

PERFORMANCE STANDARDS FOR APPELLATE COUNSEL

Georgia Public Defender Standards Council Appellate Advocacy & Legal Research Division

The Georgia Public Defender Standards Council has promulgated these Performance Standards for Appellate Counsel in indigent criminal cases pursuant to the statutory mandate of O.C.G.A. 17-12-8. Their purpose is to provide guidance as to the minimum requirements counsel must meet, to identify the steps counsel should take in order to provide effective assistance in appellate representation, and to assist the Council in training and supervising attorneys. The Standards are also intended to provide a measure by which the Council can evaluate the performance of individual attorneys and circuit public defender offices.

The language of these Standards is general, implying flexibility of action which is appropriate to the situation. In those instances where a particular course of action is highly recommended but will require the exercise of professional judgment the Standards use the word “should.” In those instances where a particular action is absolutely essential to providing proper representation, the Standards use the word “shall.” These guidelines are drawn from other states’ appellate performance standards and from the insights of Georgia appellate practitioners. The Council encourages counsel to aspire to outstanding, client-centered appellate representation, using these Standards as a starting point.

GENERAL MATTERS

1 Counsel shall be or become familiar with applicable rules of professional conduct, the Appellate Practice Act, and the rules of the Georgia Supreme Court and the Georgia Court of Appeals. Counsel should also reserve regular time to keep current with the opinions of the appellate courts and with any changes in the law.¹

¹ Appellate Division, Office of the Maryland Public Defender, Standards of Performance for Appellate Attorneys 1§ IA, 2 § II C (1993).

2 Counsel shall regularly participate in training events—whether as an instructor or student—and shall endeavor to grow professionally to the benefit of his or her clients.²

3 Counsel shall comply with all applicable court rules regarding professional conduct, acceptable pleadings, deadlines, and citations to authority.³

4 Where there appears to be a conflict of interest, Counsel shall take the necessary steps to have new counsel furnished to handle the appeal. Until an actual substitution, however, Counsel shall file the pleadings necessary to meet pertinent deadlines and perfect the right to secure review.⁴

5 As soon as feasible after conviction, Counsel shall advise the client of the particular features of his sentence⁵ and of his post-conviction remedies.⁶ In addition to a general understanding of the appellate process, counsel should convey the advantages, disadvantages, and prospects of each available remedy in view of the particular circumstances. Counsel shall make every reasonable effort to assure that the Defendant understands that his lawyer⁷ must initiate certain actions within specific time limits, even if later the Defendant or his family or the court might substitute counsel or the Defendant might elect to proceed *pro se*.

² Appellate Division, Office of the Maryland Public Defender, *supra* at 2 § II A, D, E; National Legal Aid and Defender Association, Standards and Evaluation Design for Appellate Defender Offices 69 (1980).

³ Appellate Division, Office of the Maryland Public Defender, *supra* at 1 § IA; Appellate Defender Commission, Michigan Appellate Assigned Counsel System Regulations 11 §§1, 5, 12§ 14, 15 (1985). In order to ensure that that all record references are accurate, appellate counsel should either check the record after it has been prepared but before it is transmitted to the Court of Appeals or Georgia Supreme Court (developing a working relationship with the local Clerk's office is very helpful to this end) or once it is docketed in the appellate court. The Central Office may assist with this where necessary.

⁴ National Legal Aid and Defender Association, *supra* at app A-12 § II E-2.

⁵ E.g., mandatory service features, parole eligibility (or ineligibility), the sentences' relationship to other sentences, pertinent collateral consequences (such as deportation).

⁶ Specifically, Counsel should discuss a motion for new trial and an appeal in the case of one convicted after trial, a motion to withdraw the plea (followed by an appeal) in the case of one convicted on a guilty plea, and possibly a motion to modify the sentence and an application for sentence review in either case. In addition, under particular circumstances, other potential remedies might warrant discussion. Counsel should assure that the Defendant understands that his various remedies are not necessarily exclusive and that some of them may be successive. It will probably also be useful for him to understand the mechanics of the process, particularly the likely delay while the transcript is prepared. Counsel should convey to the Defendant, for example, that an appeal is radically different from a trial, that the fact-finding phase of the trial largely has ended with the verdict, that issues of law (rather than issues of fact or credibility) drive the appeal, that the appeal is confined to the printed record of the case and will likely be decided on written briefs, and that the assessment, selection, and presentation of appellate issues are the prerogatives of Counsel.

⁷ The Court of Appeals regards any *pro se* pleading, including those to instigate an appeal, filed by a person who is represented by counsel to be nullities. See Pless v. State, 255 Ga.App. 95 (2002).

