

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 11, 2008

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter *ABA Criminal Justice Standards on Prosecutorial Investigations*, dated February 2008, to supplement the *ABA Criminal Justice Standards on the Prosecution Function*.

105D

**ABA STANDARDS FOR CRIMINAL JUSTICE:
PROSECUTORIAL INVESTIGATIONS**

FEBRUARY 2008

TABLE OF CONTENTS

	<u>Page</u>
PART 1: GENERAL STANDARDS.....	3
STANDARD 1.1 The Function of These Standards	3
STANDARD 1.2 General Principles.....	3
STANDARD 1.3 Working With Police and Other Law Enforcement Agents	5
STANDARD 1.4 Victims, Potential Witnesses, and Targets During the Investigative Process.....	6
STANDARD 1.5 Contacts with the Public During the Investigative Process	7
PART 2: Standards for Specific Investigative Functions of the Prosecutor.....	9
STANDARD 2.1 The Decision to Initiate or to Continue an Investigation.....	9
STANDARD 2.2 Selecting Investigative Techniques.....	11
STANDARD 2.3 Use of Undercover Law Enforcement Agents and Undercover Operations.....	12
STANDARD 2.4 Use of Confidential Informants	14
STANDARD 2.5 Cooperation Agreements and Cooperating Individuals and Organizational Witnesses.....	17
STANDARD 2.6 The Decision to Arrest During a Continuing Criminal Investigation.....	20
STANDARD 2.7 Use of Subpoenas.....	21
STANDARD 2.8 Search Warrants	23
STANDARD 2.9 Use of the Investigative Powers of the Grand Jury.....	26
STANDARD 2.10 Technologically-Assisted Physical Surveillance	30
STANDARD 2.11 Consensual Interception, Transmission and Recording of Communications.....	30
STANDARD 2.12 Non-Consensual Electronic Surveillance	32
STANDARD 2.13 Conducting Parallel Civil and Criminal Investigations	33
STANDARD 2.14 Terminating the Investigation, Retention of Evidence and Post- Investigation Analysis.....	34
STANDARD 2.15 Guidance and Training for Line Prosecutors	34
STANDARD 2.16 Special Prosecutors, Independent Counsel and Special Prosecution Units	36
STANDARD 2.17 Use of Information, Money, or Resources Provided by Non- Governmental Sources	37
STANDARD 2.18 Use of Sensitive, Classified or Other Information Implicating Investigative Privileges.....	38
PART 3: PROSECUTOR’S ROLE IN RESOLVING INVESTIGATION PROBLEMS	39

105D

STANDARD 3.1 Prosecutor’s Role in Addressing Suspected Law Enforcement Misconduct.....39

STANDARD 3.2 Prosecutor’s Role in Addressing Suspected Judicial Misconduct.....40

STANDARD 3.3 Prosecutor’s Role in Addressing Suspected Misconduct by Defense Counsel40

STANDARD 3.4 Prosecutor’s Role in Addressing Suspected Misconduct by Witnesses, Informants or Jurors.....42

STANDARD 3.5 Illegally Obtained Evidence.....42

STANDARD 3.6 Responding to Political Pressure and Consideration of the Impact of Criminal Investigations on the Political Process42

STANDARD 3.7 Review and Oversight of Criminal Investigations by Government Agencies and Officials.....43

**ABA Standards for Criminal Justice:
Prosecutorial Investigations
February 2008**

Preamble

A prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate. These Standards are intended as a guide to conduct for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility, e.g., serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards are intended to supplement the Prosecution Function Standards, not to supplant them. These Standards may not be applicable to a prosecutor serving in a minor supporting role to an investigation undertaken and directed by law enforcement agents.

**PART 1:
GENERAL STANDARDS**

STANDARD 1.1 THE FUNCTION OF THESE STANDARDS

- (a) These Standards address the *investigative* stage of the criminal justice process. They address the charge or post-charge stages of the criminal justice process only when those stages overlap with the investigative stage.
- (b) These Standards are not intended to serve as the basis for the imposition of professional discipline, nor to create substantive or procedural rights for accused or convicted persons. These Standards do not modify a prosecutor's ethical obligations under applicable rule of professional conduct. These Standards are not intended to create a standard of care for civil liability, nor to serve as a predicate for a motion to suppress evidence or dismiss a charge.
- (c) The use of the term "prosecutor" in these Standards applies to any prosecutor or other attorney, regardless of agency or title, who serves as an attorney in a governmental criminal investigation.

