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Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after *Strickland*

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Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after *Strickland*

Thomas Hagel *

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INTRODUCTION

The United States Supreme Court first articulated a right to effective assistance of counsel in criminal cases more than fifty years ago.¹ Until recently, no uniform standard specifically set out the substance of this constitutional right. To the contrary, the substantive degree of protection afforded the right depended upon its definition by the jurisdiction applying it. Therefore, a criminal defendant's rights in this regard depended upon broad, unpredictable judicial discretion.

For example, until recently a defendant tried in a state court in Utah could allege a violation of his right to effective assistance only if his representation by counsel was so lacking that it constituted a farce or "mockery of justice."² If the same defendant was tried in

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In this article, all masculine pronouns should be read as including the feminine gender.

1. *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932). Though the sixth amendment provides that a criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defense," the term "effective" does not appear. U.S. CONST. amend. VI.

2. *State v. Pierren*, 583 P.2d 69 (Utah 1978).

a Wisconsin state court, however, he was guaranteed representation of the type and quality rendered by a reasonably competent attorney.³ The qualitative differences between these and other standards were dramatic. Their definitions and applications were products of arbitrary decisions by trial and appellate courts.

The purpose of this article is two-fold. First, the rather chaotic state of the law in this area will be discussed. Second, a potential remedy to the problem will be suggested. The underlying thesis of this article is that the only solution to the problems presented is the creation and adoption of a uniform statutory scheme which sets out, with specificity, the right to effective assistance of counsel to be afforded defendants in criminal cases. A legislative approach to the solution of this problem will relieve courts of the need to devise and apply standards on a case-by-case basis.

From the outset, it should be obvious that only the defense attorney can insure effective representation. The burden of guiding a defendant through the complex maze of the criminal justice system rests on his shoulders. However, the path to be taken must be illuminated by the guideposts of a uniform standard of competence. Without such a standard, counsel is left to speculate about the specific nature of his professional responsibilities. His client's protection is left to the nearly unchecked discretion of the judiciary. In a society that prides itself on the protection of individual rights, neither of these present-day realities should be tolerated.

THE UNEVEN DEVELOPMENT OF THE CONCEPT OF EFFECTIVE ASSISTANCE: A BRIEF HISTORY

The concept of a right to effective assistance of counsel is not a recent development in American jurisprudence. It has been with us for at least a century.⁴ However, the idea that the right is of constitutional dimensions is of relatively recent origin.

The Supreme Court first articulated a constitutional right to effective assistance of counsel in *Powell v. Alabama*⁵—the famous "Scottsboro Boys" case. The Court granted certiorari to review the death sentences received by the seven defendants, young black men who had been convicted of raping two young, white women.⁶ Though three assignments of error were proffered, the Court considered only one:

3. *State v. Machner*, 92 Wis. 2d 797, 802, 285 N.W.2d 905, 907 (1979).

4. *See, e.g., State v. Lewis*, 9 Mo. App. 321 (1880), *aff'd*, 74 Mo. 222 (1881).

5. 287 U.S. 45 (1932).

6. *Id.* at 50.

[T]he defendants, and each of them, were denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment, specifically as follows: . . . they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.⁷

After a discussion of the representation given petitioners, the Court held that the petitioners had been denied "the right of counsel in any substantial sense."⁸ The Court further held that, in a capital case, courts must assign counsel to those who are unable to adequately prepare their defense and that this "duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."⁹ However, the Court did not specifically define "effective aid."

The Court did, however, refer to the indicia of effective representation. At various points in the opinion, such terms as "effective and substantial aid,"¹⁰ "aid of counsel in any real sense,"¹¹ exercising "their best judgment,"¹² "prompt and thoroughgoing investigation"¹³ and "zealous and active"¹⁴ appear. Though such terms avail themselves of a spectrum of definitions, courts have employed them as guideposts in applying the newly developed constitutional principles.

Less than ten years after its decision in *Powell*, the Court again considered the issue of what constitutes effective assistance in *Avery v. Alabama*.¹⁵ The petitioner had been convicted of murder and sentenced to death. The sole issue presented was whether he had been denied his "right to counsel, with the accustomed incidents of consultation and opportunity of preparation for trial."¹⁶ The alleged denial was founded on the trial court's refusal to grant a requested continuance.¹⁷

The Court, ultimately affirming the state court's judgment,¹⁸

7. *Id.*

8. *Id.* at 58.

9. *Id.* at 71. It must be noted that the Court's use of the term "effective aid" appears to be dicta. However, this term gave direction to the more comprehensive development of the concept of "effective assistance."

10. *Id.* at 53, 71.

11. *Id.* at 57.

12. *Id.* at 58.

13. *Id.*

14. *Id.*

15. 308 U.S. 444 (1940).

16. *Id.* at 445.

17. *Id.*

18. *Id.* at 453.

again addressed the scope of the right to effective assistance of counsel. In assigning a "peculiar sacredness" to this right, the Court observed that:

[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.¹⁹

The Court concluded that petitioner had been afforded the assistance of "zealous and earnest counsel" since counsel had "contested every step of the way leading to final disposition of the case."²⁰

It is questionable whether the *Avery* decision added much to the bar's understanding of the right. The Court's dictum suggested, in broad terms, what effective assistance is *not*; however, it added little to an understanding of what it *is*.

During the years following the *Avery* decision the Supreme Court decided a number of cases that raised this issue. The Court in *Glasser v. United States* specifically extended the right to defendants in federal court.²¹ Other cases dealt with various forms of alleged ineffectiveness.²² Overall, the Court continued to employ, on a case-by-case basis, the same language and concepts articulated in *Powell* and *Avery*. No uniform definition emerged that could be generally applied with any degree of logical consistency. Even the Court's landmark decision in *Gideon v. Wainwright*,²³ establishing the right of indigents to appointed counsel, failed to define the nature and quality of the assistance guaranteed.

In 1970 the Court, in *McMann v. Richardson*,²⁴ finally devised a definition of "effective assistance." In *McMann*, which concerned the validity of the respondents' guilty pleas, the Court directly addressed the issue of effective assistance. It stated that resolution of

19. *Id.* at 446.

20. *Id.* at 450.

21. 315 U.S. 60 (1942).

22. *Michel v. Louisiana*, 350 U.S. 91 (1955) (alleged ineffectiveness based upon defense attorney's failure to file a timely motion to quash the indictment); *Reece v. Georgia*, 350 U.S. 85 (1955) (appointed counsel had insufficient time to prepare defense); *White v. Ragen*, 324 U.S. 760 (1945) (failure of counsel to confer with his client and call a particular witness at trial).

23. 372 U.S. 335 (1963). In *Gideon*, the Court extended the sixth amendment guarantee to state prosecutions.

24. 397 U.S. 759 (1970).

the issue rests "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but whether that advice was *within the range of competence demanded of attorneys in criminal cases*."²⁵ It is questionable, however, whether the Court intended to establish this "test" as a uniform minimum constitutional standard. In fact, the Court concluded that the matter of "proper standards of performance" should be "left to the good sense and discretion of the trial courts."²⁶

Since its opinion in *McMann*, the Court on at least two occasions has used the "range of competence" standard as the yardstick for measurement of effective assistance.²⁷ Until recently, this was the extent of guidance given by the Court in defining an applicable standard.

STRICKLAND V. WASHINGTON: THE CONSTITUTIONAL STANDARD

The Court's reticence in defining a constitutional standard ended in 1984 when it decided *Strickland v. Washington*.²⁸ The *Strickland* Court made it clear that the standard it defined is applicable to every stage of a criminal adjudication.²⁹

The respondent pleaded guilty to three counts of capital murder in a Florida state court, and a sentencing hearing was set. While preparing for the hearing, respondent's counsel did not seek out character witnesses, request a psychiatric examination of the respondent, or request a presentence report.³⁰ Counsel's decision to forego these actions was based upon tactical considerations; counsel hoped, by not presenting evidence that would have been uncovered by these actions, to keep certain aggravating facts from the sentencing judge. After the hearing, respondent Washington was sentenced to death on each of the three counts of murder.³¹ In his appeal, Washington did not raise the issue of ineffective assistance.³² The Supreme Court of Florida upheld the convictions and

25. *Id.* at 771 (emphasis added).

26. *Id.*

27. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973).

28. 104 S. Ct. 2052 (1984).

29. *Id.* at 2064.

30. *Washington v. State*, 397 So. 2d 285, 286 (Fla. 1981).

31. *Id.*

32. *Washington v. State*, 362 So. 2d 658, 664-65 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). The issues raised were alleged misapplication of the statutory sentencing provisions and alleged violations of constitutional prohibitions against cruel and unusual punishment.

sentences.³³

Washington next sought relief through a state statutory postconviction relief action by which he alleged ineffective assistance by both trial and appellate counsel.³⁴ After a hearing, the trial court denied relief.³⁵ Washington appealed to the Supreme Court of Florida,³⁶ alleging that the trial court misapplied the standard for effective assistance of counsel without giving Washington a full evidentiary hearing on the matter.³⁷ The appeal did not, however, challenge the constitutionality of the standard applied.³⁸ The court denied relief, as well as Washington's motion for a stay of execution. It also precluded any rehearing on the petition.³⁹ At this point Washington exhausted his state remedies.

Washington next sought a writ of habeas corpus in federal court, alleging as a basis for relief trial counsel's failure to investigate defendant's background for potentially mitigating evidence.⁴⁰ The district court found that while Washington's attorney may have made judgmental errors, the errors were not prejudicial because they did not affect the outcome of the sentencing hearing.⁴¹

The Court of Appeals for the Eleventh Circuit reversed,⁴² stating that an attorney is not required to pursue a line of investigation "when a strategic choice of counsel" makes it unnecessary.⁴³ The court further held that a defendant, to prevail on a claim of ineffective assistance, must "demonstrate [not only] that the ineffective assistance created . . . a '*possibility* of prejudice,' but [also] that [it]

33. *Id.* at 667.

34. *Washington v. State*, 397 So. 2d 285 (Fla. 1981). Since appellate counsel's representation "did not relate to the judgment and sentence of the trial court," this issue was not considered during the postconviction proceeding. *Id.* at 287.

35. *Id.*

36. *Id.*

37. *Id.* at 286.

38. *Id.* at 286-87. The four-pronged standard was first articulated by the Supreme Court of Florida in *Knight v. State*, 394 So. 2d 997 (1981): First, the omission or overt act upon which the ineffective assistance claim is based must be detailed in the appropriate pleading. Second, the defendant has the burden of showing that the omission or overt act complained of was a "substantial and serious deficiency measurably below that of competent counsel." *Id.* at 1001. Third, the defendant also has the burden of showing that counsel's deficiency was so substantial that it is likely that the deficient conduct affected the outcome of the court proceedings. Fourth, even if the defendant makes the above showing, the state can still rebut it by establishing beyond a reasonable doubt that in fact there was no prejudice. *Id.* at 1000-01 (citing *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979) (en banc)).

39. *Washington v. State*, 397 So. 2d 285, 287 (Fla. 1981).

40. Washington sought relief under the provisions of 28 U.S.C. § 2254 (1982).

41. See *Washington v. Strickland*, 673 F.2d 879, 890 (5th Cir. 1982).

42. *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982).

43. *Id.* at 1251.

worked to his *actual* and substantial disadvantage.”⁴⁴ The court of appeals remanded the case for district court determination of whether Washington’s right to effective assistance of counsel was violated and whether such violation, if any, actually and substantially disadvantaged his defense.⁴⁵ The State of Florida successfully petitioned for certiorari to the United States Supreme Court.⁴⁶

I. The Two-Pronged “Standard”

In reversing the Eleventh Circuit decision, the Supreme Court defined the constitutional standard for effective assistance of counsel.⁴⁷ The standard has two components. First, a defendant must establish that specific attorney conduct was deficient as measured by a standard of “reasonableness” relative to “prevailing professional norms.”⁴⁸ Once such deficient conduct is established, the defendant must then demonstrate that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁴⁹ The Court limited application of this standard to cases of alleged “actual ineffective assistance of counsel”;⁵⁰ the standard does not apply where ineffectiveness is presumed.⁵¹ The Court suggested that the new standard applies to all criminal proceedings, not just the trial and sentencing stages of adjudication.⁵²

It will become clear that this “standard” fails to resolve the problems that have plagued courts for decades. An analysis of the Court’s holding will demonstrate that what has been presented as a standard is largely a concept without workable substance.

44. *Id.* at 1258.

45. *Id.* at 1263-64.

46. *Strickland v. Washington*, 462 U.S. 1105 (1983).

47. *Strickland v. Washington*, 104 S. Ct. 2052, 2063, *reh’g denied*, 104 S. Ct. 3562 (1984).

48. *Id.* at 2065.

49. *Id.* at 2068.

50. *Id.* at 2063.

51. *Id.* at 2067. An example of “presumed” ineffectiveness is the existence of a conflict of interest. For a conflict to be used as a ground for ineffective assistance it must be established that an actual (versus potential) conflict existed. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 268-74 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). Other examples of “presumed” ineffectiveness are cited in *United States v. Cronin*, 104 S. Ct. 2039, 2047 n.24 (1984).

52. *Id.* at 2064.

II. The "Standard" Without Substance: Attorney Performance

The Court describes its decision as setting a "standard" by which claims of ineffective assistance may be resolved.⁵³ Yet "standard" is commonly understood to mean "a definite level of excellence" or "attainment."⁵⁴ The Court declines to define specific criteria in its standard. All the Court tells us is that it is an objective standard for which the "proper measure . . . remains simply reasonableness under prevailing professional norms."⁵⁵ Several questions arise from this definition. What are these "norms"?⁵⁶ Are they uniform? Are they defined by the trial judge? If the professional norms of a given locale are extremely low, are they still the yardstick to be used to determine whether an attorney's performance falls below the constitutional standard? Is there a minimum constitutional threshold of performance? If so, what is it? These and other issues are left unresolved by *Strickland*.

Though the Court declined to resolve these issues, it did address them. It found that "specific guidelines" or "detailed rules" are not appropriate and, in fact, would hinder an attorney's ability to make tactical decisions.⁵⁷ How guidelines would have such an effect is not explained by the Court. Support for this proposition is not proffered. From the standpoint of a trial attorney seeking firm guidance in this area, the proposition seems highly questionable.⁵⁸

The lack of articulable criteria is not the only deficiency in the performance standard. The Court has directed appellate courts to be "highly deferential" to trial court findings on this issue when applying the new standard.⁵⁹ It has, in fact, coupled the performance standard with a "strong presumption" that the attorney rendered adequate assistance.⁶⁰ A defendant faced with this pre-

53. *Id.* at 2070.

54. 2 OXFORD ENGLISH DICTIONARY 3016 (compact ed. 1971).

55. *Strickland*, 104 S. Ct. at 2065.

56. Normative behavior is that which falls within the parameters of a defined pattern. Without a definition of a pattern of professional conduct it is impossible to determine when an attorney's conduct violates the "norms." This is especially true of an attorney's conduct in his role as an advocate. See generally Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978); Rueschemeyer, *Doctors and Lawyers: A Comment on the Theory of the Professions*, 1 CAN. REV. SOC. & ANTHROPOLOGY 17 (1964).

57. *Strickland*, 104 S. Ct. at 2065.

58. Specific guidelines might, in fact, have the opposite effect. They would specify the "rules of the game" so as to give notice of permissible, as well as expected, behavior. At present, counsel must speculate about what he may, as well as what he must, do. The proposed Guidelines will directly address these concerns. See *infra* appendix at § II.

59. *Strickland*, 104 S. Ct. at 2065.

60. *Id.* at 2066.

sumption may be forced to prove that the attorney's performance was so egregiously ineffective that the proceeding was a "farce."⁶¹ Any performance above this level may be deemed constitutionally adequate. The history of the law in this area reveals that very few legitimately aggrieved defendants will prevail.⁶²

III. *The Prejudice Factor*

Before *Strickland*, many courts applied the outcome-determinative test in ineffective assistance cases.⁶³ Defendants had to prove that counsel's representation was so deficient that it more likely than not altered the outcome of the case.⁶⁴ In *Strickland*, the Court declined to adopt this test.⁶⁵ Instead, it adopted what might be described as the "reasonable probability" test.⁶⁶ That is, "[the] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁶⁷ Though the Court suggested that this test imposes on the defendant a lesser burden of proof than that imposed by the outcome-determinative test,⁶⁸ other aspects of the Court's decision suggest that the defendant's burden will not be lightened.

