

**Introduction**

This chapter describes the expectations of counsel for the petitioner in state post-conviction relief proceedings. These cases are collateral challenges to criminal convictions brought under the Oregon Post-Conviction Hearing Act, ORS 138.510–138.680. Representation of post-conviction petitioners is complex and specialized, requiring counsel to combine knowledge and experience in criminal law with an understanding of pleading and practice in a civil action. Moreover, because representation in state post-conviction proceedings significantly affects a petitioner’s ability to collaterally challenge a state court conviction in federal court, counsel must also maintain a current knowledge of the complex law of federal habeas corpus. Faced with the burden of proof as the moving party in a civil case, counsel for petitioner must also undertake competent factual investigations and be proficient in the discovery and presentation of evidence.

Counsel in post-conviction cases often represent clients embittered by conviction of a crime, losses on direct appeal, the prospect of lengthy incarceration, and a belief that prior attorneys failed them, presenting counsel with unique challenges for meaningful communication and consultation. Because many of Oregon’s prisons are located in rural parts of the state, the challenges to counsel are especially great when clients are incarcerated—and venue for the case may be—hundreds of miles from counsel’s ordinary place of business or the location of critical witnesses in the post-conviction proceedings. Yet, at stake for petitioners in these cases is an opportunity for a full and fair hearing of grounds, not available in earlier proceedings, which might invalidate the criminal conviction or sentence. At stake for the legal system of the entire state is the integrity of an essential remedy for discerning and correcting violations of fundamental constitutional rights.

The standards set forth in this chapter apply to counsel for petitioner in all post-conviction relief proceedings; however, they do not address many of the special obligations and responsibilities of counsel representing the petitioner in death penalty cases.

---

## **STANDARD 6.1**

### **Prerequisites for Representation**

A lawyer in post-conviction relief proceedings shall provide competent representation to each client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

### **Implementation**

1. A lawyer representing petitioners in post-conviction cases should be proficient in applicable substantive and procedural law, including but not limited to current familiarity with the following:
  - a. The Oregon Post-Conviction Hearing Act, ORS 138.510–138.680, and the case law interpreting this act.
  - b. A knowledge of the substantive and procedural requirements of competent representation in criminal cases in Oregon, including familiarity with the relevant provisions of the American Bar Association Criminal Justice Standards, the Oregon State Bar (OSB) Principles and Standards for Counsel in Criminal Cases, and the current edition of the OSB’s *Criminal Law* (*see* (d), *below*).
  - c. The applicable provisions of the Oregon Rules of Civil Procedure, the Oregon Evidence Code, the Oregon Uniform Trial Court Rules, any applicable Supplementary Local Rules, and any other statewide or local court rule or practice governing post-conviction relief proceedings.
  - d. The current edition of *Criminal Law* (Oregon CLE 2005 & Supp 2006): Postconviction Proceedings (ch 30) and Federal Habeas Corpus (ch 31).
  - e. The provisions of the federal habeas corpus statute, 28 U.S.C. §2254, and the case law interpreting it, concerning the exhaustion of remedies requirement, the procedural default doctrine, the statute of limitations, and the necessity of adducing evidence in support of claims in state court.

- f. The federal Antiterrorism and Effective Death Penalty Act of 1996, and the case law interpreting it (*see also* Standard 6.8(11)).
    - g. The current version of *Preserving Your Issues For Federal Habeas Corpus Review* (Oregon Federal Defender).
    - h. *Uncovering the Injustice: The Role of Post-Conviction Litigation in the Criminal Justice System*, by Wendy Willis (Oregon Criminal Defense Lawyers Association 2002); *Post-Conviction Litigation*, by Steven Wax (Oregon Criminal Defense Lawyers Association 2000); and other current post-conviction training materials available from the Oregon Criminal Defense Lawyers Association.
    - i. Other post-conviction treatises and practice guides as they become available.
2. A lawyer representing petitioners in post-conviction relief proceedings should have appropriate experience, skills, and training.
  - a. A lawyer should obtain formal and informal training in post-conviction relief representation, and should consult with other lawyers, investigators, and paralegals that practice in the field.
  - b. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers. More experienced lawyers should mentor less experienced lawyers.
3. A lawyer should have adequate time and resources to provide competent representation to every client.
  - a. A lawyer should not accept caseloads that by reason of size and/or complexity interfere with the provision of competent representation.
  - b. A lawyer should have access to support services and other resources necessary to provide competent representation.
4. A lawyer appointed by a court to represent a post-conviction client at public expense shall meet and certify compliance with the Public Defense Services Commission's applicable *Qualification Standards for Court-Appointed Counsel*.