6 If the Defendant does not immediately indicate that he wishes to pursue post-conviction remedies or if he indicates that he wishes to do nothing, Counsel shall reiterate her advice in writing, with particular emphasis on the deadline and manner for the Defendant to convey his wishes or any change of mind.

7 Counsel shall periodically apprise the client of the progress of the case and copy the client on all pleadings filed or received and court opinions issued.⁸

8 Counsel should seek editing assistance and legal feedback from at least one other attorney before filing a brief or a substantial motion.⁹

THE SUBSTANCE OF AN APPEAL

9 Counsel shall promptly request and review all transcripts and case records.¹⁰

10 Except when unusual case-specific factors dictate other measures, counsel should initiate an appeal by filing a motion for a new trial.¹¹ Within a reasonable time, after reading the transcript and record, investigating any off-record claims, and performing the necessary legal research, Counsel should amend the motion and brief the issues.¹²

11 If an issue involves a matters of fact not reflected in the trial record, Counsel shall move for such evidentiary hearings as may be required.¹³

12 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.¹⁴

⁸ Appellate Division, Office of the Maryland Public Defender, *supra* at 11 § IIIA; Appellate Defender Commission, *supra* at 12 § 17; Supreme Court, Michigan, *Supra* at 3 § 7.

⁹ National Legal Aid and Defender Association, *supra* at app A-8 § I L-2.

¹⁰ See Uniform Superior Court Rule 41.3: “The filing [of a motion for a new trial or notice of appeal] shall constitute a certificate by the attorney that the transcript has been ordered from the court reporter. The filing of such motion or notice prior to ordering the transcript . . . shall subject the attorney to disciplinary action by the court.”

¹¹ If the conviction rests on a guilty plea, counsel should file a motion to withdraw the plea, unless the grounds to appeal directly have already been raised on the record and preserved.

¹² The motion need not be amended in order to present on appeal issues already perfected in the record. OCGA § 5-6-34. Furthermore, it is permissible to file a motion for a new trial simply to secure the transcript more conveniently. However, a motion for a new trial affords a valuable opportunity to study the record, identify the issues, perform the necessary legal research, and to commence writing the appellate brief. Given Georgia’s tight briefing schedule once an appeal is docketed, counsel ought to make use of this opportunity.

¹³ See OCGA § 5-6-34(a). This is particularly necessary when raising claims of ineffective assistance of trial counsel, which must be brought at the “earliest practicable moment.” See Ponder v. State, 260 Ga. 840 (1991).

13 Even though ultimately the selection of issues is Counsel's professional prerogative, Counsel shall consult with her client regarding the issues that should be addressed or raised in the pleadings.¹⁵

14 Counsel should apply professional judgment when determining whether to seek certiorari in a case or pursue further discretionary appellate remedies (i.e., Sentence Review, habeas corpus).¹⁶

15 Upon the disposition of the appeal, counsel shall promptly communicate the outcome to the client and explain remaining remedies and the scope of any further representation.¹⁷

16 When counsel's representation terminates, counsel shall cooperate with the defendant and any succeeding counsel in the transmission of the record, transcripts, file, and other information pertinent to post-conviction proceedings.¹⁸

¹⁴ See Jones v. Barnes, 463 U.S. 745 (1983) regarding independent professional judgment regarding appellate claims raised. Furthermore, while Counsel must always keep the best interests of the client in mind, Counsel should also be aware of any broad implications of raising an issue. See also Reid v. State, 235 Ga. 378, 379 (1975) and Smith v. Murray, 477 US 527, 536 (1986).

¹⁵ See GA RULES OF PROF'L CONDUCT R. 1.4. See also Hogan v. Thompkins, 264 Ga. 116 (1994) (Hunstein, J., dissenting from denial of probable cause to appeal), discussing counsel's duty to consult with her client.

¹⁶ See Ross v. Moffitt, 417 U.S. 600 (1974), which held that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment required that a state, after furnishing counsel for an indigent's first appeal as of right from a conviction, had to appoint counsel for an indigent defendant's subsequent discretionary appeals. See also Gibson v. Turpin, 270 Ga. 855 (1999) (no right to counsel exists for state habeas petitions).

¹⁷ Supreme Court of Georgia FOA 93-4; Appellate Division, Office of the Maryland Public Defender, *supra* at 11 § III D; Appellate Defender Commission, *supra* at 12§18; Supreme Court, Michigan, *Supra* at 3 § 8.

¹⁸ Appellate Defender Commission, *supra* at 12 § 19; Supreme Court, Michigan, *Supra* at 3 § 8.

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Emmet J. Bondurant
Chairperson

Attested:

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