For example, the Court stated that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding,"⁶⁹

61. See, e.g., *Ellis v. Oklahoma*, 430 F.2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).

62. See generally Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 20-33 (1973); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 927-39 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1077-81 (1973); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J. L. & SOC. PROBS. 1, 25-37 (1977).

63. See Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of the Rights Standard*, 21 AM. CRIM. L. REV. 29, 32-40 (1983).

64. *Chapman v. California*, 386 U.S. 18, 22 (1967) (noting that the "harmless error" rule had been adopted by all of the states, the Court required the defendant to show that the error affected the outcome of the case); *United States v. DeCoster*, 624 F.2d 196, 215 (D.C. Cir. 1979) (defendant must demonstrate that ineffective assistance affected the outcome).

65. *Strickland*, 104 S. Ct. at 2068.

66. *Id.*

67. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This "but for" test, which has a long history in tort law, refers to the causal connection between an act and its consequences. See W. KEETON, PROSSER AND KEETON ON TORTS 266-69 (5th ed. 1984). This concept of proximate cause is often applied in legal malpractice actions. See, e.g., *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954).

68. *Strickland*, 104 S. Ct. at 2069.

69. *Id.*

and that the scope of this inquiry is the "totality of evidence."⁷⁰ Viewing these two requirements together, it is reasonable to assume that counsel could commit one or more outrageous errors but, depending on the amount of damaging evidence presented by the prosecution, could still be found to have provided adequate assistance. It is difficult to imagine how this inquiry will protect defendants' constitutional rights. To the contrary, the standard may have the effect of lowering standards of practice and threatening the integrity of the adjudication process.

Another facet of *Strickland* that causes concern is the Court's directive that appellate courts apply a rebuttable presumption against a finding of prejudice.⁷¹ Due to social and economic circumstances, most defendants lack resources to acquire the highly skilled assistance required to bring a successful case to court. Defendants who had ineffective assistance at trial are singularly unfit to bear the burden of overcoming this presumption.⁷² Though the presumption may reduce the number of actions filed, it may not remedy the wrongs done to victims of ineffective assistance of counsel.⁷³ As Justice Marshall wisely suggested in his dissent, once a defendant establishes that counsel violated the performance standard, a new trial should be granted "regardless of whether the defendant suffered demonstrable prejudice."⁷⁴

Taken as a whole, the Court's two-pronged test is inappropriate and unworkable. This is especially true of the performance component. It is a standard without definition; thus it is no standard at all. To give it meaning, the Court or legislatures must follow the lead of the lower courts and adopt specific guidelines for resolution of ineffective assistance of counsel actions.⁷⁵

FUNCTIONS OF A SPECIFIC STANDARD

The Court in *Strickland* made it abundantly clear that a detailed set of objective standards is inappropriate.⁷⁶ The Court is not alone in this belief.⁷⁷ Some commentators have suggested that specific performance standards in fact hinder an attorney in providing

70. *Id.*

71. *See id.* at 2068.

72. *Id.* at 2076-77 (Marshall, J., dissenting).

73. *Id.* at 2078.

74. *Id.* at 2077.

75. *See id.* at 2076 (lists lower courts that adopted specific guidelines).

76. *Id.* at 2065.

77. *See generally* Note, *A Functional Analysis of Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1074 (1980).

adequate representation. One argument is that such standards will restrict an attorney's ability to make tactical judgments and exercise discretion in preparing and litigating a criminal case.⁷⁸ Other commentators have suggested that defining effective specific standards is impossible, since no set of standards can cover the myriad of factual and tactical concerns presented in cases.⁷⁹ At first blush, these arguments appear to have some merit. This apparent merit is, however, called into question when one considers the arguments in light of the realities of the practice of criminal law.

The principal problem with these arguments rests with their proponents' inability to create a set of standards adaptable to the vagaries of criminal proceedings. These commentators, who seem to assume that specific standards would require an attorney either to take some action that would not otherwise be taken or to decline to do something required by the facts of the case, possess a fatally limited idea of what a performance standard might entail.

An appropriate performance standard would simply set out, in concise and unambiguous terms, the general criteria for "reasonableness" relative to "prevailing professional norms." It would define these in a uniform manner to avoid the variances that now exist among jurisdictions. It would not require lock-step adherence without regard to the facts of a particular case. Thus, an attorney would retain the ability to make tactical decisions.

Such a uniform standard would serve three basic functions. First, it would provide criminal defense attorneys with a general standard of performance that meets the Supreme Court's test of reasonable competence. This is particularly necessary for inexperienced attorneys, for whom a standard would provide a "roadmap" to effective representation. Additionally, meeting the requirements of such a standard might provide attorneys with a defense to a disgruntled client's malpractice action.⁸⁰

Second, a uniform standard would provide trial and appellate courts with an articulable guide for resolving postconviction ac-

78. See Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 123, 127 (1977).

79. See *United States v. DeCoster*, 624 F.2d 196, 203 (D.C. Cir. 1979) (due to the "infinite variety of decisions in the development and prosecution of the case . . . categorical rules are not appropriate"); *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977) (Duniway, J., concurring) (generalized standards may be little more than a "semantic merry-go-round"), *vacated*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

80. See Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice"*, 21 UCLA L. REV. 1191, 1201 (1974).

tions based on allegations of ineffective assistance.⁸¹ At present, judges face the same problem faced by defense attorneys: what are the constitutional requirements for effective assistance? Aside from cases where ineffectiveness is presumed, judges are now required to devise their own definitions of effective assistance, as they were before *Strickland*.⁸² The Court's adoption of "reasonableness" as a standard of performance has done nothing to remedy this situation.

Finally, a uniform standard will, ultimately, function as a guarantee of the right to effective assistance of counsel. Defendants will have a clear understanding of the quality of representation to which they are entitled. Though the *Strickland* Court believed that "guidelines . . . would encourage the proliferation of ineffectiveness challenges,"⁸³ no significant data supports this conclusion.⁸⁴ There appears to be no evidence that people, when they become aware of the existence of a legal remedy, abuse the legal system by filing frivolous claims. In fact, the opposite result might occur.⁸⁵ In any event, failure to adequately inform defendants of

81. See Comment, *supra* note 62, at 1-90.

82. For cases where ineffectiveness is presumed, see *Flanagan v. United States*, 104 S. Ct. 1051 (1984) (denial of right to counsel); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest); *Estelle v. Smith*, 425 U.S. 501 (1976) (introduction of statements obtained in violation of fifth amendment rights); *Bruton v. United States*, 391 U.S. 123 (1968) (denial of right to confront witnesses). See *supra* note 51 and accompanying text.

See generally Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659, 661 (1980); Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1386-87, 1399-1401, 1408-10 (1983).

83. *Strickland*, 104 S. Ct. at 2066.

84. A number of courts have adopted guidelines as a standard for professional performance norms. See *Strickland*, 104 S. Ct. at 2076, for a list of these courts. To date, there does not appear to be any evidence that the number of ineffectiveness claims has increased in such jurisdictions. See generally Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1370-80 (1984); Comment, *supra* note 62, at 1-17.

The number of federal cases filed by state prisoners has, overall, dramatically increased in the last forty years. However, the number of filings under 28 U.S.C. § 2254, the federal habeas corpus statute, has not significantly increased in the last fifteen years. See D. WILKES, JR., *FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF* 17-25 (1983) (1984 Supp.).

85. It has been suggested that many claims are filed because defendants are incapable of distinguishing between facts that support such claims and those that clearly do not. See *United States ex rel. Cooper v. Reincke*, 333 F.2d 608, 614 (2d Cir. 1963), *cert. denied*, 379 U.S. 909 (1964). Assuming that this is true, mandatory guidelines could have the effect of reducing the number of meritless claims filed as a result of ignorance of the law. It is conceded that guidelines would probably not reduce the filing of claims known by defendants to be patently frivolous. See, e.g., *Diggs v. Welch*, 148 F.2d 667, 669-70 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 889 (1945).

their legal rights, in hopes of discouraging them from exercising such rights, runs counter to our society's concept of justice.

TOWARD A UNIFORM STANDARD: A MODEST PROPOSAL

Through the years, courts have wrestled with the problem of defining standards for effective assistance of counsel.⁸⁶ Few ever accomplished the goal. Some courts took refuge in simple labels such as "farce,"⁸⁷ "mockery of justice"⁸⁸ and "reasonable competence."⁸⁹ Yet the "tests" suffered from the same deficiency: each lacked uniform, articulable standards of what constitutes effective assistance of counsel.⁹⁰ Consequently, courts were forced to apply ad hoc standards on a case-by-case basis. At best, judges defined standards according to their personal concepts of effective representation.⁹¹ At worst, they were guided by intuition.⁹² Thus a diversity of "tests" developed through the years, with each test based on largely subjective judgments.⁹³ In response to this diversity, a number of courts created checklists which provided objective criteria.⁹⁴ However, this failed to lead to the development and adoption of a uniform standard on either the federal or state level.

The problems inherent in a lack of uniform standards did not go unnoticed by the legal profession. After years of research and discussion, the American Bar Association approved the *Standards for the Administration of Criminal Justice* (the "*Criminal Justice Stan-*

86. See, e.g., *Trapnell v. United States*, 725 F.2d 149 (2d Cir. 1983); *Beavers v. Balkom*, 636 F.2d 114 (5th Cir. 1981); *Knight v. State*, 394 So. 2d 997 (Fla. 1981).

87. *Frاند v. United States*, 301 F.2d 102, 103 (10th Cir. 1962).

88. *United States v. Tribote*, 297 F.2d 598, 601 (2d Cir. 1961).

89. *United States v. Easter*, 539 F.2d 663, 665-66 (8th Cir.), *cert. denied*, 434 U.S. 844 (1976).

90. See *Tague*, *supra* note 78, at 109; Comment, *supra* note 62, at 25-48.

91. See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325, 1329-30 (9th Cir.) (en banc) ("whether counsel's acts or omissions were within the range of competence required of criminal attorneys . . . involves a measure of personal judgment [by the judge reviewing the case]"), *cert. denied*, 440 U.S. 974 (1978); *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971).

92. See *Tague*, *supra* note 78, at 126 n.99.

93. See, e.g., Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 820 (1976) ("[W]ords like 'customary' or 'reasonable,' . . . are themselves empty vessels into which content must be poured. Such standards beg the question of what is customary or reasonable for a lawyer to do prior to or at arraignment, plea bargaining, trial, or sentencing.").

94. For analysis of the "enumeration approach" see Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 251-52 (1979); Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 203-11 (1984); *Tague*, *supra* note 78, at 127-48; Comment, *supra* note 62, at 48-53.

dards") in 1973.⁹⁵ The *Criminal Justice Standards* were designed as procedural guidelines⁹⁶ and were never intended to set standards for the practice of criminal law.⁹⁷ They are simply a set of rules that reflected a near-consensus of what the law should be.⁹⁸

Of specific relevance to the issue of effective assistance are the *Standards Relating to the Defense Function* (the "*Defense Function Standards*").⁹⁹ The *Defense Function Standards* consist of specific procedural guidelines for representation,¹⁰⁰ as well as a discussion of ethical considerations involved.¹⁰¹ Though the drafters never intended that these standards be used as a test for ineffective assistance of counsel,¹⁰² the standards are of value in defining practical uniform guidelines.

In apparent disregard of the drafters' intent, courts have used the *Defense Function Standards* in resolving ineffectiveness claims. Some courts have adopted several specific standards as governing law,¹⁰³ while others have used the standards as general guidelines without adopting them.¹⁰⁴ The standards have been useful to some

95. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) [hereinafter cited as CRIMINAL JUSTICE STANDARDS]. See Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255, 258-60 (1974). The standards consist of twenty-one chapters, each of which relates to a specific stage in a criminal proceeding (e.g., trial by jury) or a function of particular participants in the criminal justice system (e.g., the defense function). A number of the standards will be discussed in this article.

96. Jameson, *supra* note 95, at 255.

97. See Erickson, *supra* note 94, at 243; see also Address by Leon Jaworski, ABA President, Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice (Feb. 10-14, 1972) (Baton Rouge, La.) (reprinted in 57 F.R.D. 229, 266 (1973)).

98. See Day, *Appellate Court Use of the American Bar Association Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 415, 420 (1975).

99. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (2d ed. 1980) [hereinafter cited as DEFENSE FUNCTION STANDARDS].

100. See, e.g., DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-3.6, 4-3.8, 4-4.1.

101. *Id.* at §§ 4-3.5, 4-3.9.

102. [These] standard[s are] intended as a guide for honorable professional conduct and performance, not . . . as criteria for the judicial evaluation of alleged misconduct of counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Id. at § 4-1.1(f).

103. *United States v. DeCoster*, 487 F.2d 1197, 1204 n.25 (D.C. Cir. 1973) ("they are certainly relevant guideposts"); *State v. Perez*, 98 Idaho 181, 183, 579 P.2d 127, 129 (1978) (§ 4-4.1); *State v. Thomas*, 305 Minn. 513, 516, 232 N.W.2d 766, 768 (1975) (§§ 4-7.8, 4-7.9); *Baxter v. Ross*, 523 S.W.2d 930, 932-38 (Tenn. 1975) (used standards as guidelines).

104. *Brescia v. New Jersey*, 417 U.S. 921, 924 n.3 (1973) (Marshall, J., dissenting); *United States v. Wycoff*, 545 F.2d 679, 682-83 n.3 (9th Cir.), *cert. denied*, 429 U.S. 1105

courts in their attempts to give substance to their previously adopted "tests."¹⁰⁵ However, still other courts have rejected the standards out of hand,¹⁰⁶ suggesting that they are irrelevant in determining the issue of counsel's effectiveness.¹⁰⁷

I am not suggesting that the *Defense Function Standards* should be adopted *in toto* as criteria for judging the effectiveness of representation. There are at least three reasons for this. First, the standards were never intended for this use¹⁰⁸ but, rather, were drafted to articulate the professional conduct expected of criminal defense attorneys.¹⁰⁹ Consequently, their focus is as much on ethical considerations as on performance standards.¹¹⁰

This fact leads to the next reason: the *Defense Function Standards* encompass considerations that are almost wholly ethical in nature with little or no relevance to effective representation. For example, the specific standards dealing with referral services,¹¹¹ prohibited referrals¹¹² and fees,¹¹³ while laudable, have little significance as criteria for evaluating the effectiveness of representation.¹¹⁴

(1977); *Thomas v. Wyrick*, 535 F.2d 407, 413 n.6 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *Wolfs v. Britton*, 509 F.2d 304, 310 (8th Cir. 1975); *Moore v. United States*, 432 F.2d 730, 741 (3d Cir. 1970) (Van Dusen, J., concurring); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

105. *Kimbrough v. State*, 352 So. 2d 925, 928 (Fla. App. 1977) (referred to § 4-4.1; "reasonable effectiveness" test); *Rodgers v. State*, 580 S.W.2d 510, 512 (Mo. 1978) (referred to § 4-6.1(b); "fair trial" test); *State v. Bartlett*, 199 Neb. 471, 474-75, 259 N.W.2d 917, 920 (1977) (referred to § 4-3.6; "ordinary training and skill" test).

106. *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); *Thornton v. United States*, 357 A.2d 429, 437 n.14 (D.C. App.), *cert. denied*, 429 U.S. 1024 (1976).

107. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (specifically rejecting *Defense Function Standards* as establishing constitutional requirements for effective assistance); *People v. Craig*, 47 Ill. App. 3d 242, 249, 361 N.E.2d 736, 742 (1977) (stating that the *Defense Function Standards* have been rejected by a "majority of the federal circuits"); *Schoonover v. State*, 218 Kan. 377, 385, 543 P.2d 881, 887, *cert. denied*, 424 U.S. 944 (1975); *Commonwealth v. Saferian*, 366 Mass. 89, 99 n.15, 315 N.E.2d 878, 884 n.15 (1974).

108. See *supra* note 102 and accompanying text.

109. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-1.1(f).

110. A "Table of Parallel Provisions in Standards Relating to the Prosecution Function and the Defense Function and the ABA Code of Professional Responsibility" was provided in an early draft of the *Defense Function Standards*. See ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION 19-21 (Approved Draft 1971).

111. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-2.2.

112. *Id.* at § 4-2.3.

113. *Id.* at § 4-3.3.

