Summary of Prosecutors’ Ethical Duties:

James McCauley, Ethics Counsel for the Virginia State Bar, has provided the following summary regarding prosecutors’ ethical duties:

“The Brady Rule and the Prosecutor’s Ethical Duty To Disclose Exculpatory Evidence”

Brady v. Maryland, 373 U.S. 83, 87 (1963), holds that “the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” The duty to disclose such evidence is applicable even though there has been no request by the accused, and the duty encompasses impeachment evidence as well as exculpatory evidence. Under a line of cases beginning with Brady v. Maryland, 373 U.S. 83 (1963), the U.S. Supreme Court has held that prosecutors have an obligation under the due process clauses of the Fifth and 14th Amendments to disclose exculpatory evidence that is material to the guilt or sentencing of a defendant. The duty to disclose also applies to evidence that would tend to impeach the credibility of a government witness whose testimony was central to the government’s case. Giglio v. United States, 405 U.S. 150 (1972). In the context of using a BWC, video footage that is inconsistent with a victim’s or government witness' account or statement, for example, could be impeachment material a prosecutor may be obligated to disclose or make available to the defense. While the disclosure obligations set forth in Brady and Giglio appear to be broad, they are in fact more narrowly construed by the courts. First, the prosecution’s duty to disclose turns on whether the evidence is “material.” The Supreme Court has defined evidence as material “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Cone v. Bell, 129 S.Ct. 1769, 1783 (2009). But see Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006)(The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence).

Moreover, the prosecutor has an affirmative duty to seek out exculpatory evidence because the Commonwealth is charged with the duty to disclose exculpatory evidence regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Kyles v. Whitley, 514 U.S. 419 (1995). See also Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006) (In order to comply with Brady, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police).

Further, as the Supreme Court stated in Kyles v. Whitley, it is the prosecutor alone, not the police, that must assess the “materiality” of the evidence. In a discussion about staffing and resources for Commonwealth’s attorneys, these legal requirements are important as they require the prosecutor to not only to request BWC footage from law enforcement officers, but also personally review the footage, or risk a Brady violation that may cause a continuance, mistrial or reversal of a conviction.
While the obligation to disclose Brady/Giglio material is limited in a number of respects, prosecutors also have an independent ethical obligation with regard to disclosure of exculpatory evidence. Rule 3.8(d) of the Virginia Rules of Professional Conduct requires a prosecutor to “make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court.”

The ethical duty to disclose exculpatory evidence differs from the prosecutor’s duty to disclose Brady/Giglio material in three respects. First, the exculpatory evidence does not have to meet the “materiality” test, and need only negate guilt, mitigate the degree of the offense or reduce the punishment. As the Virginia State Bar’s Standing Committee on Legal Ethics has stated, Rule 3.8(d) “is not limited to ‘material’ evidence, but rather applies to all evidence which has some exculpatory effect on the defendant’s guilt or sentence.” Legal Ethics Opinion 1862.

Second, the prosecutor does not have an affirmative duty to search for exculpatory evidence under the ethics rule. The ethics rule requires only disclosure of evidence the prosecutor knows to be exculpatory, i.e., tends to negate guilt. Third, the ethics rule requires the prosecutor to disclose known exculpatory evidence as soon as practicable, a more demanding standard that leaves little room for delay once evidence comes to a prosecutor’s attention. Virginia Legal Ethics Op. 1862. Impliedly, this means a prosecutor must disclose exculpatory evidence of which the prosecutor has knowledge during plea negotiations, unless the evidence is impeachment only. United States v. Ruiz, 536 U.S. 622 (2002)(A guilty plea waives defendant’s Brady right to disclosure of material impeachment evidence). See also ABA Formal Opinion #09-454 (Timely disclosure means prior to any guilty plea proceeding.)

The Prosecutor’s Ethical Duties of Diligence and Competence

Like all lawyers, Commonwealth’s attorney must practice competently and diligently. The “Scope” section for the Rules of Professional Conduct states that the rules “apply to all lawyers, whether practicing in the private or public sector.” Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines “competent” as including “the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation.” Further pertinent clarification is found in Comment 5 to Rule 1.1; “adequate preparation” is presented as an aspect of the duty of competence. Rule 1.3 requires an attorney to perform his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, “so that each matter can be handled adequately.” Also, Comment 2 to that rule explains that the duty of diligence includes timely performance of the legal work. As expressed in that comment, a “client’s interests often can be adversely affected by the passage of time or the change of conditions.”
Rules 1.1 and 1.3 are without exceptions. There is no language in the Rules of Professional Conduct creating a different standard for prosecutors to act competently and diligently. Nor is it a defense to a bar disciplinary complaint that a lawyer’s failure to act competently and diligently was caused by an overwhelming workload. Lawyers, and their supervisors, are expected to control their workload and not undertake more work than they can handle diligently and competently. This means declining a new representation if the lawyer has reached the maximum capacity under which he or she can represent a client with competence and diligence.

