

COMMONWEALTH OF VIRGINIA
STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL
IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL

In 2004, the Virginia General Assembly created the Virginia Indigent Defense Commission to provide oversight of and support for the attorneys performing court appointed criminal defense work. As part of the new Commission's charge, the General Assembly in Section 19.2-163.01 of the Code of Virginia directed the Commission to establish standards of practice for indigent defense counsel. The Standards give meaning to the Sixth Amendment right to counsel and further the overall goal of zealous and high quality legal representation for each and every client.

Unlike many performance standards, Virginia's Standards of Practice for Indigent Defense Counsel are legislatively mandated under Section 19.2-163.01(A)(4). Court appointed counsel and public defenders must comply with these Standards and the Rules of Professional Conduct, which the Standards referentially incorporate. These Standards should not serve as a benchmark for ineffective assistance of counsel claims or attorney discipline hearings. Rather, they should serve as standards of practice for court appointed counsel and public defenders providing indigent defense in Virginia. Failure to comply with these Standards can result in the removal of the non-compliant attorney from the list of counsel certified for the court appointed representation of the indigent accused.

In order to fulfill its statutory mandate, the Virginia Indigent Defense Commission invited a number of public and private criminal defense attorneys, prosecutors, representatives from the Office of the Attorney General, judges, Supreme Court administration, and legal scholars to participate in drafting the Standards. The standards of practice committee surveyed criminal defense performance guidelines from around the country and held its first meeting in late November 2005. After several meetings the committee drafted the following standards, largely based on the National Legal Aid and Defender Association's and the American Bar Association's Performance Guidelines and standards from several of our sister states. Additionally, the committee considered the nuances of Virginia law in drafting the Standards. The Commission sent a preliminary draft to various bar associations and criminal law practitioners for their review and feedback, and incorporated many of their suggestions into these Standards.

These Standards are comprehensive, but not exhaustive. The language allows for flexibility. While the Standards are absolutely essential, the comments are instructive and advisory. The Commission has divided the Standards into the following sections:

1. Role, Duties, Training, and Experience of Counsel (pp. 4-6)
2. Pre-Trial Release and Initial Interview (pp. 6-9)
3. Preliminary Hearing, Prosecution Requests for Non-Testimonial Evidence, and Counsel's Continuing Obligation to Raise Issue of Client's Incompetence (pp. 9-10)
4. Investigation and Discovery (pp. 10-12)

- 5. Pre-Trial Motions (pp. 12-13)
- 6. Plea Negotiations (pp. 13-16)
- 7. Duties at Trial (pp. 17-24)
- 8. Sentencing (pp. 24-27)
- 9. Post-Trial Motions and Right to Appeal (pp. 27-29)
- **Standards of Appellate Practice (pp.30-36)
- **Standards for Juvenile Defense Counsel (pp. 37-58)

The Commission shall provide every attorney certified to perform indigent criminal defense with a copy of these Standards. The Commission shall also provide copies to all of the judges in Virginia’s circuit, general district, and juvenile and domestic relations courts. These Standards will be updated as necessary and those updates will be sent to the attorneys on the certification list and the courts. The Standards will also be available on the Indigent Defense Commission’s website at www.indigentdefense.virginia.gov.

The Virginia Indigent Defense Commission is grateful to all of the defense attorneys who represent indigent defendants across the state. The Commission also thanks the following members of the standards of practice committee who devoted time and energy to drafting, revising, and reviewing these Standards:

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1 STANDARDS OF PRACTICE FOR JUVENILE DEFENSE COUNSEL

Practice in juvenile cases is unique and challenging, requiring specialized skills and knowledge to assure the best legal representation of clients. Juvenile and domestic relations district courts have jurisdiction over persons less than 18 years of age who are charged with delinquent acts, are alleged to be children in need of supervision or services or are charged with a status offense. However, if a child age 14 or older is charged with some statutorily designated serious offenses, his or her case will or may be prosecuted in the circuit rather than the juvenile and domestic relations district court.

The purpose of these standards is to provide juvenile defense attorneys with a general guide to appropriate and zealous advocacy on behalf of clients in juvenile court delinquency or child in need of supervision, child in need of services or status offender proceedings, and in pursuing the appeal of such cases on a *de novo* basis in circuit court. These standards also apply to the representation of a child who is being tried in the circuit court as an adult after certification or transfer, especially with respect to possible dispositional advocacy since the client may still be treated as a child.