STANDARD 1.2 GENERAL PRINCIPLES

- (a) An individual prosecutor is not an independent agent but is a member of an independent institution the primary duty of which is to seek justice.

105D

- (b) The prosecutor's client is the public, not particular government agencies or victims.
- (c) The purposes of a criminal investigation are to:
 - (1) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and
 - (2) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.
- (d) The prosecutor should:
 - (1) ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts;
 - (2) ensure that criminal investigations are not based upon partisan or other improper political or personal considerations and do not invidiously discriminate against, nor wrongly favor, persons on the basis of race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status;
 - (3) consider whether an investigation would be in the public interest and what the potential impacts of a criminal investigation might be on subjects, targets and witnesses;
 - (4) seek in most circumstances to maintain the secrecy and confidentiality of criminal investigations;
- (e) Generally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation.
- (f) The prosecutor should be aware of and comply with the ethical rules and other legal standards applicable to the prosecutor's conduct during an investigation.
- (g) The prosecutor should cooperate with other governmental authorities regarding matters that are of legitimate concern to such authorities when doing so is permitted by law and would not compromise an investigation or other criminal justice goals.
- (h) The prosecutor's office should provide organizational structure to guide its members' investigative work.

105D

STANDARD 1.3 WORKING WITH POLICE AND OTHER LAW ENFORCEMENT AGENTS

- (a) The prosecutor should respect the investigative role of police and other law enforcement agents by:
 - (1) working cooperatively with them to develop investigative policies; and
 - (2) providing independent legal advice regarding their investigative decisions.
- (b) The prosecutor should take steps to promote compliance by law enforcement agents with relevant legal rules.
- (c) The prosecutor should be aware of the experience, skills and professional abilities of police and other law enforcement agents assigned to an investigation.
- (d) The prosecutor's office should assist in providing training to police and other law enforcement agents concerning potential legal issues and best practices in criminal investigations.
- (e) Before and throughout the course of complex or non-routine investigations, the prosecutor should work with the police and other participating agencies and experts to develop an investigative plan that analyzes:
 - (1) the investigative predicate or information concerning the matter that is then known;
 - (2) the goals of the investigation;
 - (3) the potential investigative techniques and the advantages of each, singularly and in combination, in producing relevant information and admissible evidence; and
 - (4) the legal issues likely to arise during the investigation.
- (f) The prosecutor should promote timely communications with police and other law enforcement agents about material developments in the investigation.
- (g) The prosecutor should not seek to circumvent ethical rules by instructing or recommending that others use means that the prosecutor is ethically prohibited from using. The prosecutor may provide legal advice to law

105D

enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use.

STANDARD 1.4 VICTIMS, POTENTIAL WITNESSES, AND TARGETS DURING THE INVESTIGATIVE PROCESS

- (a) Throughout the course of the investigation as new information emerges, the prosecutor should reevaluate:
 - (1) judgments or beliefs as to the culpability or status of persons or entities identified as “witnesses,” “victims,” “subjects” and “targets,” and recognize that the status of such persons or entities may change; and
 - (2) the veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.
- (b) Upon request and if known, the prosecutor should inform a person or the person’s counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation.
- (c) The prosecutor should know the law of the jurisdiction regarding the rights of victims and witnesses and should respect those rights.
- (d) Absent a law or court order to the contrary, the prosecutor should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. The prosecutor may ask potential witnesses not to disclose information, and in doing so, the prosecutor may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). The prosecutor also may alert an individual who has entered into a cooperation agreement that certain disclosures might result in violation of the agreement.
- (e) The prosecutor should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if the prosecutor does not have such authority.
- (f) The prosecutor should comply with applicable rules and case law that may restrict communications with persons represented by counsel.
- (g) The prosecutor should not take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation unless the

105D

specified conduct of the organization would constitute a violation of law or court order:

- (1) that the organization has provided, or agreed to provide counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee;
 - (2) that the organization entered into or continues to operate under a joint defense or information sharing and common interest agreement with regard to the investigation;
 - (3) that the organization shared its records or other historical information relating to the matter under investigation with an employee; or
 - (4) that the organization did not sanction or discharge an employee who invoked his or her Fifth Amendment privilege against self-incrimination in response to government questioning of the employee.
- (h) The prosecutor should not interfere with, threaten, or seek to punish persons or entities seeking counsel in connection with an investigation, nor should the prosecutor interfere with, threaten or seek to punish those who provide such counsel unless by doing so such conduct would constitute a violation of law or court order. A good faith basis for raising a conflict of interest, or for investigating possible criminal conduct by the defense attorney, is not “interference” within the meaning of this Standard.