114. For example, the DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-3.3(a), address the issue of determination of an appropriate fee. Various criteria are suggested. The ethical considerations and disciplinary rules found in Canon 2 of the *Model Code of*

Finally, the *Defense Function Standards* suffer from the same deficiency as the common-law "tests": they do not provide a uniform scheme. This is especially troubling because, since *Strickland*, attorney conduct must meet the constitutional standard articulated in that case.¹¹⁵ Uniform criteria must be designed so that courts may apply the *Strickland* test in an objective, consistent manner.¹¹⁶ The statutory scheme found in the appendix to this article (the "Guidelines")¹¹⁷ is an attempt to fulfill this directive.

The Guidelines attempt to give workable definition to the *Strickland* standard. Their content is primarily derived from the *Criminal Justice Standards* and court decisions. They are presented in a statutory format amenable to easy legislative adoption. While the Guidelines may not be the ultimate solution to the problem of ineffective assistance, they may be useful as a framework for giving substance to an ambiguous standard.

Professional Responsibility provide counsel with significantly more guidance in this area. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980) [hereinafter cited as MODEL CODE]. The same can be said for Rule 1.5 of the *Model Rules of Professional Conduct*. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983) [hereinafter cited as MODEL RULES].

The ABA adopted the *Model Code* in 1969. Since then, virtually every state has adopted some version of the *Model Code*. The *Model Code* consists of the basic Canons; the Disciplinary Rules (DR's), which establish a level of conduct beneath which an attorney cannot fall without being subject to discipline; and the Ethical Considerations (EC's), which are goals toward which an attorney should aspire.

The *Model Rules* were adopted by the ABA in 1983, to replace the *Code*. At this time, several states have adopted the *Model Rules* in whole or in part, and most states are considering the *Model Rules*. Unlike the *Code*, the *Model Rules* are presented in a re-statement format.

115. See *Strickland*, 104 S. Ct. at 2064-70.

116. One judge wisely observed that:

[given] the complexities of each case and the constant call for professional discretion, it would be a misguided endeavor to engrave in stone any rules for attorney performance. Nonetheless, preserving flexibility is not incompatible with establishing minimum components of effective assistance . . .

United States v. DeCoster, 624 F.2d 196, 276-77 (D.C. Cir. 1979) (Bazelon, J., dissenting). This idea is not a novel one. Well before the birth of our Constitution, Montesquieu expressed this ideal very succinctly:

Those who have a genius sufficient to enable them to give laws to their own . . . ought to be particularly attentive to the manner of forming them. Thy style ought to be concise. Thy style should also be plain and simple, a direct expression being always better understood than an indirect one.

. . . .

The laws ought not be subtle; they are designated for people of common understanding, not as an art of logic.

C. MONTESQUIEU, *THE SPIRIT OF LAWS* 376 (Calif. Press 1977).

117. See *infra* appendix.

ANALYSIS OF THE GUIDELINES

*I. Preamble*¹¹⁸

A preamble, or "policy section," is a useful device for explaining the purpose of a legislative scheme.¹¹⁹ A preamble achieves two valuable and interrelated goals. First, it explains the legislation's rationale and intended goals.¹²⁰ Second, it can be used by courts as a tool for interpretation and application of the statute to particular disputes.¹²¹ Although a preamble is seldom conclusive on these issues,¹²² courts tend to give it great weight.¹²³

*II. Substantive Guidelines*A. Subsection II(1):¹²⁴ Establishment of the Attorney-Client Relationship

In a criminal case, counsel's first duty is to contact his client, advise him of his legal rights and begin the process of investigation. This section of the Guidelines addresses these duties.

Subsection II(1)(a) of the Guidelines incorporates many of the substantive duties found in the *Defense Function Standards*.¹²⁵

118. See *infra* appendix at § I.

119. See *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177 (D.D.C. 1978), *aff'd*, 612 F.2d 586 (D.C. Cir. 1979); *Hayen v. County of Ogle*, 116 Ill. App. 3d 80, 84, 451 N.E.2d 612, 615 (1983) ("preamble" and "policy section" are often synonymous), *aff'd*, 101 Ill. 2d 413, 463 N.E.2d 124 (1984); 1A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20.03 (4th ed. 1985).

120. *Price v. Forrest*, 173 U.S. 410, 427 (1899) ("a preamble has been said to be a key to open the understanding of a statute We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute.").

121. See, e.g., *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 563 (1892). If there is no ambiguity, a preamble may not be used to enlarge or control the scope or language of the statute. See, e.g., *Yazoo & Miss. Valley R.R. v. Thomas*, 132 U.S. 174, 188 (1889); *National Wildlife Fed'n v. Marsh*, 721 F.2d 767, 773-74 (11th Cir. 1983). As Justice Holmes observed, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

122. See, e.g., *McColleston v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982). However, absent expressed legislative intent to the contrary, legal terms in a statute are presumed to have been used in their legal sense. See, e.g., *Bradley v. United States*, 410 U.S. 605, 609 (1973); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 51-55 (1911) (common-law meaning); *Thorn v. Browne*, 257 F. 519, 523 (8th Cir. 1919) (statutes, previously interpreted by courts, possess "a well-understood meaning and legal effect").

123. See, e.g., *Lehigh & New England Ry. v. Interstate Commerce Comm'n*, 540 F.2d 71 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *State v. Anderson*, 81 Wash. 2d 234, 501 P.2d 184 (1972).

124. See *infra* appendix at § II(1).

125. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-3.2(a), 4-3.1(a). Section 4-3.1(a) provides: "As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all

Counsel has a duty to act as quickly as possible to contact his client and ascertain the client's position. This is a vital stage of representation because it is the stage at which the attorney-client relationship is first formed. If counsel fails to create a satisfactory relationship at a time when his client is particularly vulnerable, the client may harbor feelings of anger and mistrust which continue throughout the case. Additionally, this is in many cases the time when the client is able to give the most accurate recitation of the facts, thus aiding counsel's investigation of the case. A failure to interview the client at this stage may well make counsel's task more difficult and jeopardize his client's case.

To fulfill his duty, counsel must establish a bond of trust with the client. Explanations of the need for full disclosure and the confidential nature of the attorney-client privilege are essential to this task. Without such explanations, a client is forced to speculate as to the consequences of his honest recitation of the facts. Human nature and common experience tend to suggest that, when an individual is placed in this position, trust falls victim to suspicion, ignorance and insecurity. Counsel has a duty to take affirmative steps to avoid this eventuality.

A conflict between an attorney's interests and those of his client may violate professional ethics¹²⁶ and create a basis for an allegation of ineffective assistance.¹²⁷ Subsection II(1)(b) of the Guide-

legally relevant information without seeking to influence the direction of the client's responses."

Section 4-3.2(a) provides:

Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and he should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

126. MODEL CODE, *supra* note 114, at Canon 5 ("a lawyer should exercise independent professional judgment on behalf of a client"); see also Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978).

127. See *Strickland*, 104 S. Ct. at 2064; *United States v. Cronin*, 104 S. Ct. 2039, 2046-47 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481-87 (1978).

The *Defense Function Standards* echo these conclusions:

(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her.

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict

lines establishes a standard of conduct that addresses this issue. This standard mandates counsel's withdrawal whenever a conflict exists. While it may be argued, with some merit, that not every conflict is of such significance as to require withdrawal, it is better practice to err on the side of caution. This protects the defendant's rights and eliminates any danger that the conflict will later haunt counsel in the form of an allegation of ineffective assistance.

Counsel must determine whether a conflict exists at the earliest stage of representation. By addressing the issue at the preliminary stage, counsel is in the best position to prevent any damage to the defendant. It is far better to have other counsel appointed or retained at this juncture than at a later stage of the case. The duty to inquire as to a possible conflict, and to act appropriately if one is discovered, continues throughout the life of the case.

The period immediately following arrest is a time at which a defendant, unaware of his legal rights, may damage his case by, for example, making incriminating statements. Subsections II(1)(c) and II(1)(d) of the Guidelines, by mandating that the attorney keep his client fully informed, reduce the possibility of such an occurrence.¹²⁸ The duties set out in these provisions are grounded in established methods of effective representation¹²⁹ and legal ethics¹³⁰ and are reflected in a number of the *Defense Function Standards*.¹³¹ Complete information is vital to the defendant, who must make all decisions of consequence other than certain decisions concerning strategy and tactics.¹³² A reasoned client decision requires as much information and professional advice as is available. Counsel,

of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:

- (i) no conflict is likely to develop;
- (ii) the several defendants give an informed consent to such multiple representation; and
- (iii) the consent is made a matter of judicial record.

DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-3.5(a), 4-3.5(b).

128. See *infra* appendix at §§ II(1)(c), II(1)(d). Failure to do so may amount to ineffective assistance. See, e.g., *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981) (failure to advise client about charges and defenses).

129. See A. AMSTERDAM, B. SEGAL & M. MILLER, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* §§ 35-37 (1967); F. BAILEY & H. ROTHBLATT, *FUNDAMENTALS OF CRIMINAL ADVOCACY* §§ 51-73 (1974).

130. See *MODEL CODE*, *supra* note 114, at EC 7-8.

131. E.g., *DEFENSE FUNCTION STANDARDS*, *supra* note 99, at §§ 4-3.6, 4-3.8.

132. See *infra* appendix at §§ II(3)(a), II(3)(b); *MODEL CODE*, *supra* note 114, at EC 7-7; see also *Jones v. Barnes*, 436 U.S. 745 (1983); *United States v. Moore*, 554 F.2d 1086, 1902 (D.C. Cir. 1976) (counsel's duty to discuss tactical decisions with client).

the repository of these commodities, has a duty to provide them to his client.

Section II(1) of the Guidelines¹³³ acknowledges that clients need to know that their cases are receiving sufficient attention. Too often an attorney is preoccupied by the purely legal aspects of his client's case. Though the quality of legal representation may be excellent, the client, uninformed about the progress of the case, may become hostile and distrustful. Such a client is difficult to represent. An attorney who fulfills his section II(1) duties avoids this problem by keeping his client fully informed and by establishing an attorney-client relationship based on confidence and trust.

B. Subsection II(2):¹³⁴ Pretrial Investigation and Preparation

Counsel's duty to adequately investigate and prepare his client's defense rests on constitutional¹³⁵ and ethical grounds.¹³⁶ Inadequacies at this stage of representation often lead to successful postconviction challenges based on ineffective assistance.¹³⁷ Pretrial conduct that gives rise to allegations of ineffective assistance includes counsel's inadequacies concerning investigation,¹³⁸ preparation,¹³⁹ pretrial motions¹⁴⁰ and guilty pleas.¹⁴¹ Since the quality of

133. See *infra* appendix at § II(1).

134. See *infra* appendix at § II(2).

135. See Note, *The Constitutional Mandate of Effective Assistance of Counsel: The Duty to Investigate*, 6 *HOSTRA L. REV.* 245 (1977).

136. See *MODEL CODE*, *supra* note 114, at Canon 6, DR 6-101(1), (2), (3).

137. See generally Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 *MO. L. REV.* 483, 485 (1976); Note, *Ineffectiveness of Counsel—The Duty to Make a Reasonable Pretrial Investigation*, 40 *MO. L. REV.* 369 (1975).

138. *Bell v. Georgia*, 554 F.2d 1360 (5th Cir. 1977) (failure to investigate alibi defense); *Burgess v. Griffin*, 585 F. Supp. 1564 (W.D.N.C.) (failure to research law concerning known defenses), *aff'd*, 743 F.2d 1064 (4th Cir. 1984); *United States ex rel. Lee v. Rowe*, 446 F. Supp. 1039 (N.D. Ill. 1978) (total lack of pretrial investigation); *United States ex rel. Mitchell v. La Vallee*, 417 F. Supp. 154 (S.D.N.Y.) (failure to investigate material witness and defendant's background), *aff'd mem.*, 551 F.2d 301 (2d Cir. 1976).

139. *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976); *United States ex rel. Owens v. Mack*, 383 F. Supp. 1328 (E.D. Pa. 1974).

140. *LiPuma v. Commissioner, Dep't of Corrections*, 560 F.2d 84 (2d Cir.) (failure to file motion to suppress evidence), *cert. denied*, 434 U.S. 861 (1977); *Mason v. Balcom*, 531 F.2d 717 (4th Cir.) (numerous errors committed by counsel prior to client's plea of guilty), *reh'g denied*, 534 F.2d 1407 (4th Cir. 1976); *Commonwealth v. McLaughlin*, 239 Pa. Super. 324, 361 A.2d 706 (1976) (failure to file motion to suppress confession). A number of courts have held that the failure to file pretrial motions is a tactical decision which, therefore, does not constitute ineffective assistance. *United States v. Brown*, 739 F.2d 1136 (7th Cir.), *cert. denied*, 105 S. Ct. 331 (1984); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984); *Fornash v. Marshall*, 686 F.2d 1179 (6th Cir. 1982), *cert. denied*, 460 U.S. 1042, *reh'g denied*, 461 U.S. 940 (1983); *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982).

141. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Burgess v. Griffin*, 585 F. Supp. 1564

representation at this stage has a direct impact on adequacy of representation at trial or during the entry of a plea, clear standards of conduct are vital to protection of the defendant's rights.

Subsection II(2)(a)¹⁴² defines the conduct required of counsel during the investigative stage of the case. It mirrors the duties described in the *Defense Function Standards*.¹⁴³ It should be noted that the duty to investigate continues regardless of whether the defendant desires to plead guilty. This is significant because it is not uncommon for an attorney to forego all but very cursory investigation once a client expresses such a desire. Yet, without the benefit of adequate investigation by counsel, a defendant is unable to make an informed decision concerning a plea.

The overwhelming majority of criminal cases are disposed of without trial. Some are dismissed, others are diverted to an agency or program outside the formal structure of the criminal justice system and still others culminate in a plea of guilty.¹⁴⁴ Subsections II(2)(b) and II(2)(c) detail counsel's responsibilities when he is confronted with the option of disposing of the case without trial.¹⁴⁵

After pretrial investigation, it may become clear to counsel that there is a high probability that his client will be convicted at trial. At that point, counsel must inform his client of this and explain whatever options are available. Depending on the circumstances, these options might include sending the case to a pretrial diversion program, entering a plea to a reduced charge or pleading guilty to the original charge. Though counsel has a duty to give his client the benefit of his expertise, the decision to pursue or not pursue these options rests solely with the client.

(W.D.N.C.), *aff'd*, 743 F.2d 1064 (4th Cir. 1984). *But see* Parker v. North Carolina, 397 U.S. 790 (1970) (plea not open to attack if counsel's erroneous advice was within the range of required competence).

142. See *infra* appendix at § II(2)(a).

143. The *Defense Function Standards* provide:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-4.1.

144. Guilty pleas outnumber trials by about ten to one. See B. BOLAND & B. FORST, *THE PREVALENCE OF GUILTY PLEAS* (Bureau of Justice Statistics 1984); see also Brady v. United States, 397 U.S. 742, 752 (1970).

145. See *infra* appendix at §§ II(2)(b), II(2)(c); see also DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-6.1.

Counsel in this situation must make certain that his client possesses the facts needed for an informed decision. This can be accomplished only if counsel provides his client with a clear understanding of the potential options and the consequences that may flow from them.¹⁴⁶ For example, though counsel is not expected to be able to estimate with accuracy the length of the sentence his client might receive upon entry of a plea, he does have the duty to give his client his informed, professional judgment.¹⁴⁷

The American Bar Foundation in 1978 surveyed trial judges' opinions about the quality of the lawyers practicing before them.¹⁴⁸ The most frequently cited area of incompetence was pretrial preparation.¹⁴⁹ However, trial court judges rarely become involved in the evaluation of counsel's conduct at this stage—although, arguably, they have a duty to do so.¹⁵⁰ Subsection II(2)(c) of the Guidelines mandates trial judge involvement at the stage of the case where counsel's ineffectiveness has the best chance of being discovered and, possibly, remedied.¹⁵¹

Injecting the trial judge into the evaluation process at this stage of the proceeding is rare, yet not unknown.¹⁵² It has been dis-

146. *People v. Dell*, 60 A.D.2d 18, 400 N.Y.S.2d 236 (1977); *Commonwealth v. Napper*, 254 Pa. Super. 54, 385 A.2d 521 (1978).

147. *United States v. Crook*, 607 F.2d 670 (5th Cir.), *reh'g denied*, 609 F.2d 1009 (5th Cir. 1979) (en banc). It must be noted that counsel's advice concerning the plea and its consequences does not necessarily constitute ineffective assistance if it turns out to be inaccurate. *United States v. Cronin*, 104 S. Ct. 2039 (1984); *Hill v. Lockhart*, 731 F.2d 568 (8th Cir.) (inaccurate advice, prior to entry of guilty plea, concerning defendant's parole eligibility), *aff'd on reh'g*, 764 F.2d 1279 (8th Cir. 1984) (en banc), *aff'd*, 106 S. Ct. 366 (1985); *Clark & Byrns, Hill v. Lockhart: Ineffective Assistance of Counsel: The State's Position*, 23 AM. CRIM. L. REV. 83 (1985); *Lassiter, Hill v. Lockhart: Ineffective Assistance of Counsel: The Defendant's Position*, 23 AM. CRIM. L. REV. 73 (1985).