The general defense standards of practice apply to the representation of adults in juvenile and domestic relations district court and to the representation of child clients to the extent that they are not in conflict with these standards, Virginia law and Part 8 of the Rules of the Supreme Court of Virginia.

Performance Standard 1: Obligations of Juvenile Defense Counsel

The primary and most fundamental obligation of a juvenile defense counsel (hereinafter “counsel”) is to provide zealous and effective representation for the client at all stages of the juvenile court proceedings. Counsel’s duty and responsibility is to promote and protect the child’s expressed wishes. If personal beliefs or attitudes make it impossible for the defense counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the client. Attorneys also have an obligation to abide by the Virginia Rules of Professional Conduct and to act in accordance with Part 8 of the Rules of the Supreme Court of Virginia.

Counsel shall maintain regular contact with the client during the course of the case, and especially before court hearings. Counsel should promptly respond to telephone calls and other contacts from the client, where possible, within one business day or as soon thereafter as practicable. Counsel has a continuing duty to keep the client informed of developments in the case and the progress of preparing the defense, and should promptly comply with reasonable requests for information from the client.

Performance Standard 2: Training and Experience of Juvenile Defense Counsel

Counsel should not handle juvenile cases without the adequate experience and knowledge necessary to represent the client zealously and competently.

- 2.1** Before practicing in juvenile court, counsel should be proficient in applicable substantive and procedural juvenile and criminal law, should have appropriate experience, skills and training necessary to represent children, and should be certified by the Virginia Indigent Defense Commission (VaIDC).
- a.** Counsel should observe juvenile court proceedings, including every stage of a delinquency, child in need of supervision, child in need of services or status offense case and some observation of abuse and neglect and other proceedings. Counsel should obtain formal and informal training in relevant areas of practice, including the training provided by the VaIDC.
 - b.** Unless counsel has the requisite prior relevant experience in juvenile cases, counsel must complete the initial certification training for court appointed counsel in accordance with Virginia Code § 19.2-163.03, subject to the following statutory exceptions:
 - i.** If counsel has been a member of the Virginia State Bar for more than a year and certifies that he or she has served as lead or co-counsel in four (4) cases involving juveniles within the past year, the requirement to complete ten (10) hours of continuing legal education (CLE) shall be waived.
 - ii.** If counsel has been a member in good standing of the Virginia State Bar for more than one year and certifies that in the past five (5) years he or she has participated in five (5) cases involving juveniles, the requirement to serve as lead counsel or co-counsel in four (4) cases shall be waived.
 - c.** Counsel should also work with a mentor before taking a juvenile case or have a mentor available to consult on a case.
- 2.2** Counsel should be knowledgeable about and seek ongoing training in at least the following areas:
- a.** child and adolescent development;
 - b.** brain development and the affect of trauma on brain development;
 - c.** cultural diversity;
 - d.** substance abuse issues;

- e. mental health issues and common childhood diagnoses, and the use of psychotropic medications;
- f. competency and immaturity laws, issues and defenses;
- g. interviewing and communication techniques for children;
- h. working with children and building rapport with the child or adolescent client;
- i. familiarity with the terminology used in juvenile court;
- j. the juvenile justice system;
- k. pretrial advocacy;
- l. pre-dispositional and dispositional services and programs available through the court and probation;
- m. dispositional and post-dispositional advocacy;
- n. the consequences of involvement with the juvenile justice system, including receipt of public benefits and housing, and other collateral consequences;
- o. the sealing and expungement of delinquency records;
- p. pathways to delinquency;
- q. the child welfare system;
- r. Department of Juvenile Justice (DJJ) policies and procedures;
- s. Department of Social Services (DSS) policies and procedures affecting children;
- t. special education laws, rights and remedies;
- u. facilities available to serve children: on-site visits may be appropriate;
- v. the Comprehensive Services Act for At-Risk Youth and Families (CSA);
- w. immigration laws and how they can affect a child involved with the juvenile court;