---

## **STANDARD 6.2**

### **Role of Post-conviction Counsel**

Counsel should not undertake representation in a post-conviction relief proceeding unless counsel fully understands the requirements of a collateral challenge to a criminal conviction, and how that differs from a record-based direct appeal of a criminal conviction.

### **Implementation**

1. Counsel should be familiar with the type of claims that may be raised in post-conviction relief proceedings, and understand that most direct-appeal-like, record-based claims are not cognizable.
2. Counsel should understand that a “collateral” basis for post-conviction relief, by statutory and common sense understanding, will ordinarily not be entirely established by the previously compiled record of the case, and must be supported by factual and legal grounds that arise outside the record.
3. Counsel should not accept appointment or a retainer in a post-conviction relief proceeding unless he or she is prepared, knowledgeable, and skilled to undertake a comprehensive extra-record investigation, as described in Standard 6.4.
4. Counsel should treat a post-conviction relief proceeding as both the first and last meaningful opportunity to present evidence not contained in the trial record on a variety of constitutional violations that may have taken place in the underlying criminal case, including but not limited to: claims involving the competence of the defendant; police and prosecutorial misconduct; judicial misconduct; faulty eyewitness evidence; unreliable informant testimony; coerced confessions; flawed forensic methods; juror misconduct; ineffective and inadequate assistance of trial and appellate counsel; and whether a plea of guilty is entered knowingly, intelligently, and voluntarily.
5. Counsel should understand that while a client’s innocence may not itself constitute a cognizable claim of post-conviction relief, its relevance to the case is important.

Claims of innocence are typically intertwined with other recognized bases for post-conviction relief. For example, a meritorious “*Brady* claim” is typically based on suppression of evidence pointing to innocence. Similarly, a claim of inadequate or ineffective assistance of counsel may be predicated on trial counsel’s failure to investigate sources of important evidence that support the client’s assertion of innocence. Accordingly, post-conviction counsel should be prepared to carefully evaluate the need to investigate evidence of innocence that can support a recognized claim for post-conviction relief.

6. Counsel should ordinarily not have represented the petitioner during the underlying criminal case or direct appeal, since the post-conviction proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel. Trial or appellate counsel who seek to represent their clients in post-conviction relief proceedings should do so with caution, and must abide by the conflict of interest provisions of Oregon Rule of Professional Conduct 1.7 and consult OSB Formal Ethics Op. No. 2005-160.
7. Counsel should understand, prior to undertaking representation of any client in post-conviction relief proceedings, that ordinarily any meritorious claim not contained in a first original or amended petition will likely be waived or otherwise unavailable as a ground for relief in a second petition for post-conviction relief, or in subsequent federal habeas corpus litigation. Any lack of diligence, mistake, or other omissions by counsel will ordinarily be attributed to the client. However, those claims and other pleadings to be signed by counsel must comply with ORCP 17(C), requiring a factual basis and support in existing law or in a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

---

## **STANDARD 6.3**

### **Communications with the Client**

Upon appointment or retainer in a post-conviction proceeding, counsel should promptly notify the client of counsel’s entry into the case and make arrangements for an interview with the client as soon as possible. Thereafter, counsel should continue to consult with

the client concerning the objectives of the representation and the means by which those objectives are to be pursued, keep the client informed about the case, promptly comply with reasonable requests for information, explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the objectives of the representation, and abide by those decisions.