STANDARD 1.5 CONTACTS WITH THE PUBLIC DURING THE INVESTIGATIVE PROCESS

- (a) The prosecutor should neither confirm nor deny the existence of an investigation, or reveal the status of the investigation, nor release information concerning the investigation, with the following exceptions:
- (1) releasing information reasonably necessary to obtain public assistance in solving a crime, apprehending a suspect, or calming public fears;
 - (2) responding to a widely disseminated public call for an investigation by stating that the prosecutor will investigate, or decline to investigate the matter;

105D

- (3) responding to a law enforcement or regulatory matter of significant public safety concern, by stating that the prosecutor will begin an investigation or begin a special initiative to address the issue, or by releasing information reasonably necessary to protect public safety, subject to restrictions in the law of the jurisdiction;
 - (4) announcing future investigative plans in order to deter criminal activity;
 - (5) stating in an already publicized matter and where justice so requires, that the prosecutor will not initiate, will not continue, or has concluded an investigation of a person, entity, or matter and, if applicable, has informed the subject or potential subject of the decision not to file charges;
 - (6) responding to widely disseminated false statements that the prosecutor is, or is not, investigating a person, entity, or matter;
 - (7) stating whether and when, if court rules so permit, an event open to the public is scheduled to occur;
 - (8) offering limited comment when public attention is generated by an event in the investigation (e.g., arrests, the execution of search warrants, the filing of charges, or convictions), subject to governing legal standards and court rules; and
 - (9) making reasonable and fair responses to comments of defense counsel or others.
- (b) Except as a proper part of a court proceeding and in accordance with applicable rules, the prosecutor should not publicly make the following types of statements or publicly disclose the following information about an investigation:
- (1) statements of belief about the guilt or innocence, character or reputation of subjects or targets of the investigation;
 - (2) statements that have a substantial likelihood of materially prejudicing a jury or jury panel;
 - (3) information about the character or reputation of a person or entity under investigation, a prospective witness, or victim;
 - (4) admissions, confessions, or the contents of a statement or alibi attributable to a person or entity under investigation;

105D

- (5) the performance or results of tests or the refusal or agreement of a suspect to take a test;
 - (6) statements concerning the credibility or anticipated testimony of prospective witnesses; and
 - (7) the possibility or likelihood of a plea of guilty or other disposition.
- (c) The prosecutor should endeavor to dissuade police and other law enforcement agents and law enforcement personnel from making public information that the prosecutor would be prohibited from making public, or that may have an adverse impact on the investigation or any potential prosecution.

PART 2: STANDARDS FOR SPECIFIC INVESTIGATIVE FUNCTIONS OF THE PROSECUTOR

STANDARD 2.1 THE DECISION TO INITIATE OR TO CONTINUE AN INVESTIGATION

- (a) The prosecutor should have wide discretion to select matters for investigation. Thus, unless required by statute or policy:
- (1) the prosecutor should have no absolute duty to investigate any particular matter; and
 - (2) a particularized suspicion or predicate is not required prior to initiating a criminal investigation.
- (b) In deciding whether an investigation would be in the public interest, the prosecutor should consider, but not necessarily be dissuaded by, the following:
- (1) a lack of police interest;
 - (2) a lack of public or political support;
 - (3) a lack of identifiable victims;
 - (4) fear or reluctance by potential or actual witnesses; or
 - (5) unusually complex factual or legal issues.
- (c) When deciding whether to initiate or continue an investigation, the prosecutor should consider:

105D

- (1) whether there is evidence of the existence of criminal conduct;
- (2) the nature and seriousness of the problem or alleged offense, including the risk or degree of harm from ongoing criminal conduct;
- (3) a history of prior violations of the same or similar laws and whether those violations have previously been addressed through law enforcement or other means;
- (4) the motive, interest, bias or other improper factors that may influence those seeking to initiate or cause the initiation of a criminal investigation;
- (5) the need for, and expected impact of, criminal enforcement to:
 - (i) punish blameworthy behavior;
 - (ii) provide specific and/or general deterrence;
 - (iii) provide protection to the community;
 - (iv) reinforce norms embodied in the criminal law;
 - (v) prevent unauthorized private action to enforce the law;
 - (vi) preserve the credibility of the criminal justice system; and
 - (vii) other legitimate public interests.
- (6) whether the costs and benefits of the investigation and of particular investigative tools and techniques are justified in consideration of, among other things, the nature of the criminal activity as well as the impact of conducting the investigation on other enforcement priorities and resources
- (7) the collateral effects of the investigation on witnesses, subjects, targets and non-culpable third parties, including financial damage and harm to reputation
- (8) the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtaining a conviction and having the conviction upheld upon appellate review; and

105D

- (9) whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.
- (d) When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by:
 - (1) partisan or other improper political or personal considerations, or by the race, ethnicity, religion, gender, sexual orientation, political beliefs or affiliations, age, or social or economic status of the potential subject or victim, unless they are elements of the crime or are relevant to the motive of the perpetrator; or
 - (2) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor.
- (e) The prosecutor's office should have an internal procedure to document the reason(s) for declining to pursue prosecution following a criminal investigation.

STANDARD 2.2 SELECTING INVESTIGATIVE TECHNIQUES

- (a) The prosecutor should be familiar with routine investigative techniques and the best practices to be employed in using them.
- (b) The prosecutor should consider the use of costlier, riskier, or more intrusive means of investigation only if routine investigative techniques would be inappropriate, ineffective, or dangerous, or if their use would impair the ability to take other desirable investigative steps. If non-routine techniques are used, the prosecutor should regularly reevaluate the need for them and whether the use of routine investigative techniques will suffice.
- (c) The prosecutor should consider, in consultation with police and other law enforcement agents involved in the investigation, the following factors:
 - (1) the likely effectiveness of a particular technique;
 - (2) whether the investigative means and resources to be utilized are appropriate to the seriousness of the offense;
 - (3) the risk of physical danger to law enforcement officers and others;
 - (4) the costs involved with various investigative techniques and the impact such costs may have on other efforts within the prosecutor's office;

105D

- (5) the possibility of lost opportunity if an investigative technique is detected and reveals the investigation;
 - (6) means of avoiding unnecessary intrusions or invasions into personal privacy;
 - (7) the potential entrapment of otherwise innocent persons;
 - (8) the risk of property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
 - (9) interference with privileged or confidential communication;
 - (10) interference with or intrusion upon constitutionally protected rights; and
 - (11) the risk of civil liability or other loss to the government.
- (d) The prosecutor should consider the views of experienced police and other law enforcement agents about safety and technical and strategic considerations in the use of investigative techniques.
 - (e) The prosecutor may consider that the use of certain investigative techniques could cause the subject of the investigation to retain legal counsel and thereby limit the use of some otherwise permissible investigative techniques.
 - (f) The prosecutor should avoid being the sole interviewer of a witness, being alone with a witness, or otherwise becoming an essential witness to any aspect of the investigation.
 - (g) While the prosecutor may, and sometimes should, seek changes in law and policy, the prosecutor should abide by existing legal restraints, even if the prosecutor believes that they unjustifiably inhibit the effective investigation of criminal conduct.

STANDARD 2.3 USE OF UNDERCOVER LAW ENFORCEMENT AGENTS AND UNDERCOVER OPERATIONS

- (a) For the purpose of these Standards, an “undercover law enforcement agent” is an employee of a government agency working under the direction and control of a government agency in a criminal investigation, whose true identity as a law enforcement agent involved in the investigation is concealed from third parties.
- (b) For the purpose of these Standards, an “undercover operation” means an investigation in which undercover law enforcement agents or other

105D

persons working with law enforcement conceal their purpose of detecting crime or obtaining evidence to prosecute those engaged in illegal activities.

- (c) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential benefits, including:
 - (1) the character and quality of evidence likely to be obtained; and
 - (2) the ability to prevent or solve crimes where obtaining reliable and admissible evidence to do so would otherwise be difficult or impossible to obtain.