- x. school-related issues, including school disciplinary procedures and zero tolerance policies;
 - y. gangs;
 - z. the issues of lesbian, gay, bisexual, and transgender youth in the juvenile justice system.
- 2.3 Counsel should note that local juvenile court practices may differ.
- 2.4 Counsel has a continuing obligation to stay abreast of changes and developments in the law.
- 2.5 Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer effective representation to a child in a particular matter. If it later appears that counsel is unable to offer such representation in the case, counsel should move to withdraw.
- 2.6 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.
- 2.7 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 Court and in accordance with the Virginia Rules of Professional Conduct.
- 2.8 When counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, court-appointed counsel shall inform the court or courts before whom counsel's cases are pending. If counsel is employed by a Public Defender Office, then counsel shall then first inform the Public Defender. If, after consulting with the Public Defender, counsel still believes that he or she cannot ethically represent the client because of the caseload, counsel shall advise the Director of the VaIDC before informing the court or courts before whom the cases are pending.

RELATED STANDARDS

Virginia Code § 19.2-163.03

Performance Standard 3: The Role of Juvenile Defense Counsel

After counseling the child, if the child's expressed wishes do not accord with counsel's considered judgment, then counsel may either withdraw or advocate for the child's stated wishes.

- 3.1** Counsel’s client is the child. Counsel’s principal duty is to zealously advocate for the client’s expressed wishes rather than for counsel’s opinion as to what is in the client’s best interests.
- a.** Counsel is bound by and should advocate for the client’s definition of the client’s interests, and may not substitute counsel’s own judgment for the client’s, nor should counsel ignore the client’s wishes because they are perceived not to be in the client’s best interests.
 - b.** Counsel should advise the client as to the probable success, and the consequences of adopting, any position, and should give the client all information necessary for the client to make an informed decision.
- 3.2** Counsel should remember that, even though the client is a child, all attorney-client privileges and obligations attach.
- 3.3** If a client is incapable of considered judgment on his or her own behalf, counsel should seek the appointment of a guardian ad litem (GAL) to be appointed to represent the client’s best interests.
- 3.4** Counsel should remember that the child is the client, not the parent (hereinafter “parent” refers to any parent, guardian, or legal custodian, or any entity assuming legal responsibility for the child). The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. Counsel should inform the parent that he or she is counsel for the child, and that in the event of a disagreement between a parent and the child, counsel is required to serve exclusively the wishes of the child.
- 3.5** In order to effectively advocate for the client and to provide suggestions for appropriate dispositional options, counsel should take a holistic approach to juvenile defense, evaluating all factors which may have contributed to the existing charges and behaviors.

RELATED STANDARDS

Virginia Code § 16.1-166;
Virginia Code § 16.1-268.

Performance Standard 4: Juvenile Defense Counsel’s Duty at Appointment

- 4.1** Counsel has an obligation to meet with detained clients as promptly as possible, and at least prior to the detention hearing. Counsel should regularly meet with clients, especially detained clients, on a face-to-face basis and keep them informed of the progress of the case.

- 4.2 Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. Counsel should immediately inform the child of his or her rights and the nature of the attorney-client relationship, and should pursue any investigatory or procedural steps necessary to protect the clients' interests. Counsel should invoke the protections of appropriate federal and state 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.
- 4.3 Whenever the nature and circumstances of the case permit, counsel should explore the possibility of proceeding informally, such as through a diversion program.
- 4.4 Counsel should ascertain the parent's willingness to take custody of the client upon release (in situations where the child has been detained) and obtain useful social information from the parent, such as: the client's home behavior, school performance and behavior, involvement with special education services, past or present part-time employment, prior delinquency record, whether the client is on probation or pending trial in another case, and other information concerning the child's ability to stay out of trouble if released, and the parent or some other adult's ability to control and discipline the child. Counsel should utilize this information to request and secure release of the client.
- 4.5 Counsel should also fully and candidly explain the nature, obligations, and consequences of any proposed pre-trial release conditions, including the characteristics of any facility at which pre-trial detention is possible if release is revoked, and the probable duration of the client's responsibilities under the proposed pre-trial release plan.
- 4.6 The juvenile and domestic relations district court law expressly equates a juvenile's right to bail with that possessed by an adult under Virginia law.
- 4.7 If the court requires the posting of a bond, counsel should discuss with the client and his or her parent(s) the procedures that must be followed.
- 4.8 Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of those conditions.