### **Implementation**

1. Counsel in post-conviction proceedings must fulfill all ethical requirements of the Oregon Rules of Professional Conduct, including Oregon RPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), Oregon RPC 1.4 (Communication), and, where applicable, Oregon RPC 1.14 (Client with Diminished Capacity).
2. Upon entry into a post-conviction case, counsel should begin to establish a relationship of trust with the client. Depending on the circumstances, it is not unusual for post-conviction counsel to encounter impediments to achieving this foundation of a meaningful attorney-client relationship when the client feels especially aggrieved by prior experiences with lawyers or with the criminal justice system, or when the client suffers isolation and despair because of imprisonment far from family, friends, and counsel's place of business. Counsel should be prepared to account for these challenges by making necessary adjustments to the frequency and mode of communication with the client.
3. Counsel should take appropriate steps to ensure that the client has the mental capacity to assist counsel in the identification and presentation of all viable claims for relief.
4. As soon as practicable after entry into a post-conviction case, counsel should meet with the client in person, allowing sufficient time at the prison or other interview location for a meaningful rapport to develop between attorney and client, to reveal facts within the knowledge of the client necessary for the litigation, and for counsel to consult with the client concerning the objectives of the representation and the means to achieve them.
5. Counsel should keep the client informed about the progress of investigation, the development of post-conviction claims, litigation timelines and deadlines, and consult

with the client concerning amendments and challenges to the pleadings, discovery, pretrial hearings, and other preparations for trial.

6. Counsel should advise the client concerning the consequences of prevailing on a petition for post-conviction relief, including the likelihood—in cases where petitioner has previously entered a plea of guilty pursuant to a plea agreement with the state—that the petitioner would face conviction on additional charges and/or a lengthier period of incarceration upon a new trial.

---

## **STANDARD 6.4**

### **Independent Investigation**

Upon appointment or retainer in a post-conviction case, counsel for petitioner should promptly begin an independent review and investigation of the case, including obtaining information, research, and discovery necessary to file or amend pleadings and to prepare the case for trial.

### **Implementation**

1. Counsel should conduct a thorough and independent investigation of the validity of the underlying criminal trial, sentencing, and, when applicable, appellate proceedings. Counsel's investigation should examine the entire criminal case for evidence of a substantial denial of state or federal constitutional rights in the trial level or appellate proceedings. Although counsel may have been appointed or retained following the filing of a pro se petition for post-conviction relief, counsel's investigation will determine, in consultation with the client, whether the pro se petition should be amended with additional claims or by withdrawing some claims.
2. Counsel should seek the assistance of qualified investigators and expert witnesses where necessary for the investigation, preparation, and presentation of the case. For petitioners determined to be financially eligible, counsel should seek preauthorization for these expenses from the Office of Public Defense Services, pursuant to ORS 135.055.

3. Counsel's investigation shall include a thorough review of all available transcripts of the proceedings in the criminal case. Counsel should seek to obtain, review, and transcribe any necessary portions of the proceedings that were not already transcribed. Where both the petitioner and post-conviction defendant have an interest in obtaining the same transcription, and in other instances where transcripts and other documents may be obtained by or provided to the defendant, counsel for petitioner should seek the cooperation of the defendant in sharing the cost of producing such transcripts and documents.
4. Counsel should obtain and review other relevant records and documents, including the complete file of trial counsel and appellate counsel in the criminal case, and, where appropriate, files and records of investigators and experts who worked with trial counsel, prosecutorial and police files and records, and records of the trial and appellate courts.
5. Counsel should ordinarily interview trial and, where applicable, appellate counsel in the criminal case. Prior counsel will possess records relevant to the post-conviction proceedings, and be a source of information about claims of prosecutorial and judicial misconduct, in addition to the possible subject of claims involving inadequate and ineffective assistance of counsel.
6. Post-conviction counsel should be prepared to exercise skill and tact in relations with prior counsel, seek cooperation with post-conviction counsel's investigation, and insist upon access, with a release of information from the client, to prior counsel's "entire file." See OSB Legal Ethics Op. No. 2005-125. Post-conviction counsel should also be prepared to explain to prior counsel the limits on prior counsel's disclosures to counsel for the post-conviction defendant. While prior counsel must make his or her own determination of what communications may be exempt from the attorney-client privilege if the client alleges inadequate or ineffective assistance of prior counsel, *Petersen v. Palmateer*, 172 Or App 537, 19 P3d 364 (2001), post-conviction counsel should be familiar with the limited nature of the attorney "self defense" provisions in both Oregon RPC 1.6(b)(4) and Oregon Evidence Code 503(4)(c). OSB Legal Ethics Op. No. 2005-104; Kirkpatrick, *Oregon Evidence*, at 322 (5th ed 2007). Post-conviction counsel should also consider requesting protective