- (d) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential risks, including:
 - (1) physical injury to law enforcement agents and others;
 - (2) lost opportunity if the operation is revealed;
 - (3) unnecessary intrusions or invasions into personal privacy;
 - (4) entrapment of otherwise innocent persons;
 - (5) property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
 - (6) interference with privileged or confidential communications;
 - (7) interference with or intrusion upon constitutionally protected rights;
 - (8) civil liability or other adverse impact on the government;
 - (9) personal liability of the law enforcement agents;
 - (10) involvement in illegal conduct by undercover law enforcement agents or government participation in activity that would be considered unsuitable and highly offensive to public values and that may adversely impact a jury's view of a case; and
 - (11) the possibility that the undercover operation will unintentionally cause an increase in criminal activity.

- (e) The prosecutor advising an undercover investigation should:

105D

- (1) consult with appropriate police or law enforcement agents on a regular basis about the continued propriety of the operation and the legal sufficiency and quality of the evidence that is being produced by the operation;
- (2) seek periodic internal review of the investigation to determine whether the operation's benefits continue to outweigh its risks and costs, including the extent to which:
 - (i) the goals of the investigation have been accomplished;
 - (ii) there is potential for the acquisition of additional useful and non-duplicative information;
 - (iii) the investigation can continue without exposing the undercover operation; and
 - (iv) continuation of the investigation may cause financial or other injury to innocent parties.
- (f) The prosecutor should seek to avoid or minimize the risks involved in the active participation of undercover police or law enforcement agents in illegal activity, and provide such agents guidance about authorized participation in otherwise criminal conduct.
- (g) Records of funds expended and generated by undercover activity should be retained and accounted for in a manner that facilitates a comprehensive and accurate audit.

STANDARD 2.4 USE OF CONFIDENTIAL INFORMANTS

- (a) As used in these Standards, a "confidential informant" is a person who supplies information to police or law enforcement agents pursuant to an agreement that the police or investigative agency will seek not to disclose the person's identity. The identity of a confidential informant may also be unknown to the prosecutor. A confidential informant may in some instances become a cooperator, and in such circumstances reference should be made to Standard 2.5.
- (b) The prosecutor should consider possible benefits from the use of a confidential informant, including whether the confidential informant might enable the government to obtain:
 - (1) first-hand, eyewitness accounts of criminal activity;
 - (2) critical background information about the criminal activity or criminal organization under investigation;

105D

- (3) information necessary to provide a basis for additional investigative techniques or court-ordered means of investigation such as a search warrant; and
 - (4) identification of witnesses or leads to witnesses who can provide direction to further the investigation or valuable testimony to a grand jury or at trial.
- (c) The prosecutor should consider possible risks from the use of a confidential informant. These include risks that the confidential informant will:
- (1) be untruthful, or provide misleading or incomplete information;
 - (2) compromise the criminal investigation by revealing information to others, including the subjects or targets of the investigation;
 - (3) engage in behavior constituting entrapment;
 - (4) commit or continue to commit crimes;
 - (5) be subject, or subject others, to serious risk of physical harm as a result of cooperating with law enforcement; and
 - (6) interfere with privileged or confidential relationships or communications or violate the rights of the investigation's subject .
- (d) The prosecutor should avoid being alone with a confidential informant, even for a brief period of time.
- (e) Before deciding to rely upon the information provided by a confidential informant for significant investigative steps, the prosecutor should review the following with the police or law enforcement agents:
- (1) the ability of the confidential informant to provide or obtain information relevant to the criminal investigation;
 - (2) means of corroborating information received from the confidential informant;
 - (3) the possible motives or biases of the confidential informant, including the motive to gain a competitive advantage over others in either criminal or legitimate enterprises;
 - (4) the nature of any and all promises made to the prospective confidential informant by other prosecutors, police or law