Performance Standard 5: Counsel's Initial Interview with Client

The initial interview is the first and most crucial opportunity to build rapport with the child client. It is important to initiate face-to-face contact with the client as soon as

possible after appointment or retention. This interview, and any subsequent conversations with the client, should be conducted at an age appropriate level. Although it may be a good practice to initially meet with the child and the parents together, any interview with the client regarding the offense should be out of the presence of the parents.

5.1 In preparation for the interview, counsel should:

- a.** schedule the interview to allow for ample time to speak with the client;
- b.** collect any relevant information to bring, including all records and releases;
- c.** be familiar with the elements of the offense(s) and the potential disposition.

5.2 At the interview, counsel should:

- a.** explain to both the client and parent the role of defense counsel. It is important to clarify that counsel represents the legal interests of the child, not the parent. Thoroughly explain the confidential nature of attorney-client conversations and the necessity of conducting interviews with the client alone;
- b.** explain the charges, the elements of the underlying offenses, and possible dispositions;
- c.** explain the juvenile court process, timelines and the role of all those possible individuals involved, such as judge, prosecutor, probation staff, counsel, GALs, client and parent;
- d.** inform the client and parent not to make statements to anyone concerning the delinquent offense without first consulting with counsel;
- e.** obtain signed releases by the client and parent for medical and mental health records, school records, court service unit records, Department of Juvenile Justice records, department of social services records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information;
- f.** counsel should obtain information from the client, out of the presence of the parents, concerning the facts of the arrest and

charges, and whether there were any statements made, witnesses, co-defendants, and any other relevant information;

- g.** if the client is detained, one focus of the initial interview and investigation will be to obtain information relevant to the determination of pre-adjudication conditions of release. Such information should generally include:
 - i. client's residence and length of time at that residence;
 - ii. client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client): names, addresses and phone numbers;
 - iii. health (mental and physical), including any medications currently being taken, and employment background;
 - iv. client's school placement, status, disciplinary record, attendance and special education designation;
 - v. whether the client or his or her family has had previous contact with the juvenile justice system, and the nature and status of that contact;
 - vi. possible adults willing to assume responsibility for the child.
- h.** explain the different types of pleas that can be made, and the possible collateral consequences of each.

RELATED STANDARDS

Virginia Code § 16.1-250;
Virginia Code § 16.1-260;
Virginia Code § 16.1-266;
Virginia Code § 16.1-266(b);
Virginia Code § 16.1-268.

Performance Standard 6: Juvenile Defense Counsel's Duty: Competency

- 6.1** Counsel should be familiar with the procedures for a determination of competency under Virginia Code §§ 16.1-356 through 16.1-361.
- 6.2** If at any time the client's behavior or mental ability indicates that he or she may not be competent, or may be mentally retarded, counsel should make a motion for a competency evaluation.

- 6.3 Counsel should prepare for and participate fully in the competency hearing.
- 6.4 Counsel should be aware that the burden of proof is on the child to establish incompetence and that the standard of proof is a preponderance of the evidence.
- 6.5 If the client is found incompetent, counsel should participate, to the extent possible, in the development of the restoration plan and in any subsequent meetings or hearings regarding the child's mental competency. Counsel should monitor what is occurring during any restoration process.

RELATED STANDARDS

Virginia Code § 16.1-356 through § 16.1-361

Performance Standard 7: Juvenile Defense Counsel's Duty at Detention/Arrest Hearing

Counsel should be aware that juvenile clients generally have the same constitutional rights as adult defendants.

- 7.1 Preparation for the hearing:
 - a. Counsel should be familiar with the elements of each offense alleged.
 - b. Counsel should prepare the client and parent, where appropriate, for the hearing.
 - c. Counsel should consult with the petitioning authority (petitioning authority includes, but is not limited to, prosecutors, probation officers, and police officers) concerning the facts of the case and the possibility of resolution of the case at this stage.
 - d. Counsel should review the Juvenile Detention Assessment Instrument and be prepared to make arguments against secure detention.
 - e. Counsel should know the detention facilities, community placements and other services available in the jurisdiction.
- 7.2 During the detention hearing;
 - a. Counsel should be familiar with the subpoena process for obtaining the compulsory attendance of witnesses at the detention hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings;

- b. Counsel should elicit as much information as possible at the hearing with regard to the facts and circumstances of the case;
- c. Before a client is detained, counsel should insist that probable cause be found and that the criteria for detention or shelter care are proven;
- d. If probable cause is found, counsel should argue for the least restrictive placement for the client pending arraignment and adjudication.