orders limiting access to and the use of disclosures made by prior counsel during the course of post-conviction litigation. OSB Legal Ethics Op. No. 2005-136; *Bittaker v. Woodford*, 331 F3d 715 (9th Cir 2003).

7. Counsel's investigation should also include, where necessary, interviews with other witnesses who may or may not have testified in earlier proceedings, forensic testing and examination of physical evidence, and forensic evaluations of the petitioner.

---

## **STANDARD 6.5**

### **Asserting Legal Claims**

Counsel should be familiar with all legal claims potentially available in post-conviction relief proceedings and assert claims permitted by the facts and circumstances of a petitioner's case so as to protect the client's rights against later contentions that the claims have been waived, defaulted, not exhausted, or otherwise forfeited.

### **Implementation**

1. Counsel should assert all arguably available claims mindful that legal challenges to the conviction not raised in a first post-conviction relief proceeding will likely be forfeited for purposes of any subsequent state post-conviction or federal habeas corpus proceedings.
2. Counsel should ensure that all viable claims are asserted in the petition. Current Oregon law prohibits judgment in favor of a petitioner on a claim not explicitly pled in the petition, even if the claim was litigated during the hearing, briefed in a trial memorandum, and decided on the merits by the court. Counsel who discovers that a contested claim is not included in the petition should seek leave of court to amend the petition to include the claim.
3. Counsel should seek to raise every claim in explicit state and federal constitutional terms and should include supporting facts, in order to comply with the federal habeas corpus doctrine of exhaustion of state remedies. To do so, counsel should be familiar with applicable Oregon pleading requirements and with state and federal constitutional law. The failure to properly plead the claim in the appropriate

constitutional terms may preclude the petitioner from obtaining relief on a meritorious claim in state or federal court.

- a. Federal due process violations should be pled under the Fourteenth Amendment to the United States Constitution. (The Fifth Amendment due process clause only applies to federal prosecutions.) The Oregon Constitution does not contain a due process clause, but Article I, § 33, states that the enumerated rights in Article I are not exclusive; therefore, counsel should consider Article I, § 33, as a basis for a state due process claim.
- b. It is not sufficient to allege that counsel was inadequate and ineffective to preserve an ineffective-assistance-of-counsel claim for federal review. Counsel must allege that prior counsel was inadequate under Article I, § 11, of the Oregon Constitution and ineffective under the Sixth and Fourteenth Amendments to the United States Constitutions.
- c. Counsel should carefully identify viable issues that were not previously raised or federalized by trial or appellate counsel and determine whether prior counsel's failure can be viably argued to be ineffective. By alleging ineffectiveness of prior counsel, under the Sixth Amendment for trial counsel and under the Fourteenth Amendment for appellate counsel, post-conviction counsel can ensure that issues overlooked in the past are federalized to meet the exhaustion-of-state-remedies doctrine. If post-conviction counsel fails to raise any such claims, federal habeas corpus counsel will be barred from doing so under the federal procedural default doctrine.
- d. Counsel should recognize situations in which multiple claims are implicated and should ensure that all applicable claims are raised in appropriate state and federal constitutional terms. For example, if a petitioner was coerced into pleading guilty by counsel who failed to investigate and discover a viable defense, two separate claims are implicated and should be pled: petitioner entered into a plea that was not knowing, voluntary, and intelligent, in violation of Article I, § 33, of the Oregon Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution; and petitioner received inadequate and ineffective assistance from his or her

counsel in violation of Article I, §11, of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