148. *Maddi, Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUND. RESEARCH J. 105. The survey included over 1400 federal and state judges of general jurisdiction. Though the responding judges reflected a broad range of geographic, demographic and other variables, the factors used in evaluating advocacy competence were relatively uniform. *Id.* at 130-37.

149. *Id.* at 125.

150. *See Wood v. Georgia*, 450 U.S. 261, 272 (1981); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Glasser v. United States*, 315 U.S. 60, 71 (1942); *Powell v. Alabama*, 287 U.S. 45, 52 (1932). In some cases, a trial judge's failure to protect a defendant's right to effective assistance may require reversal of the conviction. *Cuyler v. Sullivan*, 446 U.S. 335, 345-48 (1980) (failure to inquire about an apparent conflict of interest).

151. *See infra* appendix at § II(2)(c).

152. *See* Judicial Conference of the United States, *Report: January 13, 1965*, reprinted in 36 F.R.D. 277, 338 (1965), for a "checklist," provided by The United States District Court for the District of Maryland, which describes specific duties counsel must fulfill in preparing for trial. Several courts have suggested adoption of similar lists of duties. *See, e.g., United States v. DeCoster*, 624 F.2d 196, 205-10 (D.C. Cir. 1976); *Coles v. Peyton*,

cussed by many commentators.¹⁵³ Because there is little evidence to suggest that the judiciary, acting on its own, will increase its participation in this area, these duties must be imposed by statute.

This subsection gives to the trial judge the responsibility of monitoring counsel's preparation prior to the entry of a plea of guilty or nolo contendere, or the beginning of a trial. Such preparation will be detailed in an affidavit to be submitted to the judge by counsel. The standards to be applied in evaluating counsel's affidavit will be those set out in subsections II(2)(a) and II(2)(b) of the Guidelines.¹⁵⁴ This allows the judge to compare counsel's preparation with minimum standards of preparedness.

The evaluation process may take a number of forms. However, it is suggested that the most efficient and effective vehicle is a pre-trial conference.¹⁵⁵ The conference between counsel and the trial judge would follow a preset agenda¹⁵⁶ which might include discussion of the substantive factual and legal issues, the prosecution's case, possible defenses, the status of discovery and potential evidentiary problems. All of these matters will, of course, be addressed in counsel's affidavit. However, as noted in subsection II(2),¹⁵⁷ counsel will not be required to reveal anything which might jeopardize his client's rights or violate the attorney-client privilege. At the conclusion of the conference, the trial judge will be able to determine whether counsel adequately discharged his duties during the pretrial stage of the proceedings. If the judge determines that counsel has fulfilled his duties, the case moves on to the next stage.

What are the consequences of a finding that counsel's preparation has fallen below the minimum standard? Depending on the seriousness of counsel's deficiencies, the judge has a number of options. In the case of shortcomings that are remediable, the judge may advise or direct counsel concerning appropriate remedies.

389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); *Nelson v. State*, 274 So. 2d 256, 258 (Fla. Dist. Ct. App. 1973); *State v. Ercolino*, 65 N.J. Super. 20, 27-28, 166 A.2d 797, 803 (1961).

153. See, e.g., Bazelon, *supra* note 93, at 830-31; Finer, *supra* note 62, at 1115; Levine, *Toward Competent Counsel*, 13 RUTGERS L.J. 227, 253-68 (1982); Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 649-65 (1980).

154. See *infra* appendix at §§ II(2)(a), II(2)(b); *supra* notes 142-45 and accompanying text.

155. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL §§ 11-5.3, 11-5.4 (2d ed. 1980).

156. For a sample agenda, see Schwarzer, *supra* note 153, at 655-58.

157. See *infra* appendix at § II(2).

This is a common and accepted practice among the judiciary.¹⁵⁸ The judge can then monitor the case to confirm that the remedial measures have been taken.

More dramatic options will have to be considered if it becomes clear that the shortcomings are so serious that they create the risk of ineffective assistance. In such cases, the judge should advise the defendant of this conclusion and explain that he has the right to retain other counsel or, if indigent, to have counsel appointed for him by the court. If the defendant refuses to act on the court's advice, at least two options are available to the court: (1) the court may require that current counsel be assisted by a qualified trial attorney chosen by current counsel or the court,¹⁵⁹ or (2) the court may remove ineffective counsel and appoint new counsel or require the defendant to retain different counsel. While this drastic step may appear to violate a defendant's right to retain counsel of his choice,¹⁶⁰ the right is not absolute.¹⁶¹ Courts have forced the substitution of counsel where conduct was so disruptive or incompetent as to impede the orderly administration of justice¹⁶² or where conduct jeopardized the client's right to effective representation.¹⁶³ Though barring counsel from participation in the case may raise an additional issue,¹⁶⁴ the court's primary responsibility is to protect

158. See Maddi, *supra* note 148, at 129.

159. See *United States v. Bubar*, 567 F.2d 192, 203-04 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977).

160. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (defendant with financial means has right to reasonable opportunity to secure counsel of choice); *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1977).

Substitution of counsel may present less of a constitutional problem where the defendant is represented by appointed counsel. See *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984) (indigent defendant does not have right to be represented by counsel of his choice).

161. Although the sixth amendment right to counsel is absolute, an accused's right to counsel of his choice is not. *United States v. Magee*, 741 F.2d 93 (5th Cir. 1984); *United States v. James*, 708 F.2d 40 (2d Cir. 1983).

162. *United States v. Dinitz*, 538 F.2d 1214 (5th Cir.) (counsel barred from case due to his repeated acts of courtroom misconduct), *reh'g denied*, 542 F.2d 1174 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1104 (1977).

163. *United States v. Rogers*, 471 F. Supp. 847, 855-56 (E.D.N.Y.) (counsel disqualified by trial judge for incompetence), *aff'd sub nom. United States v. Raife*, 607 F.2d 1000 (2d Cir. 1979); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. App. 1978) ("Gross incompetence . . . of counsel . . . may justify the court's removal of an attorney, even over the defendant's objection.").

164. Membership in the bar of a federal court is a constitutionally protected right. Membership cannot be withdrawn—even if it is limited to participation in one case—without affording the attorney a hearing that meets the requirements of procedural due process. *In re Ruffalo*, 390 U.S. 544, *reh'g denied*, 391 U.S. 961 (1968); *Theard v. United States*, 354 U.S. 278 (1957); *Selling v. Radford*, 243 U.S. 46 (1916). The right of a non-member attorney to appear *pro hac vice* is determined by the law of the forum. See, e.g., *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam).

the defendant's right to effective assistance of counsel.

C. Subsection II(3):¹⁶⁵ Conduct of Litigation

A trial takes place because the defendant has exhausted or rejected all other methods for resolving the case; it is a last resort. Because the defendant's fate rests largely in the hands of counsel, it is not surprising that so many claims of ineffective assistance focus on counsel's conduct of litigation. Subsection II(3) of the Guidelines articulates a set of duties by which such claims may be judged.¹⁶⁶

1. *The Decisionmaking Process*

The first provision in this section addresses allocation of decisionmaking power in the conduct of litigation. Subsection II(3)(a)¹⁶⁷ is modeled after a similar provision in the *Defense Function Standards*.¹⁶⁸ Decisionmaking powers that relate to trial strategy and tactics rest solely with counsel.¹⁶⁹ Those that concern the three decisions enumerated below rest exclusively with the defendant.¹⁷⁰ This division of power is grounded in the realities of trial practice and in constitutional considerations.

The trial of a criminal case is not amenable to scientific laws or

165. See *infra* appendix at § II(3).

166. *Id.*

167. See *infra* appendix at § II(3)(a).

168. The DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-5.2(a) provide:

Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in his or her own behalf.

169. "Trial strategy and tactics" refer to actions taken by counsel in the process of litigation to maximize the potential for a successful outcome. They are decisions that require counsel to make discretionary judgments. Courts are hesitant to "second guess" the legitimacy of such decisions. See, e.g., *United States ex rel. Huckstead v. Greer*, 737 F.2d 673 (7th Cir. 1984); *Riley v. Wyrick*, 712 F.2d 382 (8th Cir. 1983). Even if, in hindsight, the decisions were wrong, courts seldom find that they constitute ineffective assistance as long as they were the product of an informed, reasoned decisionmaking process. See, e.g., *Parker v. North Carolina*, 397 U.S. 790 (1970); *Shraier v. United States*, 736 F.2d 817 (1st Cir. 1984); *Griffin v. Wainwright*, 588 F. Supp. 1549 (M.D. Fla. 1984), *aff'd in part, remanded in part*, 760 F.2d 1505 (11th Cir. 1985). *But see Kellogg v. Scurr*, 741 F.2d 1099 (8th Cir. 1984) (simply labeling the action at issue "trial strategy" does not automatically immunize an attorney from a charge of ineffective assistance).

170. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (reaffirms defendant's right to make these decisions, citing MODEL RULES, *supra* note 114, at Rule 1.2(a)); *Harris v. New York*, 401 U.S. 222, 225 (1971) (defendant's right to testify); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (decision as to what plea to enter); *Patton v. United States*, 281 U.S. 276, 298 (1930) (decision concerning waiver of jury trial).

formulas. It is more analogous to the artistic process in that while the trial takes place within the framework of well-defined laws and procedures, the end product is, essentially, the "creation" of the defense attorney. Whether he is successful depends primarily on the facts at his disposal and the artfulness of his presentation of these facts. Thus counsel must be free, using his informed judgment, to present his case in the manner which he believes will most benefit his client. To allow a client to control this process would undercut the essential role of the trial attorney.¹⁷¹ Although in many cases the defendant is bound by counsel's tactical decisions¹⁷² even when they are wrong,¹⁷³ the nature of the trial process demands this allocation of decisionmaking power.¹⁷⁴

It must be noted that counsel's decisionmaking process is not intended to take place in a vacuum. He has a duty to consult with his client before acting. However, if the decision concerns tactics and strategy, the ultimate decision rests with counsel. Three decisions are deemed so significant that only the defendant may make them. The first of these concerns the nature of the plea. Though an accused is entitled to the assistance of counsel in deciding the nature of his plea,¹⁷⁵ the decision is the defendant's.¹⁷⁶ The second decision is whether to waive the right to a trial by jury.¹⁷⁷ The final decision is whether the defendant will testify in his own behalf.¹⁷⁸

171. The primary function of a defense attorney is to act as an objective, informed advocate. To fulfill this function, counsel must be allowed free reign to make judgments concerning trial strategy. Allowing a defendant to limit this power would make defense counsel superfluous in the trial process. See MODEL CODE, *supra* note 114, at DR 7-101(B)(1) (right to exercise professional judgment).

172. See, e.g., *Parker v. North Carolina*, 397 U.S. 790 (1970); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983).

173. See, e.g., *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965) (defendant bound by counsel's tactical decision to forego an objection available on constitutional grounds).

174. See MODEL CODE, *supra* note 114, at EC 7-7 ("the authority to make [such] decisions is exclusively that of the client, and if made within the framework of the law, such decisions are binding on his lawyer"). But see *Id.* at DR 7-101(B)(1) ("In his representation of a client, a lawyer may . . . [w]here permissible exercise his professional judgment to waive or fail to assert a right or position of his client.").

175. *Williams v. Kaiser*, 323 U.S. 471 (1945); see also ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 14-1.3(a) (2d ed. 1980) [hereinafter cited as GUILTY PLEA STANDARDS].

176. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); see also GUILTY PLEA STANDARDS, *supra* note 175, at §§ 14-1.5, 14-3.2.

177. *Patton v. United States*, 281 U.S. 276, 298 (1930); see also ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 15-1.2 (2d ed. 1980).

178. As noted in *Harris v. New York*, 401 U.S. 222, 225 (1971), a defendant has the right to testify. This right is acknowledged in the DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-5.2(a), and MODEL CODE, *supra* note 114, at EC 7-7, 7-8.

All of these decisions are critical, and all will have a direct and dramatic impact on the defendant. Consequently, he must have the power and the responsibility to make these decisions.

There is one qualification, however, that must be met before the defendant may be armed with this decisionmaking power—a qualification fraught with significant ethical and constitutional considerations. The defendant must be mentally competent to make these important decisions.

It is well established that a defendant who suffers from a significant mental impairment cannot be forced to enter a plea¹⁷⁹ or stand trial,¹⁸⁰ and cannot be executed.¹⁸¹ These laws apply when a significant mental impairment severely limits a defendant's ability to understand and effectively participate in the proceedings.¹⁸² Such cases are relatively easy to resolve. However, what is counsel's responsibility in the decisionmaking process when his client has a mental, emotional or intellectual impairment that is *not* so significant as to make him legally incompetent to stand trial, but *is* of such a degree as to make him, in counsel's opinion, incompetent to make the decisions discussed above? Though the problem is not uncommon, there are very few detailed rules to guide counsel in resolving this issue. Counsel may, however, look to the American Bar Association *Code of Professional Responsibility* (the "Code") for some general guidance.¹⁸³

Canon 7 of the *Code* mandates that "a lawyer should represent a client zealously within the bounds of the law."¹⁸⁴ Ethical Considerations 7-11¹⁸⁵ and 7-12¹⁸⁶ discuss counsel's responsibilities to-

179. *Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981); *Spikes v. United States*, 633 F.2d 144 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981).

180. *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955).

181. This principle of law is well established in all state jurisdictions by either statutory or common law. See *Sollesbee v. Balkcom*, 339 U.S. 9, 14-26 (1950) (Frankfurter, J., dissenting); *Gray v. Lucas*, 710 F.2d 1048, 1053 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237 (1983). However, whether constitutional "due process bars the execution of an insane person . . . is an open question which the Supreme Court of the United States has not decided. . . ." *Welch v. Beto*, 355 F.2d 1016, 1019 (5th Cir. 1966). See *Gray*, 710 F.2d at 1053-56; see also Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980); Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979).

182. See, e.g., *Jackson v. Indiana*, 406 U.S. 712 (1972); *Dusky v. United States*, 362 U.S. 402 (1960).

183. See generally MODEL CODE, *supra* note 114, at Canon 7.

184. *Id.*

185. There is no counterpart to EC 7-11 in the *Model Rules of Professional Conduct*. See MODEL RULES, *supra* note 114.

186. There is no counterpart to EC 7-12 in the *Model Rules of Professional Conduct*. See *Id.* at Rule 1-14 (Code Comparison).

ward a client who is mentally deficient or disabled. However, the *Code* lacks specific guidelines to be followed in such cases. Ethical Consideration 7-11 simply states that counsel's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client . . . or the nature of a particular proceeding. Examples include the representation of . . . an incompetent."¹⁸⁷ Ethical Consideration 7-12 suggests that counsel may, at times, "be compelled in court proceedings to make decisions on behalf of the client" and in such instances counsel should "consider all circumstances" and act to "safeguard and advance the interests of the client."¹⁸⁸ It is obvious that these broad dictates fail to resolve the legal issue at hand.

Though the issue is fraught with constitutional concerns, it is the intent of the Guidelines to allow counsel to liberally interpret and apply these ethical provisions in resolving conflicts relating to the decisionmaking process. In "borderline" situations, counsel must exercise informed judgment to save his client from making a decision the consequences of which may be damaging and irreparable.¹⁸⁹

Total agreement between counsel and client concerning the decisionmaking process is an ideal to be sought, but disagreements in this context are not uncommon. If such a conflict is not resolved, an unsuccessful defendant may use it as a ground for an allegation

187. The *Model Code* does not define the term "incompetent." This is significant in that this term has a variety of meanings in the context of civil and criminal law. See, e.g., *Anderson v. State*, 54 Ariz. 387, 96 P.2d 281 (1939) (discussion of terms such as "incompetent," "incapable" and "lunacy"); *In re Beverly*, 342 So. 2d 481, 484-86 (Fla. 1977) (discussion of concept of "mental illness"); *State ex rel Leeb v. Wilson*, 27 Ohio App. 2d 1, 272 N.E.2d 363 (1971) ("legal" insanity versus "medical" insanity); see also Hagel, *Representing the Mentally Disabled Criminal Defendant*, 27 AM. JUR. MODEL TRIALS 8-23 (1980).