RELATED STANDARDS

Virginia Code § 8.01-407
Virginia Code § 16.1-248.1
Virginia Code § 16.1-250;
Virginia Code § 16.1-265.

Performance Standard 8: Juvenile Defense Counsel’s Duty to Conduct an Investigation

- 8.1 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 the client is aware of potential defenses to the charges.
- 8.2 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 child.
 - b. Research relevant statutes and case law to identify:
 - i. the elements of the offense(s) with which the child is charged;
 - ii. the defenses 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 statutes of limitations or double jeopardy.
 - c. If not done previously, conduct an in-depth interview of the client as described in Performance Standard 5.

- d. Attempt to interview all witnesses, favorable or adverse, try to obtain signed witness statements where appropriate, and obtain any criminal or juvenile history records of the witnesses.
- e. Examine any available police reports, documents, statements, and identification procedures obtained through discovery or any other means.
- f. Counsel should ascertain whether any physical evidence exists and should make a prompt request to examine such evidence.
- g. Counsel should attempt to view and photograph the scene of the alleged offense. If practicable, 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).
- h. Counsel should ascertain whether the assistance of an expert is needed in preparation of the defense case or to understand or rebut the prosecution's case and take all steps necessary to acquire such an expert.
- i. Counsel should, where appropriate, obtain those records of the client and/or any witnesses as described in Standard 5.2.

Performance Standard 9: Juvenile Defense Counsel's Duty to Conduct Discovery

Formal discovery in juvenile court is governed by Rule 8:15. Counsel should consider filing a formal request for discovery, taking into account that such requests may trigger reciprocal discovery obligations.

- 9.1 Counsel must pursue discovery procedures provided by the Constitution of the United States, the Code of Virginia, the Rules of the Supreme Court of Virginia and any local practices of the court, and pursue such available informal discovery methods as soon as practicable unless there is a sound tactical reason for not doing so. In considering discovery requests, counsel should consider that such requests may ~~will~~ trigger reciprocal discovery obligations.
- 9.2. Counsel should consider seeking discovery of the following items:
 - a. potential exculpatory information;
 - b. potential mitigating information;

- c. all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;
- d. the prior juvenile record of the client and any evidence of other misconduct that the Commonwealth may intend to use against the client;
- e. all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
- f. all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
- g. statements of co-defendants;
- i. all audio and video recordings relevant to the case, including 911 calls, radio runs, and videotaped statements;
- j. all documents and other evidence of any identification procedures in the client's case.

RELATED STANDARDS

Rules of the Supreme Court of Virginia 3A:11;

Rules of the Supreme Court of Virginia 7C:5;

Rules of the Supreme Court of Virginia 8:15.

Performance Standard 10: Juvenile Defense Counsel's Duty in Plea Negotiations

After interviewing the client and developing a thorough knowledge of the law and facts of the case, counsel should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission.

- 10.1** Counsel is responsible for assuring that the juvenile 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.
- 10.2** Counsel should explain the probabilities of the plea agreement being accepted by the court and the client's options, if the plea agreement is not accepted by the court.
- 10.3** Counsel should make it clear to the client that the ultimate decision to enter a plea has to be made by the client. Counsel should investigate and candidly explain to the client 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 an adjudication of

delinquency. Counsel should also ascertain and advise the client of the court's practices concerning disposition recommendations and withdrawing pleas or admissions.

- 10.4** 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 client's situation. Such advice should not be based *solely* on the client's acknowledgment of guilt or *solely* on a favorable disposition offer.
- 10.5** The client shall be kept informed of the status of the plea negotiations.
- 10.6** 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 and represent the client's expressed wishes.
- 10.7** 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.
- 10.8** Counsel should make sure that the client is carefully prepared to participate in the procedures required and used in the particular court to determine the providence of a plea.
- 10.9** Counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual and legal basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived.
- 10.10** Counsel should inform the client of the potential collateral consequences that may result from a plea or adjudication of guilt or a deferred finding. Counsel must consider whether an admission will compromise the client's or the client's family's public assistance, public housing or immigration status, and counsel's advice to the client regarding any admissions should include the possible consequences above.
- 10.11** Counsel should be aware of the effect the client's admission will have on any other court proceedings or related issues, such as probation or school suspension.