105D

- enforcement agents, including promises related to the treatment of associates or relatives of the confidential informant;
- (5) the prior history of the confidential informant, including prior criminal activity and other information, including the informant's true identity if necessary for the prosecutor's review;
 - (6) whether the prospective confidential informant is represented by an attorney or is party to a joint defense agreement with other targets of the investigation and, if so, how best to address potential legal or ethical issues related to the representation or agreement;
 - (7) if reasonably available, the experience other prosecutors and law enforcement agents have had with the confidential informant;
 - (8) whether the proposed compensation or benefits to be received by the confidential informant are reasonable under the circumstances;
 - (9) the risk that the prospective confidential informant may be an agent of the subjects of the investigation or of other criminal groups and individuals, or may reveal investigative information to them; and
 - (10) the risk that the prospective confidential informant will engage in criminal activity not authorized by the prosecutor, and the seriousness of that unauthorized criminal activity.
- (f) The prosecutor's office should work with police and law enforcement agents to develop best practices and policies for the use of confidential informants that include:
- (1) a rule that investigative information obtained from other sources should not be provided to the confidential informant unless doing so would materially advance the investigation;
 - (2) prohibitions on making promises of compensation or other benefits that would shock the conscience of a moral society or would risk compromising the credibility of the informant in any proceeding in which the informant's testimony may be important;
 - (3) prohibitions on making promises that the police or law enforcement agents are unlikely to be able to keep;
 - (4) routine instructions to confidential informants to refrain from criminal conduct other than as directed by law enforcement; and

- (5) the routine use of standard form agreements when such agreements are entered into by law enforcement officers without the involvement of the prosecutor.

STANDARD 2.5 COOPERATION AGREEMENTS AND COOPERATING INDIVIDUALS AND ORGANIZATIONAL WITNESSES

- (a) As used in these Standards, “cooperation agreements” are agreements between the prosecutor and otherwise culpable individuals or entities (“cooperators”) who provide the government with assistance useful to an investigation in exchange for benefits. A cooperator may have been a confidential informant earlier in the investigation.
- (b) The prosecutor should ordinarily seek to have the cooperator plead guilty to an appropriate criminal charge rather than provide the cooperator immunity for culpable conduct.
- (c) In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:
 - (1) the cooperator is able and willing to provide valuable assistance to the investigation;
 - (2) the cooperator will maintain the confidentiality or secrecy of the investigation;
 - (3) the cooperator has biases or personal motives that might result in false, incomplete, or misleading information;
 - (4) leniency or immunity for the criminal activity of the cooperator is warranted by the goals of the investigation and the public interest, including appropriate consideration for victim(s) interests;
 - (5) providing leniency, immunity or other benefits would be seen as offensive by the public or cause a reasonable juror to doubt the veracity of the cooperator’s testimony;
 - (6) information that has been provided (such as through an attorney proffer or by a debriefing of the cooperator) has been corroborated or can otherwise shown to be accurate;
 - (7) the culpability of other participants in the criminal activity relative to the cooperator’s culpability has been determined as accurately as possible;

105D

- (8) there is a likelihood that the cooperator will provide useful information only if given leniency or immunity;
 - (9) the case could be successfully prosecuted without the cooperator's assistance; and
 - (10) the cooperator could be successfully prosecuted without the admissions of the cooperator made pursuant to the agreement.
- (d) The cooperation agreement should not:
- (1) promise to forego prosecution for future criminal activity, except where such activity is necessary as part of an officially supervised investigative and enforcement program; or
 - (2) adversely affect third parties' legal rights.
- (e) The prosecutor should:
- (1) be aware that anything said to the cooperator might be repeated to the cooperator's criminal associates or in open court; and
 - (2) be aware of the disclosure requirements under relevant law if a cooperator ultimately testifies at trial, including disclosure of any and all agreements and promises made to the cooperator and evidence which could impact the cooperator's credibility, including the complete criminal history of the cooperator. The prosecutor should take steps to assure the preservation of such evidence.
- (f) The prosecutor should recognize and respect the role of the cooperator's attorney in the decision to cooperate and in the disposition of significant legal rights.
- (g) Ordinarily, a prosecutor who offers leniency in exchange for cooperation should not withdraw or threaten to withdraw the offer because of the potential cooperator's request to consult with counsel prior to deciding whether to accept it. However, if the time required for the potential cooperator to consult with counsel would render the agreement ineffective, the prosecutor may withdraw or threaten to withdraw the offer before there is opportunity for such consultation. In that event, the prosecutor may condition cooperation on an immediate and uncounseled decision to proceed.
- (h) The prosecutor should reduce a cooperation agreement to writing as soon as practicable. An agreement should only cover those crimes known to the government at the time it is made, and should specify:

105D

- (1) the specific details of all benefits and obligations agreed upon;
 - (2) the specific activities to be performed by the cooperator;
 - (3) the requirement that the cooperator be truthful in dealing with the government and in all legal proceedings;
 - (4) the prohibition against the cooperator's engaging in any criminal conduct other than as directed by law enforcement;
 - (5) the extent of the disposition of the potential criminal and civil claims against the cooperator;
 - (6) a complete list of any other promises, financial benefits or understandings;
 - (7) the limitations of the agreement with respect to the terms it contains and to the identified jurisdiction or jurisdictions; and
 - (8) the remedy in the event the cooperator breaches the agreement.
- (i) The prosecutor should avoid being alone with a cooperator even for a brief period of time.
 - (j) The prosecutor should guard against the cooperator obtaining information from others that invades the attorney-client or work product privileges or violates the Sixth Amendment right to counsel.
 - (k) Prior to relying on the cooperator's information in undertaking an investigative step that could cause adverse consequences to the investigation or to a third party, the prosecutor should be satisfied as to the truthfulness of the cooperator.
 - (l) If an investigative step involves an application to a court or other official body, the prosecutor should make appropriate and required disclosures about the cooperator to the court or other body.
 - (m) If the prosecutor suspects that the cooperator is not being truthful, the prosecutor should take reasonable steps to address such concerns and seek further corroboration of the cooperator's information.
 - (n) If the prosecutor determines that a cooperator has knowingly provided false information or otherwise breached the cooperation agreement, the prosecutor should:
 - (1) seek guidance from a supervisor;

105D

- (2) undertake or request the initiation of an investigation into the circumstances;
- (3) consider the possible prosecution of the cooperator, and;
- (4) carefully reevaluate the investigation.

STANDARD 2.6 THE DECISION TO ARREST DURING A CONTINUING CRIMINAL INVESTIGATION

- (a) In making a tactical decision whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential benefits of the arrest, including:
 - (1) protecting the public from a person known to present an imminent danger;
 - (2) reducing the likelihood of flight;
 - (3) preventing the destruction of evidence and providing an opportunity to obtain evidence of a crime pursuant to a search incident to arrest;
 - (4) stopping or deterring the harassment or coercion of witnesses or other acts of obstruction of justice;
 - (5) creating an opportunity to ask questions about an unrelated crime;
 - (6) encouraging other culpable individuals or witnesses to surrender to law enforcement and to cooperate with the investigation;
 - (7) inducing relevant conversation or other communication likely to be intercepted by law enforcement; and
 - (8) protecting the existence of an undercover agent or confidential informant, a cooperator or an undercover operation.
- (b) In deciding whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential risks of the arrest, including:
 - (1) limiting the continued conduct of a criminal investigation by alerting others involved in continuing criminal activity;
 - (2) restricting the use of some investigative techniques;
 - (3) triggering speedy charge and speedy trial rules;

105D

- (4) triggering disclosure obligations that have been subject to delayed notice;
 - (5) appearing to be illegitimate or pre-textual and thus adversely affecting community support for police and prosecution efforts; and
 - (6) causing significant shame, embarrassment or prejudice to the arrestee or innocent third parties and unintended and unfair financial impacts.
- (c) The prosecutor should be aware that Sixth Amendment right to counsel issues raised by the filing of criminal charges may limit the availability of some investigative options, including:
- (1) use of the grand jury as an investigative technique;
 - (2) soliciting incriminating information from a charged individual; and
 - (3) contacts with the individuals or entities who have been charged.

STANDARD 2.7 USE OF SUBPOENAS

- (a) As used in these Standards, a “subpoena,” however named or designated, is a written command for a person or entity to provide physical evidence, testimony or documents. A subpoena may be issued by a prosecutor, a court, a grand jury or a law enforcement agency, as provided by the law of the jurisdiction.
- (b) In deciding whether to use a subpoena, the prosecutor should consider potential benefits including:
- (1) the conservation of law enforcement resources by requiring others to search for and provide factual information and physical evidence needed for an investigation;
 - (2) the imposition of an obligation on the subject of the subpoena to provide factual information or physical evidence;
 - (3) the fact that no predicate or less of a showing is required to issue a subpoena, as compared to a search warrant;
 - (4) the ability to delay or prevent a third party from voluntarily or compulsorily disclosing information about the subpoena (including the disclosure of either the fact of the subpoena itself or of any information provided in response) as a means to preserve the secrecy of the investigation if authorized by law; and