- e. When alleging claims of trial court error, prosecutorial misconduct, and other violations of the petitioner's constitutional rights, counsel should allege facts establishing why the claims were not and could not reasonably have been raised at trial or on direct appeal.
4. Counsel should be familiar with local rules and customs and with ORS 138.580, which governs petition pleading requirements, and applicable case law respecting inclusion of "affidavits, records or other documentary evidence supporting the allegations of the petition" pursuant to 138.580. Although seldom enforced in the past, many courts are now enforcing this requirement pursuant to local rules and supplementary local rules by dismissing petitions that fail to comply with the requirement. Counsel should be careful to avoid such a dismissal, because a federal court may later hold that the dismissed petition was not "properly filed," with a result that the one-year federal statute of limitations will not have been tolled by the post-conviction litigation.
    - a. Just as the applicable and controlling federal constitutional provisions must be properly and fully pled for federal exhaustion purposes, the fullest possible factual basis for a claim for relief must be presented to the state post-conviction court.
    - b. Fair presentation of the factual basis for a claim for relief requires that a petitioner provide the state court with all of the facts necessary to give application to the constitutional principle upon which the petitioner relies.
    - c. If the petitioner fails to develop and present the facts in state court that the petitioner is attempting to rely upon in federal court, then no evidentiary hearing will be allowed for the presentation of those facts in federal court under 28 U.S.C. § 2254(e)(2).

---

## **STANDARD 6.6**

### **Litigating Claims**

Counsel should ensure that all available legal opportunities are pursued to protect the client's right to a full and fair hearing on the claims asserted in a petition for post-conviction relief.

### **Implementation**

1. Amending the petition.
  - a. Counsel should be familiar with and adhere to the requirements imposed by statute, court rule, or case law for properly pleading claims for post-conviction relief. As necessary and in consultation with the client, counsel should be prepared to file an amended petition to add or delete claims raised in a pro se petition for post-conviction relief, and to make other corrections and changes.
  - b. Counsel should seek leave of court, where required, for amending a petition and file an amended petition that complies with the applicable Oregon Rules of Civil Procedure, other court rules, and relevant case law.
2. Discovery.
  - a. Counsel should be familiar with the opportunities for seeking formal discovery, under applicable Oregon Rules of Civil Procedure, and pursue discovery where appropriate in the manner best suited for the particular case.
  - b. Counsel should be familiar with the defendant's rights to discovery, including the opportunity to take the deposition of the petitioner, and explain those rights to the petitioner, informing the petitioner of possible sanctions, including dismissal of the petition, for refusal to respond to defendant's discovery requests.
  - c. Upon the scheduling of a deposition of petitioner, counsel should promptly notify the petitioner of the date and time of the deposition and take steps to prepare the petitioner to participate in the deposition. Whenever possible, counsel should be present with the petitioner when the deposition is taken in

order to consult with petitioner as necessary during the course of the deposition.

- d. Counsel should object to discovery by defendant, or seek to limit it, where appropriate and take other steps to maintain such privileges and rights retained by the petitioner during depositions and other discovery by the defendant.

### 3. Motions.

- a. Counsel should consider motions for change of venue where another permissible venue will permit more effective presentation of petitioner's evidence.
- b. Counsel should respond, within the time permitted and as appropriate, to motions to dismiss or for summary judgment or other challenges to the petition.
- c. When defendant challenges the petition as successive or time-barred, counsel should develop and present a factual and legal basis for any available exception to that challenge.
- d. Counsel should consider what other pretrial motions might be necessary to protect the petitioner's right to a full and fair hearing on the claims asserted in a petition for post-conviction relief.

### 4. Trial.

- a. During the hearing on the petition for post-conviction relief, counsel should develop a factual basis through the presentation of evidence to establish the claims asserted in the petition. In so doing, counsel should consider that:
  1. A certified transcript or other records and documents will be necessary to prove events occurring in the official proceedings that resulted in the conviction and/or sentence challenged in the petition for post-conviction relief.
  2. Ordinarily, the testimony of the petitioner alone will not suffice to prove allegations concerning inadequate or ineffective assistance of counsel or other claims.
  3. Allegations of inadequate or ineffective assistance of counsel may require post-conviction counsel to offer proof of the standard of

reasonable professional skill and judgment that prior counsel failed to provide.