188. EC 7-12 concludes that "obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent." MODEL CODE, *supra* note 114, at EC 7-12. This statement appears to directly contradict other provisions of EC 7-12.

These Ethical Considerations place counsel in a position where no matter what action he takes he may violate the *Model Code* and deprive his client of effective assistance. It is suggested that he rely on the provisions of DR 7-101(B)(1) when faced with such a dilemma: "In his representation of a client, a lawyer may . . . [w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." MODEL CODE, *supra* note 114, at DR 7-101(B)(1). The sad fact remains that counsel may have to face an allegation of ineffective assistance in order to know whether an appellate court agrees that reliance on this provision is justified.

189. See Mazor, *Power and Responsibility in the Attorney-Client Relationship*, 20 STAN. L. REV. 1120 (1968).

of ineffective assistance.¹⁹⁰ Therefore, the best interests of both client and counsel demand resolution of the conflict before the case continues. Subsection II(3)(b) of the Guidelines suggests procedures for conflict resolution.¹⁹¹

When a conflict arises, counsel should attempt to resolve it by discussing the matter with his client. An accurate record should be made of these discussions. The Guidelines suggest the minimum content of this record. The record will, in the event of an allegation of ineffective assistance, assist the court in determining the truth of the allegation. If the conflict is resolved by discussion then the case will proceed. If it is not, counsel must take additional steps toward its resolution.

If the conflict is so significant that it undermines counsel's ability to render effective assistance, he must take steps to remove himself from the case.¹⁹² Prior to doing this, counsel must discuss the matter with his client and advise him of his right to seek other counsel. The substance of this discussion must be recorded. If the client decides to seek other counsel, counsel must inform the trial judge of this decision.

Once the court is made aware of the conflict, it should conduct an inquiry to determine if bona fide grounds for a change of counsel exist.¹⁹³ Whether counsel is retained or appointed should be irrelevant to the decision.¹⁹⁴ If the court determines that the con-

190. See, e.g., *United States ex rel. Pugach v. Mancusi*, 310 F. Supp. 691 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 1073 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971). But see *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.) (a difference of opinion with respect to trial tactics does not constitute ineffective assistance); *reh'g denied sub nom. Dondich v. United States*, 454 U.S. 1127 (1981); *United States ex rel. Curtis v. Illinois*, 521 F.2d 717, 719 (7th Cir.) (defendant by refusing to cooperate with his attorney may constructively waive his right to challenge his representation on ground of ineffective assistance), *cert. denied*, 423 U.S. 1023 (1975). Accord *Williams v. United States*, 295 A.2d 503 (D.C. App. 1972).

191. See *infra* appendix at § II(3)(b). This section reflects the language and intent of the DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-5.2(c):

If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, the lawyer's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

192. See MODEL CODE, *supra* note 114, at Canon 5.

193. *United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973); *United States v. Calabro*, 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); see also ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-2.5 (2d ed. 1980) [hereinafter cited as TRIAL JUDGE STANDARDS] (judge's duty to respect attorney-client relationship).

194. *McQueen v. Swenson*, 498 F.2d 207, 217 n.14 (8th Cir. 1974); *Monroe v. United States*, 389 A.2d 811, 819-20 (D.C. App.), *cert. denied*, 439 U.S. 1006 (1978).

flict jeopardizes the defendant's right to effective assistance, it should allow counsel to withdraw. The defendant can then retain new counsel. If he is unable to do so, the court should appoint counsel for him.¹⁹⁵

2. Duties at Trial

Over the years, various proposals have been proffered to delineate the proper scope of counsel's duties at trial.¹⁹⁶ Since so many of counsel's actions are based on strategic and tactical considerations, these proposals have fallen short of their goal. The following provisions of the Guidelines are premised on the acknowledgement that specific duties may very well be impossible to delineate.

Subsection II(3)(c) articulates, in rather broad terms, counsel's duties during the trial process.¹⁹⁷ Most of the duties reflect normative conduct as described in the *Defense Function Standards*.¹⁹⁸ Each of the seven provisions deals with trial behavior that is frequently the subject of allegations of ineffective assistance.¹⁹⁹

The goals of this subsection are three-fold. First, it informs the defendant of the behavior he has a right to expect from his attorney. Second, it provides counsel with a set of duties that define the scope of his responsibilities to his client at trial. Finally, it provides both trial and appellate courts with uniform criteria for use in adjudicating ineffective assistance claims.

a. Courtroom Decorum

The first of these duties concerns counsel's decorum when interacting with the trial judge, opposing counsel, witnesses and ju-

195. *Cuyler v. Sullivan*, 446 U.S. 335, 345-48 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 484-86 (1978); *Wilson v. Morris*, 724 F.2d 591 (7th Cir.), *cert. denied*, 104 S. Ct. 2357 (1984).

196. Levine, *supra* note 153, at 227; Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497 (1981); Comment, *The Standard for Effective Assistance of Counsel in Pennsylvania—An Ineffective Method of Ensuring Competent Defense Representation*, 86 DICK L. REV. 41 (1981).

197. See *infra* appendix at § II(3)(c).

198. DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-7.1-4-7.10.

199. The Guidelines do not attempt to describe specifically every potential act or omission that could be the basis of such an allegation. The intent of this subsection is to categorically define counsel's duties so that courts, with the assistance of precedent, the preamble and other sources, will be able to resolve these issues with some degree of objectivity and uniformity. See *Dixon v. United States*, 465 U.S. 482 (1984); *Kordel v. United States*, 335 U.S. 345, 349 (1948) (a statute must be interpreted so as not to defeat its purpose "by creating exceptions from or loopholes in it").

rors.²⁰⁰ It addresses two concerns, one ethical, the other pragmatic. Counsel, as an officer of the court, has an ethical duty to conduct himself within the bounds of appropriate behavior.²⁰¹ Though what is "appropriate" may differ somewhat according to local practice, the concept is generally defined by the *Code*,²⁰² the *Defense Function Standards*,²⁰³ and common law.²⁰⁴ Violation of this duty may, of course, be grounds for a disciplinary proceeding.

Inappropriate conduct may have consequences other than those that accompany a violation of professional ethics—it may adversely affect the client's case. One such consequence might be the barring of counsel from the courtroom.²⁰⁵ Furthermore, there is evidence which suggests that counsel's conduct influences a jury's perception of the merits of a case.²⁰⁶ Thus counsel's offensive or inappropriate conduct may have a significant negative impact on the trier of fact. Counsel's conduct may in fact be so egregious that it constitutes ineffective assistance.²⁰⁷

200. See *infra* appendix at § II(3)(c)(i); see also DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-7.2, 4-7.3.

201. The *Model Code* addresses this issue in a number of Ethical Considerations. See MODEL CODE, *supra* note 114, at EC 7-36 to EC 7-39. It also defines specific duties and prohibitions in the Disciplinary Rules. See *Id.* at DR 7-106 to DR 7-109. The *Model Rules* contain similar provisions. See MODEL RULES, *supra* note 114, at Rules 3.1-3.6.

202. See MODEL CODE, *supra* note 114, at DR 7-102.

203. DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-7.1 to 4-7.3.

204. See, e.g., *Sacher v. United States*, 343 U.S. 1, 9 (1952); *Hanley v. Condrey*, 467 F.2d 697, 699-700 (2d Cir. 1972); *Cherry Creek Nat'l Bank v. Fidelity & Casualty Co.*, 207 A.D. 787, 790-91, 202 N.Y.S. 611, 614 (1924).

205. Courts have inherent authority to deal with an attorney's courtroom misconduct. See *Arizona v. Washington*, 434 U.S. 497 (1978); *Ex parte Bradley*, 74 U.S. 364 (1868); *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); see also *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976) (trial judge has affirmative duty to maintain proper standards of representation in his court); TRIAL JUDGE STANDARDS, *supra* note 193, at § 6-3.3 (judge's use of his powers to maintain order).

206. See F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* §§ 7.1-8.19 (2d ed. 1985); F. LANE, *GOLDSTEIN TRIAL TECHNIQUE* §§ 9.49-9.62 (3d ed. 1984); Costopoulos, *Persuasion in the Courtroom*, 10 DUQ. L. REV. 384, 397-402 (1972); Hayes, *Applying Persuasion Techniques in Trial Proceedings*, 24 S.C.L. REV. 380 (1972).

207. See, e.g., *Wilson v. Mintzes*, 733 F.2d 424, 425-27 nn.1, 2 (6th Cir.) (argument between defense counsel and judge; hostile comments in presence of jury), *vacated*, 105 S. Ct. 317 (1984); *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984) (sleeping through substantial portions of the trial); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974) (unjustifiable trial tactics; failure to raise available defenses); *Hudspeth v. McDonald*, 120 F.2d 962, 966-68 (10th Cir.) (intoxication at trial), *cert. denied*, 314 U.S. 617 (1941); *People v. Jenkins*, 297 N.W.2d 706, 707 (Mich. App. 1980) (Counsel left courtroom during voir dire and prosecution's closing argument; conducted cross-examination damaging to defendant; told defendant he could not testify, plead to lesser charge or present wit-

b. Evidence and Defenses

The next duty concerns counsel's responsibility to proffer relevant evidence and raise valid defenses.²⁰⁸ This duty goes to the very heart of the trial process. There may, of course, be tactical considerations which justify not offering certain evidence or raising certain defenses. If counsel, for example, reasonably believes that a piece of evidence or a defense, though arguably relevant, might be detrimental to the presentation of the defense, his decision not to introduce it does not necessarily constitute ineffective assistance.²⁰⁹ This is true even if, judging by hindsight, counsel was wrong.²¹⁰ However, an unjustified failure to introduce relevant evidence or raise valid defenses may amount to ineffective assistance.²¹¹

c. Examination of Witnesses and Jurors

The third duty set out in the Guidelines concerns the examination of witnesses and prospective jurors.²¹² This duty is not absolute.²¹³ It must be interpreted relative to counsel's strategy in presenting his case. If counsel's decision to limit or forego examination of a witness or prospective juror is due to reasonable tactical

nesses. "Rarely does the trial record so graphically depict a defense counsel falling short of the standard as in the instant case.").

208. See *infra* appendix at § II(3)(c)(ii).

209. See *Fornash v. Marshall*, 686 F.2d 1179 (6th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *Poole v. United States*, 438 F.2d 325 (8th Cir. 1971).

210. *Shraiar v. United States*, 736 F.2d 817, 818 (1st Cir. 1984); *Griffin v. Wainwright*, 588 F. Supp. 1549 (M.D. Fla. 1984), *aff'd in part, remanded in part*, 760 F.2d 1505 (11th Cir. 1985).

211. See *Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978) (lack of mental capacity); *Bell v. Georgia*, 554 F.2d 1360 (5th Cir. 1977) (alibi defense); *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967) (insanity defense); see also *Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir.) (quoting *Von Maltke v. Gillies*, 332 U.S. 708, 721 (1948)), *cert. denied*, 375 U.S. 832 (1963):

Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the salutary reason that "[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."

See *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984) (for tactical decisions to constitute ineffective assistance they must be so ill-chosen as to render the trial fundamentally unfair), *cert. denied*, 105 S. Ct. 940 (1985); *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1978) (if the trial strategy is unreasonable, relative to the facts of the case, its implementation constitutes ineffective assistance).

212. See *infra* appendix at § II(3)(c)(iii).

213. *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) (examination of witnesses is a tactical decision left to the discretion of defense counsel); *Charles v. Foltz*, 741 F.2d 834 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 970 (1985).

considerations, it is unlikely that this decision will later be deemed ineffective assistance.²¹⁴ Unless such a justification is present, however, failure to adequately examine a prospective juror or witness may constitute ineffective assistance.²¹⁵

d. Defendant's Testimony

Defendants have the right to testify in their own behalf.²¹⁶ As stated in the Guidelines,²¹⁷ counsel has a duty to assist his client in the realization of that right. However, counsel's responsibilities in this regard are subject to constitutional, ethical and tactical considerations.

The first consideration, constitutional in nature, involves the protection afforded the defendant against self-incrimination.²¹⁸ If he testifies in his own behalf he waives this protection.²¹⁹ On the other hand, a failure to testify may adversely affect his case. Though the prosecutor cannot directly comment on the defendant's failure to testify,²²⁰ judges and juries often perceive the defendant's silence as suggesting guilt.²²¹ Counsel must explain these factors to his client so the client can make an informed decision.

This duty to advise²²² raises a number of issues of professional ethics regarding the client's desire to testify. The most troublesome of these concerns counsel's duty when a defendant expresses

214. C. TESSMER, CRIMINAL TRIAL STRATEGY 95 (1968).

215. *United States v. Cronin*, 466 U.S. 648 (1984); *Davis v. Alaska*, 415 U.S. 308, 318 (1974); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *King v. Beto*, 305 F. Supp. 636, 637 (S.D. Tex. 1969), *aff'd*, 429 F.2d 221 (5th Cir. 1970), *cert. denied*, 401 U.S. 936 (1971); *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1st Dist. 1978) (failed to call a single witness); *People v. Schulman*, 299 Ill. 125, 132 N.E. 530 (1921).

216. *Harris v. New York*, 401 U.S. 222, 225 (1971).

217. See *infra* appendix at § II(3)(c)(iv).

218. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (general discussion of privilege); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege applicable to defendants in state prosecutions).

219. *Harrison v. United States*, 392 U.S. 219 (1968) (waiver by taking the stand).

220. *Frontaine v. California*, 390 U.S. 593 (1968); *Griffin v. California*, 380 U.S. 609 (1965). But see *United States v. Hastings*, 461 U.S. 499 (1983) (in certain situations, the prosecutor's comment on defendant's failure to testify may be harmless error); *Lockett v. Ohio*, 438 U.S. 586 (1978).

221. *Ullmann v. United States*, 350 U.S. 422, 426 (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.").

222. See MODEL CODE, *supra* note 114, at EC 7-8 ("A lawyer should advise his client of the possible effect of each legal alternative He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions."); see also MODEL RULES, *supra* note 114, at Rule 2.1 (advisor), Rule 1.2(a) (scope of representation).

a desire to give perjured testimony.²²³ On one hand, counsel must preserve the confidences and secrets of his client²²⁴ and zealously represent him within the bounds of the law.²²⁵ On the other hand, counsel is prohibited from knowingly using perjured testimony.²²⁶ The ultimate question, of course, is how to fulfill both obligations without undercutting the defendant's case. This issue has been debated for years.²²⁷ Though commentators have suggested a number of solutions,²²⁸ the *Defense Function Standards* present an approach which arguably protects both the interests of the client and the professional integrity of counsel.²²⁹

The final consideration in this area is tactical. It arises in situa-

223. See generally Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

224. MODEL CODE, *supra* note 114, at Canon 4, DR 4-101; see also MODEL RULES, *supra* note 114, at Rule 1.6. See generally Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976). See *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (informing court of client's perjury constitutes ineffective assistance).

225. See MODEL CODE, *supra* note 114, at Canon 7, DR 7-101, 7-102; see also MODEL RULES, *supra* note 114, at Rules 1.1, 1.2, 1.3.

226. See MODEL CODE, *supra* note 114, at DR 7-102(A)(4) ("In his representation of a client, a lawyer shall not . . . knowingly use perjured testimony or false evidence."). But see DR 7-102(B)(1) (duty of attorney when he knows that his client "perpetrated a fraud upon a person or tribunal"; attorney cannot act if "the information is protected as a privileged communication"). See also MODEL RULES, *supra* note 114, at Rule 1.2 (though the rule impliedly addresses this issue, it fails to resolve it); DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-7.5 (presentation of evidence).

227. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Brazil, *Unanticipated Client Perjury and Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979). Courts have struggled with this issue as well. See, e.g., *Lowery v. Cardwell*, 575 F.2d 727, 730-32 (9th Cir. 1978) (Hufstедler, J., concurring) (due process and ineffective assistance analysis); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-22 (3d Cir. 1977) (due process analysis).

228. See M. FREEDMAN, *supra* note 227, at 27-41; Brazil, *supra* note 227, at 601-50; Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and His Client*, 59 DEN. L.J. 75 (1981); FREEDMAN, *supra* note 223, at 1475-78; Wolfram, *supra* note 223, at 842-66. This problem has plagued the criminal justice system since the founding of the republic. Recently, the Supreme Court resolved much of the uncertainty regarding the appropriate limits of counsel's behavior. In *Nix v. Whiteside*, 106 S. Ct. 988 (1986), the Court held that "an attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct [in this case, perjury]." *Id.* at 998. However, the Court observed that, as previously stated in this article, "we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct." *Id.* at 994.

229. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-7.7:

(a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true

tions where potential perjury by the defendant is not an issue. What is counsel's duty when the client demands that he be allowed to testify even though counsel strenuously advises against it? This problem should be dealt with by applying the provisions of the Guidelines concerning such conflicts,²³⁰ as well as by referring to the applicable provisions of the *Code*²³¹ and the *Defense Function Standards*.²³² In the final analysis, counsel fulfills his duty by giving his client the benefit of his expertise. If the client fails to follow counsel's advice, then he must bear the consequences.²³³

e. Motions and Objections

One of the primary functions of trial counsel is to offer appropriate motions and objections. Their use is vital to protection of the client's rights. Consequently, the Guidelines create an affirmative duty to use these devices when appropriate.²³⁴

Several courts have found ineffective assistance where counsel

but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.

(b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

230. See *infra* appendix at §§ II(3)(a), II(3)(b).

231. MODEL CODE, *supra* note 114, at DR 7-101(B)(1), EC 7-5, 7-6, 7-8.

232. DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-5.2.

233. See *United States v. Knox*, 396 U.S. 77 (1969) (right to testify does not include right to commit perjury); *Brown v. United States*, 356 U.S. 148 (waiver of privilege against self-incrimination; defendant subject to punishment for contempt for refusing to answer relevant questions), *reh'g denied*, 356 U.S. 948 (1958); *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976) (counsel's tactical decision not to call defendant as witness, contrary to defendant's wishes, does not constitute ineffective assistance).

234. See *infra* appendix at § II(3)(c)(v).

failed to make appropriate motions and objections. Failure to move for suppression of a confession²³⁵ or the fruits of an illegal search,²³⁶ for example, has been found to constitute ineffective assistance. Failure to proffer motions concerning other issues has similarly been regarded as ineffective assistance.²³⁷ Courts have treated the failure to raise objections in the same way.²³⁸ However, such failures, standing alone, do not necessarily constitute ineffective assistance. They must be considered in context with the facts of the case and counsel's trial strategy.

Motions and objections are matters that rest solely within counsel's discretion. They may be made only after consideration of tactical and legal issues.²³⁹ Consequently, the decision to forego making motions and objections might be based on reasonable trial tactics.²⁴⁰ When this is the case, courts are hesitant to "second guess" the decision.²⁴¹ Therefore, counsel's duty to raise appropriate motions and objections is not absolute. He fulfills it by making decisions, based upon strategic concerns, that will further a sound defense.

f. Effective Argument

Subsection II(3)(c)(vi) defines counsel's duty in regard to opening and closing statements.²⁴² It does not make such statements

235. See, e.g., *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983); *United States v. Friel*, 588 F. Supp. 1173 (E.D. Pa. 1984); *Lufkins v. Solem*, 554 F. Supp. 988 (D.S.D.), *aff'd*, 716 F.2d 532 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 2667 (1984).

236. See, e.g., *Moran v. Morris*, 478 F. Supp. 145 (C.D. Cal. 1979), *vacated*, 665 F.2d 900 (9th Cir. 1981); *People v. Sanin*, 84 A.D.2d 681, 446 N.Y.S.2d 636 (1981).

237. See, e.g., *Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979) (failure to move for mistrial); *Ganger v. Peyton*, 258 F. Supp. 387, 391 (E.D. Va. 1966) (failure to make motions of record to insure reviewability of issues).

238. See, e.g., *Ricalday v. Procunier*, 736 F.2d 203 (5th Cir. 1984) (failure to object to clearly improper jury instructions); *Alston v. Garrison*, 720 F.2d 812 (4th Cir. 1983) (failure to object to prosecutor's comment concerning defendant's silence at time of arrest), *cert. denied*, 104 S. Ct. 3589 (1984); *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967) (failure to object to defendant appearing at trial in jail uniform).

239. *Henry v. Mississippi*, 379 U.S. 443 (1965); *Hester v. United States*, 303 F.2d 47 (10th Cir. 1962).

240. See, e.g., *United States v. Hager*, 505 F.2d 737 (8th Cir. 1974) (counsel wanted to avoid possible impeachment of defendant by prior convictions); *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965) (counsel did not want to risk alienating jury).

241. See *United States v. Payne*, 741 F.2d 887 (7th Cir. 1984); *United States ex rel. Cornitcher v. Rundle*, 285 F. Supp. 625, 628 (E.D. Pa. 1968) ("Counsel are not held to Delphic anticipation of all future decisions that might retroactively affect the case."), *aff'd*, 406 F.2d 773 (3d Cir. 1969).

242. See *infra* appendix at § II(3)(c)(vi).

mandatory,²⁴³ since counsel may have tactical reasons for not making them.²⁴⁴ Counsel's duty, if he decides to make the statements, is to present the relevant facts and legal concepts in an accurate,²⁴⁵ ethical²⁴⁶ and persuasive manner.

g. Preservation of the Record

The final trial duty addressed in the Guidelines relates to the need to protect a client's rights on appeal.²⁴⁷ Counsel, of course, must do this throughout the course of the trial. However, the focus of this subsection is on counsel's duty to preserve, by appropriate procedural devices, all appealable issues. Such devices include, but are not limited to, proper objections,²⁴⁸ motions to strike,²⁴⁹

243. Failure to make an opening statement or closing argument has generally been held not to constitute ineffective assistance. *See Bellavia v. Fogg*, 613 F.2d 369 (2d Cir. 1979) (waiver of opening statement); *People v. Espinoza*, 99 Cal. App. 3d 44, 159 Cal. Rptr. 803 (1979) (waiver of closing argument). *But see United States v. Lespier*, 558 F.2d 624 (1st Cir. 1977) (waiver of opening statement one factor in finding of ineffective assistance); *Mullins v. Evans*, 473 F. Supp. 1321 (D. Colo. 1979) (waiver of closing argument one factor in finding of ineffective assistance), *aff'd*, 622 F.2d 504 (10th Cir. 1980). The *Defense Function Standards* relating to the subject are silent on the issue of whether opening and closing statements are mandatory. *See DEFENSE FUNCTION STANDARDS*, *supra* note 99, at §§ 4-7.4, 4-7.8.

244. *See Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984) (opening statement); *People v. Huffman*, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (1977) (waiver of closing argument).

245. *See Nero v. Blackburn*, 597 F.2d 991 (5th Cir.) (ineffective closing argument), *reh'g denied*, 603 F.2d 860 (5th Cir. 1979); *Oesby v. United States*, 398 A.2d 1, 5 (D.C. App. 1979) ("confusing and unilluminating" opening statement constituted ineffective assistance).

246. *See United States ex rel. Castelberry v. Sielaff*, 446 F. Supp. 451 (N.D. Ill.) (in opening statement, defense counsel accused prosecutor of racism; this, combined with other counsel behavior, constituted ineffective assistance), *reh'g denied*, 446 F. Supp. 455 (1978); *People v. Robinson*, 70 Ill. App. 3d 24, 387 N.E.2d 1114, 1117 (1979) (defense counsel's crude and offensive tone and use of profanity in summation constituted ineffective assistance); *see also MODEL CODE*, *supra* note 114, at DR 7-106(C):

In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

...

(3) Assert his personal knowledge of the facts in issue

(4) Assert his personal opinion as to the justness of a cause

...

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

247. *See infra* appendix at § II(3)(c)(vii).

248. *See United States v. McCoy*, 193 U.S. 593 (1904) (failure to make proper objection waives review of the admissibility of the evidence); *United States v. Bunker*, 532 F.2d 1262, 1264 n.2 (9th Cir. 1976) (in absence of hearsay objection, the point is not preserved on appeal; citing FED. R. EVID. 103(a)(1) (rulings on evidence; effect of erroneous ruling; objection)); *see also* FED. R. CRIM. P. 51.

offers of proof,²⁵⁰ motions for a mistrial,²⁵¹ motion for judgment of acquittal,²⁵² objections to jury instructions,²⁵³ motion for arrest of judgment,²⁵⁴ and motion for a new trial.²⁵⁵ If counsel fails to make an objection or proffer a motion on the record, the issue that could have been the subject of these actions might be waived and, therefore, be unappealable.²⁵⁶ Such a failure may constitute ineffective assistance.²⁵⁷

D. Subsection II(4):²⁵⁸ Duties Concerning Post-trial Proceedings

Counsel's responsibilities to his client usually do not end with the rendering of a verdict of guilty. Though some would disagree with this statement,²⁵⁹ it is suggested that counsel has an affirmative duty to protect a client's rights during the period between the

249. See *United States v. Hutcher*, 622 F.2d 1083, 1087 (2d Cir.) (discusses need for motion to strike; citing FED. R. EVID. 103(a)), *cert. denied*, 449 U.S. 875 (1980).

250. See *Espino v. Kingsville*, 676 F.2d 1075, 1079 (5th Cir. 1982) (dismissed allegations of error because offer of proof was not made; citing FED. R. EVID. 103(a)(2)).

251. See generally *Oregon v. Kennedy*, 456 U.S. 667 (1982); *Arizona v. Washington*, 434 U.S. 497 (1978); *Gori v. United States*, 367 U.S. 364 (1961). See *Nero v. Blackburn*, 597 F.2d 991 (5th Cir.) (counsel's failure to move for mistrial constituted ineffective assistance), *reh'g denied*, 603 F.2d 860 (5th Cir. 1979).

252. See *Palos v. United States*, 416 F.2d 438 (5th Cir. 1969) (failure to make motion waives review), *cert. denied*, 397 U.S. 980 (1970); FED. R. CRIM. P. 29.

253. See FED. R. CRIM. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."). See generally *Engle v. Isaac*, 456 U.S. 107 (1982); *Ricalday v. Procnier*, 736 F.2d 203 (5th Cir. 1984) (failure to object to clearly improper jury instruction constitutes ineffective assistance).

254. See *Rowiette v. United States*, 392 F.2d 437 (10th Cir. 1968) (waiver); FED. R. CRIM. P. 34.

255. See *Goforth v. Dutton*, 409 F.2d 651 (5th Cir. 1969) (counsel's failure to pursue motion for new trial constituted ineffective assistance); FED. R. CRIM. P. 33.

256. See *supra* notes 234-41.

257. See *Perron v. Perrin*, 742 F.2d 669 (1st Cir. 1984) (counsel has duty to preserve record for appeal); *Arrowood v. Clusen*, 732 F.2d 1364 (7th Cir. 1984) (failure to request jury instruction); *Pinnell v. Cauthron*, 540 F.2d 938 (8th Cir. 1976) (failure to object to admissibility of defendant's pretrial statements); *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2d Cir. 1967) (failure to move to set aside guilty verdict in order to perfect appeal); *Ganger v. Peyton*, 258 F. Supp. 387 (E.D. Va. 1966) (failure to make motions on record to insure review on appeal); *Commonwealth v. Cook*, 380 Mass. 314, 403 N.E.2d 363 (1980) (failure to request jury instruction concerning accomplice's testimony); *Commonwealth v. Humphrey*, 473 Pa. 533, 375 A.2d 717 (1977) (failure to move to strike objectionable testimony). But see *Bell v. Lockhart*, 741 F.2d 1105, 1107 (8th Cir. 1984) (failure to move for directed verdict, based on tactical reasoning, did not constitute ineffective assistance).

258. See *infra* appendix at § II(4).

259. See, e.g., *Buxton v. Brown*, 222 Ga. 564, 150 S.E.2d 636 (1966).

rendition of the verdict and sentencing.²⁶⁰ Subsection II(4) addresses this duty.²⁶¹

The protective measures contemplated by this provision include the duty to preserve the client's right of appeal.²⁶² Other, less well-defined duties are also present. Counsel must advise the client regarding the meaning of the verdict, the procedural steps that must be taken prior to sentencing, and the sentencing process. Counsel's duty is to inform his client of his status at that stage of the process and to maintain the status quo until the time of sentencing.

Sentencing is considered a critical stage of the prosecution.²⁶³ The right to assistance of counsel at this stage is vital.²⁶⁴ Counsel must actively participate in order to protect the client's rights in a proceeding that will have a direct impact on his future.²⁶⁵ Subsection II(4)(b) addressed counsel's duties in this process.²⁶⁶

260. Counsel's responsibilities at this stage may be limited by the terms of his retainer or court appointment. It is suggested, however, that counsel may have a professional—versus contractual—responsibility to protect his client's rights at this juncture of the proceedings. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-7.10 ("The trial lawyer's responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the defendant's rights.") ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 18-6.3(a) (2d ed. 1980) [hereinafter cited as SENTENCING STANDARDS] ("The duties of . . . defense attorneys do not cease upon conviction. . . .").

261. See *infra* appendix at § II(4).

262. See *supra* notes 247-57 and accompanying text.

263. *Mempa v. Rhay*, 389 U.S. 128 (1967).

264. *Id.*

265. *Strickland*, 104 S. Ct. at 2064 (counsel's role at a capital sentencing proceeding is comparable to counsel's role at trial); *Carter v. Illinois*, 329 U.S. 173, 178 (1946) (the need for counsel at sentencing may be greater than that at trial); SENTENCING STANDARDS, *supra* note 260, at § 18-6.3(e) ("The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed.").

266. See *infra* appendix at § II(4)(b). This section was drafted to mirror the language and substance of the applicable provisions in the *Defense Function Standards*. See DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-8.1:

(a) The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, the lawyer should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on the lawyer's exploration of employment, educational, and other opportunities made available by community services.

This section emphasizes counsel's dual roles. First, he is a source of information for both the client and the court. More significantly, he is his client's advocate. The provision focuses on the fact that only counsel can protect his client from the consequences of an uninformed or unsympathetic court.²⁶⁷

The standards for effective assistance during the sentencing process have never received the attention accorded to the trial and appellate stages. Various formulations have been suggested,²⁶⁸ but few have been formally adopted by courts.²⁶⁹ However, courts have adjudicated postconviction claims based on allegations of ineffective assistance at sentencing. Most of the claims arise from situations where a defendant was represented by substitute counsel²⁷⁰ or where counsel failed to actively and effectively represent his client's interests.²⁷¹ Other inadequacies have also been deemed ineffective assistance.²⁷² Thus both the defendant and counsel have significant reasons for insuring the adequacy of representation at sentencing.

After sentencing, the defendant's only avenue for relief from the conviction or sentence lies in a postconviction or appellate action. Sentencing may bring to an end trial counsel's representation.

(c) Counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice an appeal.

267. See A. CAMPBELL, LAW OF SENTENCING §§ 102-23 (1978) (defense counsel's role); Feit, "Before Sentence is Pronounced. . . ." *A Guide to Defense Counsel in the Exercise of His Post-Conviction Responsibilities*, 9 CRIM. L. BULL. 140 (1973); Portman, *Defense Lawyer's New Role in the Sentencing Process*, 34 FED. PROBATION 3 (1979).

268. See, e.g., DEFENSE FUNCTION STANDARDS, *supra* note 99, at §§ 4-8.1, 4-8.2; SENTENCING STANDARDS, *supra* note 260, at § 18-6.3; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE GOALS AND STANDARDS REPORT ON CORRECTIONS § 5.18 (1973).

269. See *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973) (referring to various sentencing standards, including those found in the *Defense Function Standards*).

270. See, e.g., *United States v. Lucas*, 513 F.2d 509 (D.C. Cir. 1975); *People v. Ward*, 47 A.D.2d 891, 367 N.Y.S.2d 264 (1975).

271. For cases dealing with failure to present evidence concerning mitigation, see *United States v. Daniels*, 558 F.2d 122 (2d Cir. 1977); *Gadsen v. United States*, 223 F.2d 627 (D.C. Cir. 1955); *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984). See also *People v. Cropper*, 89 Cal. App. 3d 716, 152 Cal. Rptr. 555 (1979) (total failure to present evidence and argument).

272. See, e.g., *United States v. Donn*, 661 F.2d 820 (9th Cir. 1981) (failure to show defendant the presentence report prior to sentencing); *Canary v. Bland*, 583 F.2d 887 (6th Cir. 1978) (counsel failed to protest defendant's sentence as habitual criminal which was based on a prior juvenile court adjudication); *Thomas v. Lockhart*, 378 F.2d 304 (8th Cir. 1984) (counsel failed to investigate defendant's mental condition relative to sentencing alternatives); *Johnson v. Kemp*, 585 F. Supp. 1496 (S.D. Ga. 1984) (failure to present evidence or witnesses; defendant sentenced to death), *vacated*, 759 F.2d 1503 (11th Cir. 1985).