RELATED STANDARDS

Virginia Code § 16.1-35.1;
Virginia Code § 16.1-277.1.

Performance Standard 11: Preparation for Adjudicatory Hearing

- 11.1** Counsel should develop a theory of the case, and be prepared to deliver an opening statement and closing argument and to conduct the direct and cross-examination of any witness, where appropriate.
- 11.2** Pretrial Motions:
 - a.** Counsel should review all statements, reports and other evidence to determine whether a motion is appropriate.
 - b.** Counsel should file motions in a timely manner pursuant to the applicable provisions of the Code of Virginia, Rules of the Supreme Court of Virginia and local procedures and practices, keeping in mind the time constraints of juvenile court.
 - c.** Counsel should be aware of the burdens of proof, evidentiary principles and court procedures applying to any motions hearing.
 - d.** Counsel has the continuing duty to file pretrial motions as issues arise or new evidence is discovered.
- 11.3** Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the hearing process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the adjudicatory hearing.
- 11.4** Counsel should be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review.
- 11.5** Counsel should advise the client as to suitable courtroom dress and demeanor.
- 11.6** Counsel should meet with and prepare all defense witnesses.
- 11.7** Counsel should request the court to authorize the full, official recordation of juvenile court proceedings, when warranted, and especially transfer and certification hearings and adjudicatory and dispositional hearings involving serious felony charges.

Performance Standard 12: Juvenile Defense Counsel's Duty at Adjudicatory Hearing

- 12.1** Counsel should ensure that:

- a.** all rights afforded by the United States Constitution and the Constitution of the Commonwealth of Virginia are protected;
 - b.** the state bears its burden of proving the allegations beyond a reasonable doubt;
 - c.** the rules of evidence apply to all juvenile court proceedings;
 - d.** the rules of criminal procedure apply to all juvenile court proceedings, except as modified by Part 8 of the Rules of the Supreme Court of Virginia.
- 12.2** Counsel should be aware that except for certain circumstances, juveniles have a right to a public hearing unless expressly waived.
- 12.3** Counsel should be aware that a parent must be given notice of the adjudicatory hearing. This requirement cannot be waived by the child. If a parent is unable or unwilling to participate, a guardian ad litem can be appointed.
- 12.4** Counsel should prepare for adjudication with a written opening statement, closing argument, and direct and cross-examination of witnesses.
- 12.5** Counsel should use the opening statement as an opportunity to educate the judge as to counsel's theory of the case. Counsel should consider the advantages and disadvantages of the disclosure of information during the opening statement.
- 12.6** During the Commonwealth's case counsel should:
 - a.** be alert to and object to attempts to admit inadmissible evidence or testimony;
 - b.** be prepared to cross-examine witnesses. Any cross-examination should be conducted to advance the defense's theory of the case.
- 12.7** At the conclusion of the prosecution's case, counsel should move to strike the prosecution's case and request the court to dismiss each count of the petition, unless there exists a good faith reason for not doing so. Counsel should be prepared to present supporting case law.
- 12.8** When presenting the client's case, counsel should:
 - a.** consider whether any evidence needs to be presented;

- b. discuss with your client all the implications of testifying, keeping in mind that the decision whether to testify is solely the client's. Counsel should also be aware of his or her ethical responsibilities if counsel knows that the client will testify untruthfully;
 - c. be prepared for direct examination and redirect of any witnesses;
 - d. be prepared to assert any affirmative defenses.
- 12.9** At the conclusion of the defense case, counsel should move to strike the prosecution's case and request the court to dismiss each count of the petition, unless there exists a good faith reason for not doing so. Counsel should be prepared to present supporting case law.
- 12.10** Counsel should use the closing argument to summarize and argue the evidence and testimony as it applies to the theory of the case and remind the judge of the prosecution's burden of proof.

RELATED STANDARDS

Virginia Code § 16.1-302;

Gilbert v. Commonwealth, 198 S.E.2d 633, 214 Va. 142 (Va., 1973).

Performance Standard 13: Juvenile Defense Counsel's Duty at the Disposition Hearing

The active participation of counsel at disposition is essential. In many cases, counsel's most valuable service to clients will be rendered at this stage of the proceeding. An important part of representation in a juvenile case is planning for disposition.