4. Allegations of inadequate or ineffective assistance of counsel will also ordinarily require proof that, under the state constitution, counsel's unreasonable performance had a tendency to affect the outcome of the case; or, under the federal constitution, that there exists a reasonable likelihood that the outcome of the case would have been different.
- b. Counsel should seek to present all evidence on behalf of the petitioner in the manner most likely to protect the petitioner's right to a full and fair hearing on the claims asserted in the petition, including oral testimony by witnesses present in a courtroom, depositions, affidavits, or other competent evidence.
- c. Counsel should object to time limitations or other constraints on the presentation of evidence, on behalf of the petitioner, that might interfere with a full and fair hearing.
- d. Counsel should prepare and file a trial memorandum outlining the factual and legal basis for the petitioner's claims, properly delineating the grounds for relief under both state and federal law. Similarly, counsel should gather and present all supporting exhibits, affidavits, depositions, and other documents, accompanied by a list of such items, that counsel intends to introduce as evidence in support of the petition.
- e. Counsel should protect the petitioner's right to testify and make offers of proof if the post-conviction trial court denies or limits such testimony or other evidence presented on behalf of the petitioner. Counsel should object to other limitations that interfere with a full and fair presentation of petitioner's case, making offers of proof as appropriate.

---

## **STANDARD 6.7**

### **Obligations of Counsel After Trial**

Counsel for petitioner will ordinarily have continuing obligations to the client following a trial, or other dispositive ruling, on the petition for post-conviction relief, that should be fulfilled to protect the interests of the client.

### **Implementation**

1. Counsel should seek opportunities to draft proposed findings of fact and conclusions of law, even when the ruling will deny a petition for post-conviction relief, in order to advance the interest of the client on appeal and in subsequent proceedings.
2. Counsel should review the judgment filed by the court and object to unfounded findings of fact and incorrect conclusions of law entered by the court. Pursuant to ORCP 62, where appropriate, counsel should request other, different, or additional special findings of fact.
3. Counsel should take all necessary actions to effectuate rulings favorable to the petitioner, including but not limited to ensuring compliance with the requirements of ORS 138.640 for an enforceable judgment.
4. Counsel should determine and advance the client's wishes for appeal from an adverse judgment. In determining the client's choice concerning whether or not to pursue an appeal, counsel should make the client aware that the failure to appeal will likely result in a finding that the claims made in the petition will be forfeited in any subsequent state or federal proceeding.
5. Ordinarily, when the client wishes to appeal an adverse judgment, post-conviction trial counsel should prepare and file a notice of appeal. Appointed counsel should be familiar with the current protocol, available at the Office of Public Defense Services' Web site, for securing the appointment of appellate counsel to represent the petitioner on appeal.
6. Counsel should organize and preserve records of representation on the petition for post-conviction relief.

7. Counsel should cooperate with appellate and federal habeas corpus counsel for petitioner.
- 

## **STANDARD 6.8**

### **Duties of Appellate Counsel**

Appellate counsel for a post-conviction relief petitioner has special responsibilities to both advance the interests of the client in the Oregon appellate courts and ensure the proper preservation and exhaustion of claims for purposes of federal habeas corpus review. In addition to observing applicable provisions of the preceding performance standards, counsel on appeal has additional duties and responsibilities, including those set forth below.