However, regardless of whether counsel withdraws at this point or goes on to represent his client in future proceedings, he has certain responsibilities to his client during the interval between sentencing and filing for review.

Counsel's duties are both informational and prophylactic.²⁷³ First, counsel has a duty to explain to the defendant the meaning and consequences of the conviction and sentence, the substance of available postconviction remedies and his evaluation of their potential for success. If counsel fails to fulfill this duty, by inaction²⁷⁴ or by rendering incorrect advice,²⁷⁵ the defendant may have grounds for a claim of ineffective assistance.

Counsel's other duty is to take all steps necessary to preserve his client's right to appeal. This may take a number of forms. It may be as simple as informing the client of the statutory time limitations for filing an action or providing the client with the proper forms for requesting appointment of counsel, or filing a habeas corpus petition. The danger, of course, is that without counsel's assistance the defendant may, due to ignorance of the law or inaction, effectively waive his rights to postconviction remedies. A waiver resulting from counsel's breach of duty may constitute ineffective assistance.²⁷⁶

273. DEFENSE FUNCTION STANDARDS, *supra* note 99, at § 4-8.2 provide:

- (a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and the defendant's right of appeal. The lawyer should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable result of an appeal. The lawyer should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
- (b) The lawyer should take whatever steps are necessary to protect the defendant's right of appeal.

274. See, e.g., *Martin v. Texas*, 737 F.2d 460 (5th Cir. 1984) (failure to advise indigent defendant of right to have appellate counsel appointed); *Wayne v. Wyrick*, 646 F.2d 1268 (8th Cir. 1981) (failure to perfect an appeal on instructions from defendant); *Thomas v. Zimmerman*, 583 F. Supp. 701 (E.D. Pa. 1984) (failure to file notice of appeal on defendant's request); *Smothermann v. Beto*, 276 F. Supp. 579, 585 (N.D. Tex. 1967) (discusses specific duties of counsel at post-trial stage). *Contra Callahan v. Virginia*, 262 F. Supp. 31 (W.D. Va. 1967) (assistance not inadequate, despite counsel's failure to inform defendant of right to appeal, when defendant was satisfied with outcome).

275. See *Powers v. United States*, 446 F.2d 22 (5th Cir. 1971); *Stewart v. Wainwright*, 309 F. Supp. 1023 (M.D. Fla. 1969).

276. *Wilson v. United States*, 554 F.2d 893 (8th Cir.) (failure to advise defendant of right to petition for writ of certiorari), *cert. denied*, 434 U.S. 849 (1977); *Wynn v. Page*, 369 F.2d 930 (10th Cir. 1966) (failure to inform defendant of right to appeal); *Ingram v. Peyton*, 367 F.2d 933 (4th Cir. 1966) (failure to inform defendant of potentially meritorious grounds for appeal that were known to counsel at the time).

III. Procedural Guidelines

The protection afforded in the substantive Guidelines is meaningless without a procedure for insuring that it is not being denied. It is suggested that the process of review will insure this protection most efficiently. The procedural Guidelines²⁷⁷ attempt to implement the review of ineffective assistance claims in an efficient manner consistent with the standards set out by the Court in *Strickland*.²⁷⁸ These Guidelines do not attempt to address all of the procedural²⁷⁹ and constitutional²⁸⁰ rights that relate to the review process in general. Since they are intended to be incorporated into state and federal legislative schemes, any attempt in this article to tailor them to individual codes would be impossible. This task is left to the individual legislatures.²⁸¹

277. See *infra* appendix at § III.

278. *Strickland*, 104 S. Ct. at 2064-71. Most state constitutions contain right-to-counsel provisions similar to the sixth amendment. See, e.g., OHIO CONST. art. I, § 10 ("In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel."). In interpreting and applying these provisions, some state courts have afforded defendants *more* protection of their right to effective counsel than that found in the sixth amendment as interpreted by federal courts. *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (state constitutional right to counsel in civil cases); *State v. Lane*, 60 Ohio St. 2d 112, 397 N.E.2d 1338 (1979). In such cases, defendants may be better served by alleging violations of their rights to effective counsel under both the state and United States constitutions. In some cases they may obtain relief under the state constitutional provision, and not the sixth amendment, because the burden of proof imposed by the state may be less than that imposed by *Strickland*. This should be taken into consideration by state legislatures drafting or adopting legislation in this area. See *Blue v. State*, 558 P.2d 636, 641 (Alaska 1977) (right to counsel under state constitution accorded broader protection than under sixth amendment).

279. For example, a detailed discussion of procedures such as stays of execution, the record on appeal, release pending appeal, or the transmission of the record are beyond the scope of this article. Development of appropriate procedures, in this regard, would be left to the enacting jurisdiction.

280. For example, a defendant convicted in a state court does not have a constitutional right to appellate review of the conviction. *Jones v. Barnes*, 463 U.S. 745 (1983); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). However, if a state creates a statutory or common-law right to review, defendants must be accorded certain due process and equal protection guarantees. See, e.g., *Mayer v. Chicago*, 404 U.S. 189 (1971) (right of indigent to free transcript of record); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel); *Burns v. Ohio*, 360 U.S. 252 (1959) (waiver of filing fee if indigent). These guarantees are also applicable to state postconviction proceedings. *Long v. Iowa*, 385 U.S. 192, 194 (1966); *Lane v. Brown*, 372 U.S. 477, 483-84 (1963); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). Therefore, it is assumed that these rights would be accorded defendants in the proceedings described in the procedural Guidelines. See *infra* appendix at § III(1)(d).

281. Every jurisdiction provides some form of postconviction relief to defendants, based on either statutory or common law. See D. WILKES, *supra* note 84, at §§ 1.1-1.8. Consequently, any jurisdiction adopting these Guidelines would have to harmonize them with existing forms of relief. Standards must also be consistent with federal constitutional principles and the dictates of the Supreme Court. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("It is basic to [the supremacy clause of the United States Constitu-

The procedural Guidelines are comprised of four distinct sections. Each describes a single step in the process of review. The first section defines the jurisdictional scope of review and the remedy.²⁸² Exclusive jurisdiction is given to the court in which the alleged ineffective assistance occurred.²⁸³ The rationale for this two-fold. First, this court is most familiar with the facts contained in the allegation. Second, as a matter of judicial economy, since a large number of such claims initially filed in appellate courts are ultimately remanded for further evidentiary hearings, it seems desirable to confine the initiation of these actions to the court to which they may be remanded.²⁸⁴ An additional benefit may be a reduction in frivolous claims.²⁸⁵

This section defines three additional jurisdictional limitations.

tion] that all conflicting state provisions be without effect.”); *United States v. Butler*, 297 U.S. 1 (1936) (state legislation must conform to United States Constitution and its principles).

These Guidelines reflect much of the language and underlying policy of the 1980 *Uniform Post-Conviction Procedure Act* and its predecessors [hereinafter cited as the *UNIFORM ACT*]. Though only a minority of states have adopted it, the act should be used as a guide in implementing and interpreting the Guidelines. The act’s recommended post-conviction action has been used, with some success, as a forum for litigating ineffectiveness claims. See *State v. Blackburn*, 99 Idaho 222, 579 P.2d 1205 (1978); *Emery v. Fenton*, 266 N.W.2d 6 (Iowa 1978) (Iowa postconviction statute intended as a substitute for habeas corpus); *State v. McBride*, 296 N.W.2d 551 (S.D. 1980) (postconviction action is the proper vehicle for ineffectiveness claims); see also Note, *The Need for an Iowa Post-Conviction Hearing Statute*, 18 *DRAKE L. REV.* 98 (1968); Note, *The Uniform Post-Conviction Procedure Act*, 69 *HARV. L. REV.* 1289 (1956).

282. See *infra* appendix at § III(1).

283. See *UNIFORM ACT*, *supra* note 281, at § 2 (vesting jurisdiction in court of original jurisdiction in habeas corpus cases). This preference is also reflected by the drafters of the ABA Standards. See *ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POSTCONVICTION REMEDIES*, § 22-1.4 (2d ed. 1980) [hereinafter cited as *POST CONVICTION STANDARDS*] (“An action for postconviction relief should be brought in the court in which the applicant’s challenged conviction and sentence was [sic] rendered.”) *Id.* at § 22-1.4(b). This preference has been criticized by some members of the criminal defense bar. See *ABA SECTION OF JUDICIAL ADMINISTRATION, EFFECTIVE STATE POSTCONVICTION REMEDIES—THEIR NATURE AND ESSENTIALITIES* 26 (1958).

284. See *Allen v. State*, 217 N.W.2d 528 (Iowa 1974) (purpose of postconviction remedy is to return to trial courts, for first consideration and possible correction, challenges addressed to their prior actions).

285. A number of courts have suggested that, too often, petitions raise frivolous claims. See, e.g., *Diggs v. Welch*, 148 F.2d 667, 669-700 (D.C. Cir.) (“drafting of petitions for habeas corpus has become a game in many penal institutions”; a petitioner has nothing to lose), *cert. denied*, 325 U.S. 889 (1945); *United States v. Edwards*, 152 F. Supp. 179 (D.D.C.) (many petitions are filed simply because the defendant is disappointed in the results at trial), *aff’d*, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958). It is suggested that due to the exclusive nature of this remedy (§ III(1)(b) of the Guidelines), the limitations as to its reviewability and the prohibition against successive petitions (§ III(3)(e)), petitioners might be less likely to play the “game.” The trial judge is best equipped to dispose of such cases before they move through the appellate levels.

First, the proceeding is limited to allegations of ineffective assistance of counsel. Claims founded on other grounds must be considered in a different proceeding.²⁸⁶ Second, this proceeding is a claimant's exclusive remedy; it replaces other statutory and common-law remedies presently available.²⁸⁷ Yet a claimant will still retain the right to apply for judicial review of the judgment.²⁸⁸ Finally, the action must be initiated within one year of the final judgment. This limitation is intended to deter defendants from filing an action, years after the alleged incident, when it might be difficult to ascertain the true facts.

An action alleging ineffective assistance may be initiated only by a petition for postconviction relief.²⁸⁹ It must be filed in the court having exclusive jurisdiction over such actions. The petition must clearly state: (1) facts identifying the judgment that is the focus of the claim; (2) facts on which the allegation is based; (3) facts describing how the petitioner was prejudiced; and (4) the relief desired. If the petitioner has access to affidavits, records or other evidence supporting the petition, copies must be attached to the petition. When the jurisdictional and pleading requirements have been met, the process of review will begin.

Subsection (2) defines the standard for summary disposition.²⁹⁰ Its substance is based on the two-pronged test described in *Strickland*.²⁹¹ If, after an evaluation of the record, or at the conclusion of an evidentiary hearing, it is clear that the assistance was ineffective according to the *Strickland* requirements, the court may summarily grant appropriate relief. If the court determines that the claim may be described as falling into one of the three specified categories, it may summarily dismiss the petition. However, if there exists a material issue of fact concerning the allegation, the court is precluded from granting summary relief and must grant an

286. The postconviction procedures presently in place would be utilized for the adjudication of claims founded on other grounds.

287. This was the intent of the drafters of the *Uniform Act* and the states that adopted it. See *Coleman v. State*, 633 P.2d 624, 628 (Mont. 1981), *cert. denied*, 455 U.S. 983 (1982); *State v. Jefferson Park Books, Inc.*, 314 N.W.2d 73, 76 (N.D. 1981); *Finklea v. State*, 273 S.C. 157, 255 S.E.2d 447 (1979).

288. See *infra* appendix at § III(3)(e).

289. This provision reflects the language and intent of the *Uniform Act*. See *UNIFORM ACT*, *supra* note 281, at §§ 3, 4; see also *POSTCONVICTION STANDARDS*, *supra* note 283, at Part B.

290. This provision is an integration of *Uniform Act* sections. See *UNIFORM ACT*, *supra* note 281, at §§ 6(a), 9; see also *POSTCONVICTION STANDARDS*, *supra* note 283, at §§ 22-4.4(d), 22-4.5(b).

291. See *Strickland*, 104 S. Ct. at 1064; *supra* notes 47-52 and accompanying text.

evidentiary hearing.²⁹²

The substantive and procedural scope of a hearing is defined in subsection (3).²⁹³ The scope of the hearing shall be limited to the material facts at issue.²⁹⁴ Rules of procedure applicable to civil proceedings will apply. The reception of evidence will be governed by the codified rules of evidence. These requirements accord the petitioner advantages that, historically, have not been available to moving parties in postconviction actions.²⁹⁵

At the conclusion of the hearing, the court must render a decision based on explicit findings of fact and conclusions of law. It may enter an order dismissing the petition or granting appropriate relief.²⁹⁶ The order shall also inform the parties that the judgment is reviewable by the appropriate court. Further, it shall state the time limitations for giving notice of appeal.

The final portion of this subsection defines the limits of the review process.²⁹⁷ The decision of the court is reviewable, but a successive petition based on the same facts will be summarily dismissed.²⁹⁸ These provisions, justified by the need for finality and

292. See UNIFORM ACT, *supra* note 281, at § 9(a) (no summary disposition if "matters of record" show that there is a "genuine issue of fact"); accord POSTCONVICTION STANDARDS, *supra* note 283, at § 22-4.5(b).

293. See *infra* appendix at § III(3).

294. See UNIFORM ACT, *supra* note 281, at § 7; POSTCONVICTION STANDARDS, *supra* note 283, at § 22.4.6.

295. For example, petitioners in federal postconviction actions (28 U.S.C. §§ 2254-55) have, at best, only partial access to the Federal Rules of Evidence. See FED. R. EVID. 1101(d)(3); 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 622 (1981).

296. See UNIFORM ACT, *supra* note 281, at § 11; POSTCONVICTION STANDARDS, *supra* note 283, at §§ 22-4.6(e), 22-4.7.

297. See *infra* appendix at § III(3)(e).

298. It is unquestioned that defendants have a constitutional right of access to courts to litigate alleged violations of federal constitutional rights. *Bounds v. Smith*, 430 U.S. 817 (1977) (access must be adequate, effective and meaningful); *Johnson v. Avery*, 393 U.S. 483 (1969) (access through federal habeas corpus). Although the Constitution may not require states to establish procedures for postconviction or appellate review, once such procedures are established, states may not create unreasonable impediments to their implementation. *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). However, the limitations placed on state court review do not appear unreasonable. Such limitations have existed in federal law for some time. See, e.g., RULES GOVERNING [28 U.S.C.] SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS (1978), § 2254, Rule 9(b), and § 2255, Rule 9(b) (1978). These Rules have survived constitutional challenges. See *Sanders v. United States*, 373 U.S. 1 (1963); *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980). Therefore, since a defendant is granted the right to state appellate court review upon the dismissal of his first petition, the constitutionality of this section does not appear to be in question. A dissatisfied petitioner may still seek review in the federal appellate system.

judicial economy,²⁹⁹ will not handicap petitioners with legitimate claims. It is hoped that their effect will be to drastically reduce the filing of successive, frivolous petitions.

The final subsection, the heart of the procedural Guidelines, defines the burden of proof. Its formulation is based on the holding in *Strickland*.³⁰⁰

The petitioner must clear three hurdles to prove his allegation. The first is the rebuttable presumption "that counsel's conduct [fell] within the wide range of reasonable professional assistance."³⁰¹ The petitioner must overcome the presumption that the alleged ineffective assistance was "sound trial strategy"³⁰²—the most widely accepted defense to, and justification for, alleged misconduct of counsel.³⁰³ Though the Court never explained how it intended this "presumption" to be defined or applied to specific facts, it is not unreasonable to assume that the intended meaning is that applicable in the jurisdiction hearing the case.³⁰⁴ As used in the Guidelines, this evidentiary rule means that the petitioner is confronted, at the outset, with the rebuttable presumption that counsel's assistance was effective.³⁰⁵ As the movant, he has the burden of producing evidence to overcome the presumption.³⁰⁶ However, since he

299. As one judge accurately perceived, "[i]t is evident that the orderly administration of justice requires that a criminal controversy, like any other litigation, [must] some day come to an end." *Commonwealth v. Slavik*, 449 Pa. 424, 432, 297 A.2d 920, 924 (1972).

300. See *supra* notes 47-52 and accompanying text.

301. See *Strickland*, 104 S. Ct. at 2065-66 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .").

302. *Id.* at 2066.

303. To constitute ineffective assistance, a tactical decision must be so ill-chosen as to render the proceeding fundamentally unfair. See *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir. 1984) (citing *Strickland*, 104 S. Ct. at 2067), *reh'g denied*, 105 S. Ct. 1236 (1985).