13.1 Preparation for Hearing:

- a. Counsel should explain to the client and parent the nature of the disposition hearing, the issues involved and the alternatives open to the court. Counsel should also 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 client's responsibilities under the proposed dispositional plan;
- b. Counsel should advise the client and the parents that they will be contacted by a probation officer regarding preparation of the social history and that whatever information they give the probation officer likely will be provided to both the court and the prosecution;

- c. Counsel should advise the client regarding the possible request by the probation officer to give the client's account of the facts and circumstances surrounding the charge to include in the social history, especially if the client intends to appeal or if the client did not testify during the adjudicatory hearing;
- d. Counsel shall read and be thoroughly familiar with the social history (dispositional) report prepared by the court service unit as far in advance of the dispositional hearing as possible. Counsel should review the contents of the report with the client and discuss any findings and recommendations therein. With the consent of the client, counsel should advise the probation officer who prepared the social history report of any findings and recommendations with which the client disagrees, if it is strategically advantageous to do so;
- e. Counsel should be familiar with and consider:
 - i. 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 client's circumstances;
 - ii. the official version of the client's prior record, if any;
 - iii. the position of the probation department with respect to the client;
 - iv. the sentencing recommendation, if any, of the prosecutor;
 - v. using a creative interdisciplinary approach by collaborating with educational advocates, social workers, and civil legal services providers;
 - vi. the collateral consequences attaching to any possible disposition including, but not limited to, sex offender registry, immigration status, right to possess weapons;
 - vii. the disposition practices of the judge;
 - viii. referrals to court clinics or community agencies;
 - ix. any victim impact statement to be presented to the court;
 - x. requesting a continuance for disposition at a later date;

- xi. 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;
- xii. preparing a letter or memorandum to the judge to assist the court in deciding the client's disposition. A thoughtfully written presentation of a disposition plan that highlights the client's strengths and the appropriateness of the disposition plan should be delivered to the judge and opposing counsel in advance of the disposition hearing. This letter is an opportunity to anticipate and address any concerns the judge may have about the client and the disposition plan. It is also an opportunity to address specific issues of punishment, deterrence, community safety, and rehabilitation as they relate to the client's case.

13.2 During the Hearing:

- a. Counsel should insist that proper procedures be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence and in accordance with what is permitted under Virginia law;
- b. Counsel should subpoena witnesses and present evidence to support counsel's proposed disposition plan;
- c. Counsel should fully cross examine adverse witnesses, and challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court;
- d. Counsel should consider whether the client should make a statement to the court.

13.3 When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and the client's family and to urge upon the client the need for accepting and cooperating with the dispositional order. If an appeal is contemplated, the client should be advised of that possibility, but counsel must advise compliance with the court's decision during the interim, unless the disposition order is stayed.

RELATED STANDARDS

Virginia Code § 16.1-261;
Virginia Code § 16.1-273;
Virginia Code § 16.1-274;
Virginia Code § 16.1-278.8.

Performance Standard 14: Juvenile Defense Counsel’s Continuing Duty to Client

- 14.1** Whether or not the charges against the client have been disposed of, if counsel is aware that the client or the client’s family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.
- 14.2** If the client is committed to the Department of Juvenile Justice, counsel should attempt to ensure that the client is placed in the most appropriate, least restrictive placement available.

Performance Standard 15: Juvenile Defense Counsel’s Post-dispositional Duties

- 15.1** Counsel should be prepared to represent and inform the client with respect to proceedings to review, reopen or modify adjudicative or dispositional orders or to pursue any affirmative remedies that may be available to the client under the law.
- 15.2** Counsel appointed to represent a client charged with violation of his or her probation or parole should prepare in the same way and with as much care as for an adjudicatory hearing.

RELATED STANDARDS

Virginia Code § 16.1-133.1;
Virginia Code § 16.1-289.

Performance Standard 16: Child’s Right to an Appeal

Appeals from final judgments in juvenile court are handled de novo in the circuit court, where the client has an absolute right to a trial by jury on guilt or innocence, and appeals from the circuit court to the Court of Appeals are handled in the same manner as other appeals from the circuit court.