### **Implementation**

1. A lawyer representing petitioners in appeals of post-conviction cases should be proficient in applicable substantive and procedural law, including but not limited to familiarity with the current rules, laws, and publications identified in Standard 6.1, and also with the Oregon Rules of Appellate Procedure, the Oregon Appellate Courts Style Manual, and the current edition of *Appeal and Review* (Oregon CLE 1993 & Supp 2002).
2. Upon appointment to or retainer in a post-conviction appeal, counsel should contact the client as soon as practicable to provide information about the time frame for the appeal and the nature of the appeal, obtain any materials in the client's possession that may be pertinent to the appeal, and respond to any questions the client may have about the appeal. Counsel should inform the client that he or she may be responsible for a prevailing party fee of \$100, under ORS 20.190(1), plus the opponent's brief printing and mailing costs, under ORS 20.310(2) and ORAP 13.05, and that these fees and costs are recoverable even against an indigent and/or incarcerated person.
3. Upon appointment to or retainer in a post-conviction appeal, counsel should contact post-conviction trial counsel as soon as practicable for information about the case and

to obtain a complete copy of the client's file, including copies of all exhibits in the case.

4. Upon appointment to or retainer in a post-conviction appeal, counsel should make arrangements, or confirm that arrangements have been made, to secure transcripts of any hearings from the post-conviction trial-level proceedings.
5. Upon receipt of materials from the client and trial counsel, counsel should confirm via the case register that all trial-level materials have been received, and if they have not, counsel should obtain or review any missing materials by viewing the trial court file.
6. Throughout the course of the appeal, counsel should inform the client of all developments, including requests for extensions of time in the briefing schedule and any other motion filed by either petitioner's counsel or counsel for the state.
7. Counsel shall diligently search the record for meritorious appellate claims, and perform legal research under state and federal law to support such claims. Counsel's review should also identify those portions of the record that undercut adverse findings made by the court in denying post-conviction relief.
8. Counsel should raise all meritorious federal constitutional claims in order to ensure state appellate court consideration and to preserve those claims if later federal habeas corpus review is sought. Failure to raise a claim under the federal constitution will result in the procedural default of that claim in federal habeas corpus litigation. Accordingly, to avoid default, the appellate brief in state court should cite the provision of the United States Constitution that provides the basis of the claim. The same constitutional provision should be cited in the pertinent section of any Petition for Review filed in the Oregon Supreme Court.
9. If the state files a motion for summary affirmance of the judgment under ORS 138.225, counsel should file a response.
10. Counsel should rarely file a brief under ORAP 5.90(4); *see State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991). While in direct criminal appeals, appointed counsel is permitted to select the issues that will be presented to the court, Oregon law constrains that decision-making in post-conviction cases. In post-conviction cases, the petitioner bears the responsibility for pursuing the case. Accordingly, in those

instances in which the petitioner seeks to pursue his claims, counsel should ordinarily abide by the petitioner's decision. To fulfill counsel's ethical responsibility, the brief should cite any controlling adverse precedent and those facts necessary to a proper resolution of the case. It is, of course, appropriate to advise a client against pursuing an appeal. Counsel must also be fully aware of the legal definition of *frivolous*, which is not synonymous with a weak issue. A claim is frivolous only if it is entirely "without factual basis or well-grounded legal argument." *Davis v. Armenakis*, 151 Or App 66, 74, 948 P2d 327 (1997). In those instances where counsel does file a brief pursuant to ORAP 5.90(4), counsel should advise the client regarding the manner in which claims must be asserted in the "Section B" brief in order to preserve and exhaust federal constitutional claims.

11. Counsel shall understand the operation of the one-year statute of limitations established by the federal habeas corpus statutory provision known as the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2244(d) (*see also* Standard 6.1(1)(f)). Failure to meet the one-year deadline will result in the dismissal of the federal habeas corpus case. Accordingly, during the pendency of the post-conviction appeal, counsel should advise the petitioner of the one-year federal filing deadline, and inform the petitioner that any time that passed between the date of the appellate judgment following a direct appeal (or trial court judgment if there was not a direct appeal) and the date of filing the post-conviction petition counts against the one-year federal timeline. Counsel should ascertain on behalf of the petitioner the amount of time remaining within which to file for federal habeas corpus relief.
12. If the Oregon Court of Appeals affirms the judgment of the trial-level court denying post-conviction relief, counsel should review with the client the advisability of filing a petition for review with the Oregon Supreme Court. In any case in which the petitioner intends to pursue federal habeas corpus review, counsel must file a Petition for Review.