304. See C. MCCORMICK, EVIDENCE § 349 (E. Cleary 3d ed. 1984); FED. R. EVID. 302.

305. In applying for relief, a defendant must plead certain basic facts. For example, he must allege: (1) that his representative at trial was an attorney; and (2) that the attorney functioned as his legal counsel. Once these basic facts are established, the *Strickland* presumption of effective assistance attaches. Therefore, the defendant's allegations in the application may be construed as judicial admissions that conclusively establish the basic facts underlying the rebuttable presumption of effectiveness. See C. MCCORMICK, *supra* note 304, at §§ 265, 346-49; 4 J. WIGMORE, EVIDENCE §§ 1064-67 (J. Chadbourn rev. ed. 1972). A number of states have specifically incorporated this rule into their codified rules of evidence. See, e.g., OKLA. R. EVID. 302 (1978) ("The basic fact of a presumption may be established in an action by the pleadings . . ."); B. JEFFERSON, CALIFORNIA EVIDENCE BENCHMARK 804 (1972).

306. See C. MCCORMICK, *supra* note 304, at §§ 336-41. The petitioner in a postconviction action bears the burden of rebutting the presumption of correctness of the trial

has the burdens of production and persuasion with respect to the entire hearing, the effect of the presumption of competence may be of little consequence.³⁰⁷ The final word as to the proper application of this presumption must await further clarification by the Supreme Court.

The second hurdle that must be surmounted is proof of an unreasonable deviation from the "performance" element of the *Strickland* test. This is satisfied by proving that counsel failed to perform one or more of the duties described in the substantive Guidelines.³⁰⁸ However, petitioner must also prove that the "failure" was not in fact the result of a reasonable tactical decision.³⁰⁹

Finally, assuming that a violation of the performance standard is established, petitioner must prove a causal relationship between the violation and his alleged injury. More specifically, he must prove that there is a reasonable probability that counsel's deficient performance adversely affected the outcome of the case,³¹⁰ that is, that the outcome would have been different but for counsel's ineffective assistance.³¹¹ Furthermore, the petitioner must overcome the presumption that he was not prejudiced by counsel's performance.³¹² In effect, the petitioner must prove that but for counsel's ineffective assistance he would not have been convicted.³¹³

If the petitioner sustains his burden of proof as to both elements of the test, relief must be granted.³¹⁴ The court will grant whatever

proceedings, as well as the burden of proving the material facts supporting his allegations. See *Patton v. Yount*, 104 S. Ct. 2885 (1984) (28 U.S.C. § 2254 action; presumption of correctness); *Parker v. Parratt*, 662 F.2d 479 (8th Cir. 1981) (28 U.S.C. § 2254 action; petitioner bears burden of proof as to material issues), *cert. denied*, 459 U.S. 846 (1982); *Thomas v. State*, 316 N.W.2d 182 (Iowa Ct. App. 1981) (state postconviction action).

307. The presumption adds nothing to the petitioner's burden of proof as it relates to material issues of fact. This is true because the petitioner already has the burden of production as to the basic facts that, when proven, will bring into being the presumed fact. See *supra* note 305.

308. See *Strickland*, 104 S. Ct. at 2064. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Though the Court specifically refused to recognize or articulate a list of "errors" that would fulfill the burden of proof in this regard, the procedural Guidelines require proof of failure to perform "one or more duties set out in the substantive guidelines." See *infra* appendix at § III(4)(c)(i).

309. *Strickland*, 104 S. Ct. at 2066.

310. *Id.* at 2068.

311. *Id.*

312. See *id.*; *supra* note 71 and accompanying text.

313. 104 S. Ct. at 2068.

314. The defendant must prove his allegations by a preponderance of the evidence. This is a common standard of proof in postconviction actions. See, e.g., *Powers v. United States*, 446 F.2d 22, 24 (5th Cir. 1971); *United States ex rel. Senk v. Brierley*, 363 F.

relief is appropriate for the injury sustained.³¹⁵

CONCLUSION

It has been suggested that the most important constitutional right of an accused is the right to assistance of counsel.³¹⁶ Unless the assistance is effective, this right is of little value. This article attempted to give substance to this right and to provide a procedural device by which its denial can be remedied.

Fulfillment of this goal has been hindered in the past by the lack of any uniform guidelines for the adjudication of ineffectiveness claims. Claimants have been forced to build their own cases on the uncertain and unpredictable foundation of common-law concepts.³¹⁷ The problem, of course, is not new;³¹⁸ neither are the proposed solutions.³¹⁹ Nor is the problem limited to ineffectiveness claims.³²⁰ Yet, flawed as it may be, the best vehicle for the realization of the goal is legislation.

Codification of standards cannot guarantee absolute certainty,³²¹

Supp. 51 (M.D. Pa. 193); *Heck v. State*, 103 Idaho 648, 651 P.2d 582 (1982); *Kelly v. Nix*, 329 N.W.2d 287, 291-92 (Iowa 1983); *In re Jones*, 176 Mont. 412, 578 P.2d 1150 (1978); accord POSTCONVICTION STANDARDS, *supra* note 283, at § 22-4.6(d).

315. The court should have the authority to fashion appropriate remedies.

316. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

317. For discussions of jurisprudential uncertainty, see J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 335 (Lafleur ed. 1948) ("uncertainty is of the very essence of [common law]"); D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983); Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U. L. REV. 195 (1980); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

318. See, e.g., 5 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 235 (1843):

Do you know how they make [the common law]? Just as man makes law for his dog. When your dog does anything you want to break him of, you wait until he does it and then beat him. This is the way you make law for your dog, and this is the way judges make laws for you and me. They won't tell a man beforehand

319. See generally J. BENTHAM, OF LAWS IN GENERAL 156-83 (H. Hart ed. 1970) (codification); D'Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (reduction theory); Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (efficiency as justice).

320. See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM L. REV. 161, 163 (1977).

321. See, e.g., Gilmore, *Commercial Law in the United States: Its Codification and Other Misadventures*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW: SALES, CONSUMER CREDIT, AND SECURED TRANSACTIONS 449 (J. Ziegel & W. Foster eds. 1969);

nor can it insure protection of the rights of defendants.³²² Law is simply a tool to be used to give substance to these ideals.³²³ The ultimate solution to the problem of ineffective assistance lies in the hands of defense attorneys. It is their zeal and commitment which gives meaning to the constitutional guarantee of effective assistance of counsel.

Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Freund, *Prolegomena to a Science of Legislation*, 13 NW. U.L. REV. 264 (1918).

322. At best, the law can mandate an "official behavioral reaction" by defense counsel. See D'Amato, *supra* note 316, at 36-41. Though a statute may command appropriate behavior, it cannot insure compliance. See Radin, *Solving Problems by Statute*, 14 OR. L. REV. 90 (1934).

323. See generally Freund, *supra* note 320.

Appendix

MODEL GUIDELINES FOR THE EFFECTIVE ASSISTANCE OF COUNSEL

I. Preamble

It is the intent of the legislature that the following Model Guidelines be interpreted and applied to achieve the following goals:

- (1) to guarantee that all criminal defendants shall receive effective assistance of counsel at all stages of the adjudicatory process as mandated by the sixth amendment to the Constitution of the United States;
- (2) to articulate concisely the nature and extent of counsel's duty to his client in all stages of the adjudicatory process; and
- (3) to assist courts in the evaluation of claims of ineffective assistance of counsel and to insure that such evaluations are accomplished in a uniform manner based upon uniform criteria.

II. Substantive Guidelines

- (1) Establishment of the Attorney-Client Relationship
 - (a) Once retained or appointed, counsel shall, as soon as is practicable, contact his client, ascertain all relevant facts known to the client, and explain to the client the necessity of full disclosure of all facts relevant to the case.
 - (b) After determining the relevant facts, counsel shall take affirmative steps to determine whether he, his partners or his associates have interests that could in any way conflict with those of the client. If such a conflict of interest exists, counsel shall: (i) immediately disclose this matter to his client, and (ii) take whatever steps are necessary to withdraw from the case and assist his client in retaining other counsel. These duties shall continue throughout the period of counsel's representation of his client.
 - (c) As soon as practicable, counsel shall inform his client of his legal rights and take whatever steps are available promptly to protect them. Further, counsel shall consider, and discuss with his client, all procedural steps which, in good faith, may be taken to protect these rights. These steps shall include, for example, moving for the client's pretrial release, obtaining psychiatric examination of the client when necessary, moving for a

change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

- (d) After determining the relevant facts and law, counsel shall, with complete candor, advise his client concerning all aspects of the case, including counsel's best professional judgment as to the probable outcomes of various courses of action available. Further, counsel shall keep his client informed of developments in the case and progress of defense preparation so that his client is able to make informed decisions concerning his defense.

(2) Pretrial Investigation and Preparation

- (a) Counsel shall promptly and thoroughly investigate all factual and legal issues relevant to the issues of defense, guilt and degree of guilt and penalty. The investigation must include efforts to secure information in the possession of the prosecution, law enforcement authorities and independent witnesses. The duty to investigate exists regardless of the client's admissions or statements to the lawyer regarding guilt or the client's stated desire to plead guilty.
- (b) Whenever appropriate after a full investigation of the case, counsel shall explore the possibility of diverting the case from the criminal process through the use of available community agencies. Whenever counsel concludes, after a thorough investigation of the relevant facts and law, that a conviction is probable, he shall promptly advise his client of his conclusion and seek his consent to engage in plea discussions with the prosecutor, if this course of action appears to be in his client's best interests. Counsel shall secure his client's consent prior to engaging the plea discussions. Further, counsel shall fully inform his client of the content and outcome of such discussions and shall not conclude an agreement with the prosecutor without first securing his client's knowing and voluntary consent.
- (c) Prior to the entry of a plea of guilty or nolo contendere or the commencement of a trial, counsel shall submit to the trial judge his sworn affidavit setting out, in specific detail, all steps taken in the investigation and preparation of the case. However, counsel shall not be required to submit information that could be used to jeopardize his client's rights at trial or during sentencing, or that would violate the attorney-client privilege.

After examination by the trial court judge, the affidavit will be sealed. In no case shall the prosecutor have access to the affidavit before the final disposition of the case at the trial level. The affidavit shall not be included in the official record until the conclusion of the case.

(3) Conduct of Litigation

(a) Certain decisions relating to the conduct of the case are ultimately for the client and others are ultimately for defense counsel. The decisions to be made by the client, who is mentally competent to do so, after full consultation with counsel, are: (i) what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in his own behalf. All other decisions concerning the conduct of the litigation, including strategic and tactical decisions, are to be made by counsel after full consultation with his client.

(b) If counsel and his client disagree on strategic and tactical matters, counsel shall make a record of the circumstances giving rise to the disagreement, his advice concerning it, the reasons underlying his advice and the conclusion reached. The record shall be made in a manner which protects the confidentiality of the attorney-client relationship.

If in the opinion of counsel the disagreement undermines his ability to effectively represent his client, he shall immediately inform his client and explain to him his right to seek other counsel. Counsel shall make a record of this discussion and his client's decision. If the client decides to seek other counsel, counsel shall promptly inform the court of his client's decision, assist his client in retaining new counsel and withdraw from the case. In fulfilling this duty, counsel shall take whatever steps are necessary to protect his client's interests until new counsel is retained or appointed and shall do nothing to jeopardize the confidentiality of the attorney-client relationship.

(c) Counsel's conduct at trial shall effectively protect the best interests of his client. Such conduct shall include:

- (i) appropriate courtroom decorum and respect;
- (ii) introduction of relevant evidence and legitimate defenses;
- (iii) thorough examination of all witnesses and prospective jurors;
- (iv) presentation of his client's testimony when such

- presentation is in the client's best interests and is ethically appropriate;
- (v) presentation of appropriate motions and objections during trial;
- (vi) presentation of appropriate facts and arguments to the trier of fact in both opening and closing statements; and
- (vii) performance of all steps necessary to preserve the record of all potentially appealable issues.

These duties are mandatory except where their fulfillment would be contrary to reasonable strategic and tactical decisions formulated by counsel.

(4) Duties Concerning Post-Trial Proceedings

- (a) Counsel shall take appropriate action, after the verdict and before sentencing, to protect his client's rights.
- (b) Counsel shall be familiar with the sentencing alternatives available to the court and shall investigate the court's exercise of its sentencing discretion. The consequences of the various dispositions available shall be explained fully by counsel to his client.

Counsel shall present to the court any ground which may lead to a disposition favorable to his client. If a presentence report or summary is made available to counsel, he shall verify the information contained in it and shall be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed to counsel, he shall submit to the court and the prosecutor all favorable information relevant to sentencing and, where appropriate, shall be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services. Counsel shall alert his client to his right of allocution, if any, and to the possible dangers of making, in the course of allocution, a judicial confession which might prejudice his appeal.

- (c) After conviction, counsel shall explain to his client the meaning and consequences of the judgment and his right of appeal. He shall also explain to his client the advantages, disadvantages, and probable results of such an appeal. Further, counsel shall take whatever steps are necessary to protect his client's right of appeal.

III. Procedural Guidelines

(1) Procedure for Review

- (a) A person convicted of and sentenced for a crime may, by instituting a proceeding within one year from the date of final judgment, apply for relief under this act on the ground that he was denied effective assistance of counsel.
- (b) A proceeding under this act shall be the exclusive remedy for collaterally challenging the validity of the judgment of conviction or sentencing on the grounds of ineffective assistance of counsel. A petitioner must exhaust his remedies under this act prior to applying for direct review in an appellate court.
- (c) Exclusive jurisdiction to conduct these proceedings is vested in the court that rendered the judgment which is the subject of petitioner's allegations.
- (d) A proceeding under this act is commenced by filing a petition with the clerk of the court of exclusive jurisdiction. No filing fee is required. On request, and upon proper showing, counsel will be appointed for persons unable to obtain counsel.
- (e) The petition must contain: (i) information identifying the judgment complained of and the court that rendered it; (ii) facts which petitioner believes support a finding that such assistance probably undermined the legitimacy of the outcome; and (iv) a statement of the relief requested. Petitioner shall attach to the petition copies of all affidavits, records, and other evidence that support his allegations. The court, for good cause, may allow petitioner to amend his petition prior to the filing of an answer by the state.
- (f) Within thirty days after the filing of the petition, or within any further time the court may allow, the state shall respond by answer or motion. The state may move to dismiss the petition on the ground that it is evident from the petition that the petitioner is not entitled to relief and that no purpose would be served by any further proceeding.
- (g) The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery may be used only to the extent and in the manner allowed by the court.

(2) Summary Disposition

- (a) If it is evident from the pleadings and other matters of

record that the petitioner is not entitled to relief, the court shall enter an order dismissing the petition.

- (b) If it is evident from the pleadings and other matters of record: (i) that the petition is without merit; or (ii) that counsel's failure to exercise reasonable skill and care (as set out in the substantive guidelines of this act) was harmless error, the court shall enter an order dismissing the petition.
- (c) The court shall make, and set out in its order, explicit findings of fact and conclusions of law.
- (d) If, after considering the pleadings and other matters of record, there exists a genuine issue as to any material fact, the court shall grant an evidentiary hearing.

(3) Evidentiary Hearing

- (a) The court shall conduct a hearing in open court and the evidence shall be recorded and preserved in the record of the proceedings.
- (b) The court shall limit the scope of the hearing to a determination of the material facts at issue.
- (c) The hearing shall be conducted pursuant to rules of procedure and evidence applicable to civil proceedings.
- (d) At the conclusion of the hearing, the court shall make explicit findings on material issues of fact and expressly state its conclusions of law relating to each issue presented. The order shall inform the parties of their right to appellate review of the judgment and the time limitations for seeking relief.
- (e) The court's judgment shall be reviewable only by the [appropriate court]. The decision of the [appropriate court] is nonreviewable. A second or successive petition based upon the same facts will be summarily dismissed.

(4) Burden of Proof

- (a) The petitioner shall have the burden of proving the facts alleged by a preponderance of the evidence.
- (b) There exists a rebuttable presumption as to the following: (1) that counsel's assistance was effective; and (2) if it is found that counsel's assistance was ineffective, that the defendant was not prejudiced thereby. Failure to rebut this presumption shall be grounds for dismissal of the petition.
- (c) In order for relief to be granted, petitioner must prove: (i) that counsel failed to perform the duties set out in the substantive guidelines of this act; and (ii) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been dif-

ferent. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome of that proceeding.