Rule 1.16 (a) of the Rules of Professional Conduct requires that a lawyer not continue or undertake representation if the representation cannot be performed without violating the Rules of Professional Conduct. Comment [1] to Rule 1.16 states “[a] lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.”

In Legal Ethics Opinion 1798, the Virginia State Bar’s Standing Committee on Legal Ethics quoted with approval language from the Arizona Bar:

> Ethical Rule 1.16 makes clear that a lawyer with a maximum caseload must decline new cases or terminate representation where the representation will result in violation of the Rules of Professional Conduct or other law. Consequently, where the demands of an extreme caseload make an attorney unable to devote sufficient attention to a particular case, acceptance of that case will cause a violation of Ethical Rules 1.1 on competent representation, 1.3 on attorney diligence and 1.16 for failing to decline or terminate representation where the representation will violate these rules.

> Thus, a lawyer who accepts more cases than he can competently prosecute will be committing an ethical violation.

In LEO 1798 the Committee concluded that “a Commonwealth’s Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules.”

If a Commonwealth’s Attorney’s office has lawyers who are charged with managing and supervising Assistant Commonwealth’s Attorneys, those managing and supervising lawyers owe ethical duties required by Rule 5.1 of the Rules of Professional Conduct. Rule 5.1 (a) requires that a lawyer in a managerial position make reasonable efforts to ensure that the office has measures in place so that lawyers in the office conform to the Rules of Professional Conduct. Also, paragraph (b) of Rule 5.1 states that where one attorney has direct supervision over another lawyer, the supervisor should make reasonable efforts to ensure the other lawyer complies with the Rules of Professional Conduct. As the Ethics Committee stated in LEO 1798:
Those provisions do place responsibility on the shoulders of a Commonwealth’s Attorney for having in place policies and procedures to establish an office that practices within the parameters of the Rules of Professional Conduct and that the Commonwealth’s Attorney properly supervise the Assistant Commonwealth’s Attorneys reporting to him to assure ethical compliance. Attorney Smith in struggling with his caseload and missing important deadlines was under the supervision of the Commonwealth’s Attorney. That lead attorney in deciding the case load to be borne by Attorney Smith is in a position to render impossible Attorney Smith’s ability to work competently and diligently. Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney’s ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1.

. . . if a Commonwealth’s Attorney has in fact assigned such an impermissibly large caseload to an Assistant Commonwealth’s Attorney, the facts that the client is the amorphous Commonwealth and that the Commonwealth’s Attorney has himself a large caseload provide no safe harbor from the requirements of Rule 5.1."
Sixth Amendment - U.S. Constitution

Sixth Amendment - Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
American Bar Association Criminal Justice Standards for the Defense Function

Standard 4-4.1  Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client’s best interests, after consultation with the client. Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made ex parte if appropriate to protect the client’s confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.
Rule 1.4 - Professional Guidelines and Rules of Conduct

Rule 1.4

Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Comment

[1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.


[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the
lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

Virginia Code Comparison

Rule 1.4(a) is substantially similar to DR 6-101(C) of the Virginia Code which stated: "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered."

Paragraph (b) has no direct counterpart in the Virginia Code. EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Paragraph (c) is identical to DR 6-101(D) of the Virginia Code.

Committee Commentary

The Virginia Code had already substituted the essential notion of paragraph (a) as DR 6-101(C), thus specifically addressing a responsibility omitted from the ABA Model Code. The Committee believed that paragraph (b) specifically addressed a responsibility only implied in the Virginia Code and that adding DR 6-101(D) as paragraph (c) made the Rule a more complete statement regarding a lawyer's obligation to communicate with a client. Additionally, the Committee added
a new second paragraph to the Comment to remind lawyers of their continuing duty to help clients choose the most appropriate settlement process.

Updated: October 30, 2009
Rule 1.16 - Professional Guidelines and Rules of Conduct

Rule 1.16

Declining Or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the representation will result in violation of the Rules of Professional Conduct or other law;
  - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
  - (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;
  - (2) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
  - (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (6) other good cause for withdrawal exists.
- (c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).
- (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the
lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication.

- Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer:
  - lawyer/client and lawyer/third-party communications;
  - the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph);
  - transcripts, pleadings and discovery responses;
  - working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation;
  - research materials;
  - and bills previously submitted to the client.

Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

Comment

[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that
professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed pro se.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer
Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.

The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Virginia Code Comparison

Paragraph (a) is substantially the same as DR 2-108(A).

Paragraph (b) is substantially similar to DR 2-108(B) which provided that a lawyer "may withdraw from representing a client if: (1) Withdrawal can be effected without material prejudice to the client; or (2) The client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; or (3) The client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."

Paragraph (c) is identical to DR 2-108(C).

Paragraph (d) is based on DR 2-108(D), but does not address documents in the lawyer's files (which are handled under paragraph (e)).

Paragraph (e) is new.

Committee Commentary

The provisions of DR 2-108 of the Virginia Code derived more from ABA Model Rule 1.16 than from its counterpart in the ABA Model Code, DR 2-110. Accordingly, the Committee generally adopted the ABA Model Rule, but substituted the "illegal or unjust" language from DR 2-108(B)(2) for the "criminal or fraudulent" language of the ABA Model Rule. Additionally, the Committee substituted the language of DR 2-108(C) for that of paragraph (c) of the ABA Model Rule to make it clear that a lawyer, in circumstances involving court proceedings, has an affirmative duty to request leave of court to withdraw. The Committee recommended paragraph (e) instead of a "prejudice" standard as being more easily understood and applied by lawyers.

The amendments effective January 1, 2004, in paragraph (e), first sentence, inserted "therefore, upon termination of the representation, those items" between “client and” and “shall,” inserted “within a reasonable time” between “returned” and “to the client,” and inserted “or the client’s new counsel” between “the client” and “upon request; in paragraph (e), third sentence, substituted “Also upon termination,” for “Upon request,” inserted “upon request” between “the client” and “must also,” inserted “within a reasonable time” between “provided” and “copies,” inserted “transcripts” before the present word “pleadings,” and inserted “or collected” between “prepared” and “for the client; in paragraph (e), added the last sentence; and added Comment [11].
Standard 4.1 Investigation
A. Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or account of events provided to counsel indicating guilt. Counsel should conduct a fact investigation as promptly as practicable.
B. Counsel has a duty to investigate information that may affect a non-citizen client’s immigration status including, but not limited to:
   1. Current immigration status and immigration history, including but not limited to, when the client came to the United States, how the client entered the United States, any change or expiration in status, and any prior immigration proceedings;
   2. Status of family members to include spouse, parents, and children;
   3. Prior criminal record, specifically:
      a. Date of the offense;
      b. Date of conviction;
      c. Sentencing information to include the date, and active and suspended sentence;
      d. Any dismissed charges (See Comment D).
C. Sources of investigative information may include the following:
   1. Charging Documents:
      Counsel shall obtain and examine copies of all charging documents in the case to determine the specific charges brought against the accused. Counsel shall examine relevant statutes and precedents to identify:
      a. The elements of the offense with which the accused is charged;
      b. The available defenses, ordinary and affirmative;
      c. Any defects, constitutional or otherwise, in the charging documents.
   2. The Client: As previously stated in Standard 2.2, counsel should conduct an in-depth interview as soon as possible after counsel’s appointment.
3. Potential Witnesses: Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should consider doing so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial.

4. Law Enforcement and Prosecution Counsel should try to secure information in the prosecution’s and/or law enforcement authorities’ possession including physical evidence and expert reports relevant to the offense or sentencing. Counsel should pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.

5. The Scene Where appropriate, counsel should attempt to visit the scene of the alleged crime in a timely manner, prior to the preliminary hearing or trial. Counsel should consider obtaining fair and accurate photographs and maps of the area, and, where relevant, measurements.

6. Expert Assistance Counsel should formally request the assistance of experts where it is reasonably necessary or appropriate to:
   a. Prepare the defense;
   b. Rebut the prosecution’s case.

Comment:

A. In appropriate cases, court-appointed counsel should consider requesting court funds to retain an investigator to assist with the client’s defense. Public defenders should utilize the services of the investigator on staff when necessary.

B. In appropriate cases, counsel should pursue the appointment of interpretive services to assist with communication.
C. In cases where private funds are available to secure an expert, counsel should engage the services directly so as to maintain the attorney-client privilege.

D. Even dismissed charges may be considered to be “convictions” for immigration purposes and can have adverse immigration consequences. For example, a dismissed charge under Va. Code § 18.2-251 will often be considered a conviction under federal law.

RELATED STANDARDS