- 16.1** Counsel should inform the client of his or her right to an appeal, the steps necessary to appeal and the likelihood of success.
- 16.2** Counsel should know the statutes and rules governing the filing of appeals in the circuit court, the Court of Appeals, and the Supreme Court of Virginia.

RELATED STANDARDS

Virginia Code § 16.1-296;
Virginia Code § 16.1-297.

Performance Standard 17: Juvenile Defense Counsel’s Duty during Transfer or Certification Hearings under Virginia Code § 16.1-269 et seq.

A new, inexperienced juvenile defense counsel should not handle a transfer hearing without the supervision or assistance of a more experienced juvenile defender. A transfer or certification hearing, while not a hearing on the merits of the case, could result in the loss of the protections afforded in juvenile court. Therefore, counsel should prepare in the same way and with as much care as for an adjudicatory hearing, in accordance with all previous performance standards.

- 17.1** Counsel should be aware of the statutory findings the court must make before transferring or certifying jurisdiction to the circuit court.
- 17.2** Counsel should be aware of the current statutory and case law governing these findings.
- 17.3** Counsel should explore at an early stage the possibility of a plea negotiation to ensure that the case is handled and disposed of in juvenile court, subject to Standard 10.
- 17.4** Counsel should be prepared to vigorously contest the issue of probable cause to prevent transfer or certification.
- 17.5** Counsel should be prepared to present evidence and testimony to prevent transfer or certification, including testimony by people who can provide helpful insight into the client’s character, such as teachers, counselors, psychologists, community members, probation officers, religious affiliates, employers, DJJ personnel, or other persons with a positive personal and/or professional view of the defendant. If the competency of the client to participate in the proceedings is in question, that issue should be pursued.
- 17.6** Counsel should request the court to authorize the full, official recordation of all transfer proceedings, when warranted.
- 17.7** Counsel should preserve all issues for appeal.
- 17.8** Counsel should consider obtaining an independent evaluation from a defense expert.
- 17.9** Counsel should investigate possible placements for the client if the case remains in juvenile court.
- 17.10** If the judge transfers the case, counsel should make every possible argument to keep the client in juvenile detention or to release the client on bond rather than having the client placed in jail.

RELATED STANDARDS

Virginia Code § 16.1-269.1 through § 16.1-272.1.

Performance Standard 18: Trial and Sentencing of a Child as an Adult in Circuit Court

- 18.1** Where the client is being tried in the circuit court, he or she has an absolute right to a trial by jury on guilt or innocence.
- 18.2** Counsel should be prepared to make arguments during sentencing for a juvenile disposition, since the client may still be treated as a child for sentencing purposes.

Performance Standard 19: Special Considerations

There are related legal issues and unique considerations in the juvenile justice system that do not exist in the criminal justice system. Juvenile defense counsel should be aware of the following matters:

- 19.1** Time Limits: Counsel should be aware of the statutory time limits applicable with regard to detention and the time of trial.
- 19.2** Confidentiality of Proceedings and Records: Counsel should be aware of the applicable laws and rules governing access to juvenile court proceedings and those juvenile records that are available generally to the public and to other persons.
- 19.3** Sealing of Records: Counsel should be aware of and inform the client regarding the expungement of juvenile court records.
- 19.4** Children in Need of Supervision, Children in Need of Services and Status Offenses: Counsel should be aware of the definition of a “child in need of supervision,” a “child in need of services,” and a “status offender” and know the procedural safeguards applicable to such designations.
- 19.5** Guardians ad litem. Counsel has an ongoing duty to represent the child’s wishes. Where counsel has determined that it is appropriate to seek the appointment of a GAL, counsel should not delegate this duty or allow the GAL to interfere with the performance of this duty. In most cases, both the GAL and the client should be instructed not to discuss the facts of the case, as this discussion may not be privileged. However, counsel may discuss the facts of the case with the GAL with discretion.
- 19.6** Immigration: Counsel should be aware of the collateral effects of a juvenile court proceeding on the client or client’s family’s immigration status and consult with an expert if necessary.

19.7.1 Special Education: Counsel should be aware of any rights the client may have under special education laws and that any special education records should be presented to the court.

RELATED STANDARDS

Virginia Code § 16.1-228;

Virginia Code § 16.1-277.1;

Virginia Code § 16.1-299 through § 16.1-309.1