release have been or other orders restricting the client's conduct have been entered (e.g. a nocontact 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.

D. Counsel's Duty in Pretrial Release Proceedings:

1. 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, to make a proposal concerning conditions of release.

2. 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.

3. 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. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

4. 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/her client not to answer any questions that do not pertain strictly to the issue of bond.

E. Counsel's Duties at Preliminary Hearing:

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

2. In preparing for the preliminary hearing, the attorney 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 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.

F. Duty of Counsel to Conduct Investigation:

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

2. Sources of investigative information 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 statutes and 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 statute 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.

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 (e.g., weather, time of day, and lighting conditions).

g. Securing the assistance of experts. **(this is an issue to discuss, should funds be made available to PD's for experts, invertigators etc. this is the practice in the US,)**

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.

G. Formal and Informal Discovery:

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

- 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 accused, and the details of the circumstances under which the statements were made;
- e. The prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
- 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 codefendants;
- 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.

H. Development of a Theory of the Case:

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

I. The Duty to File Pretrial Motions:

1. 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.

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

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

4. 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, and 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 Chief attorney in his office.

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.

J. Preparing, Filing, and Arguing Pretrial Motions:

1. 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.

2. 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.

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

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

K. Continuing Duty to File Pretrial Motions:

1. 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.

L. Duty of Counsel in Plea Negotiation Process:

Plea negotiations are currently not a part of mainstream Nepali legal practice. Plea negotiations can be to the clients advantage, and this is an area that should be explored. A training on this subject should be part of future training programs.

1. 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.

2. 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.

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

4. The existence of ongoing tentative plea negotiations with the Public Prosecutor or Judge 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.

M. The Process of Plea Negotiations:

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

- a. the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory sentence, and counsel should make the client aware that a guilty plea may have adverse impact upon;
- 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 and the like.

2. 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:
 - 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;
 - 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 sanction within a specified range;

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 is the best person to do so 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 Nepalese law; and,

3. 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, and a plea in which the defendant is not required to personally acknowledge his or her guilt.
- 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 and prison and parole authorities; and,

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

N. The Decision to Enter a Plea of Guilty:

1. 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, and the advantages and disadvantages of the potential consequences of the agreement.

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

3. If 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.

4. A negotiated plea should be committed in writing.

O. Entering the Negotiated Plea before the Court:

1. 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,

4. 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.

P. Counsel's Duty of Trial Preparation:

1. The decision to proceed to trial 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 and the client's decision concerning trial.

2. 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. outline or draft of opening statement;

d. cross-examination

plans for all possible prosecution witnesses;

e. direct examination plans for all prospective defense witnesses;

f. copies of defense subpoenas;

g. prior statements of all prosecution witnesses (e.g., transcripts, police reports) and counsel should have prepared transcripts of any audio or video taped witness statements;

h. prior statements of all defense witnesses;

i. reports from defense experts;

j. a list of all defense exhibits, and the witnesses through whom they will be

introduced;

- k. originals and copies of all documentary exhibits;
- l. outline or draft of closing argument.

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

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

5. 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 insure 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.

6. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor.

7. 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.

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

Q. Opening Statement

1. Prior to delivering an opening statement Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

2. 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;

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

R. Preparation for Challenging the Prosecution's Case

1. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
2. In preparing for cross-examination, counsel should be familiar with the applicable law 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.
3. 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. be alert to issues relating to witness credibility, including bias and motive for testifying; and,
 - i. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including copies of records such as prior convictions of the witness or prior sworn testimony of the witness.
5. 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.
6. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses. 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.

S. Presenting the Defendant's Case

1. 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 burden of proving each element of the charge.

2. 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.

3. Counsel should be aware of the elements of any affirmative defense.

4. In preparing for presentation of a defense case, counsel should, where appropriate:

- 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 what 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.

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

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

7. Counsel should conduct redirect examination as appropriate.

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

T. Preparation of the Closing Argument

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

2. 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, and provisions for rebuttal argument by the prosecution.

3. In developing closing argument, counsel's argument should reflect counsel's 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. responses to anticipated prosecution arguments;
- d. and the effects of the defense argument on the prosecutor's rebuttal argument.

4. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, and request dismissal of the charges

V. Obligations of Counsel at Sentencing Hearing

1. Among counsel's obligations in the sentencing process are:
 - a. where a defendant 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;

X. Sentencing Options, Consequences and Procedures

1. 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;
2. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
 - a. credit for pretrial detention and credit against fines imposed;
 - b. deportation and other immigration consequences;
 - c. loss of civil rights;

d. impact of a fine or restitution and any resulting civil liability;

3. 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;

X. Preparation for Sentencing

1. 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, and financial status, family obligations, and obtain from the client 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 statement, if any, to be made to the court, considering 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;

Y. The Prosecution’s Sentencing Position

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

Z. The Sentencing Process:

1. 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.

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

3. 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 defendant, 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.

4. 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.

5. 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.

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

AA. A Motion for a New Trial:

1. 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.

2. When a judgment of guilty has been entered against the defendant 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.

BB. The Defendant's Right to an Appeal:

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

2. Where the defendant 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.

FACILITIES AND SUPPORT SERVICES:

1. 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. 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 Chief Public Defender
4. All public defender offices, , shall make arrangements to maintain the confidentiality of client information. This includes physical security for confidential documents, exhibits, and electronic communications.

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.

1. Counsel providing representation at public expense 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.

a.. A 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.

2. When compensating counsel providing services on an hourly basis, the Public Defender board shall pay at an hourly rate to be established by the Board. The Public Defender 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.

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.

I. TRAINING.

1. The attorney will receive a minimum of Twenty (20) hours of training specific to the Rules of Appellate Procedure including acceptable pleadings, deadlines, and citations to the record and authority, procedural and substantive legal issues and applicable rules of professional conduct.
2. Counsel shall reserve regular time to keep current with the statutes, rules, and

cases regarding both procedural and substantive legal issues.

3. Counsel shall participate in regular training events as directed by the Public Defender Board.

II. HANDLING THE CASE 1

1. 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.

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

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

4. 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 defendant's own.

5. 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.

6. 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.

7. 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 postconviction rights and, if the appeal is not successful, file the appropriate postconviction petitions.

8. 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.

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

10. 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.

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

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

14. 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 postconviction proceedings.