105D

- (5) voluntary disclosures or cooperation by witnesses and subjects prompted by receipt of the subpoena.
- (c) In deciding whether to use a subpoena, the prosecutor should consider the following potential risks and ways to mitigate them:
 - (1) that evidence will be destroyed or altered in between receipt and production;
 - (2) that information responsive to the subpoena will be improperly withheld or that the request will be interpreted narrowly; and
 - (3) that knowledge of the subpoena will cause the subjects of the investigation to disguise criminal activity, or take actions to impede or obstruct the investigation.
- (d) The prosecutor using a subpoena should:
 - (1) seek to limit the scope of the subpoena to the needs of the investigation, avoid overbroad requests, and avoid seeking the production of attorney-client privileged material; and
 - (2) provide reasonable accommodations based on factors such as the size or nature of the request, the impact of the request on legitimate business operations, or the time reasonably needed to perform a review for privileged or other legally protected fact information, unless doing so would be outweighed by the government's interest in avoiding delay.
- (e) The prosecutor should ensure that materials received pursuant to a subpoena are properly stored, logged or indexed, and are readily retrievable.
- (f) The prosecutor should accept copies of documents subject to a subpoena unless there is a specific need for original documents that outweighs the producing party's need and right to retain its original materials.
- (g) The prosecutor should provide copies, or if necessary, reasonable access to copies or original documents to the person or entity who has produced the copies or originals.
- (h) The prosecutor should seek to minimize the cost and dislocation suffered by a person or entity to whom a subpoena is issued and, where applicable, should inform the person or entity of any right to compensation allowed by law.

105D

- (i) The prosecutor should arrange for the return of subpoenaed documents and materials when the purpose for which they were subpoenaed has ended.
- (j) The prosecutor involved in an investigation where police or law enforcement agents have legal authority to issue written requests for various records and data without probable cause or judicial oversight, should provide advice as to whether the proposed use of such authority is consistent with the limits of the applicable law, the Constitution, and the circumstances of the investigation.

STANDARD 2.8 SEARCH WARRANTS

- (a) As used in these Standards a “search warrant” is a written command issued by a judge or magistrate that permits law enforcement agents to search specified persons or premises and seize specified effects and information.
- (b) The prosecutor should consider the following potential benefits associated with using a search warrant:
 - (1) securing evidence that might otherwise be removed, hidden, altered or destroyed;
 - (2) removing contraband from commerce before it is transferred or used;
 - (3) seeing and documenting the precise location of the items to be seized in their natural or unaltered state or location;
 - (4) obtaining statements by individuals at the scene of the search that might further the investigation;
 - (5) observing and recording the presence of individuals found together at the scene of the search as evidence of their coordination; and
 - (6) encouraging other culpable individuals or witnesses to come forward and provide information to the investigation.
- (c) The prosecutor should consider the following potential costs and risks before applying for a search warrant:
 - (1) the extensive utilization of limited government resources during the preparation and execution of a search warrant, as compared with other means of gathering information, such as a subpoena;

105D

- (2) the intrusive nature of the execution of the warrant and its impact on personal privacy or on legitimate business operations;
 - (3) the impact of execution of the warrant on innocent third parties who may be on the premises at the time the warrant is executed; and
 - (4) the potential danger or harm to third parties.
- (d) When the prosecutor is involved in an investigation, the prosecutor should review search warrant applications prior to their submission to a judicial officer. In all other cases, the prosecutor should encourage police and law enforcement agents to seek prosecutorial review and approval of search warrants prior to their submission to a judicial officer.
- (e) In jurisdictions that authorize telephonic warrants, the prosecutor should be familiar with the rules governing the use of such warrants and should be available to confer with law enforcement agents about them.
- (f) In reviewing a search warrant application, the prosecutor should:
 - (1) seek to assure the affidavit is complete, accurate and legally sufficient;
 - (2) seek to determine the veracity of the affiant and the accuracy of the information, especially when the application is based on information from a confidential informant; and
 - (3) seek to ensure that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.
- (g) The prosecutor involved in the investigation should:
 - (1) generally, if time permits, meet in advance with all law enforcement and other personnel who will participate in the execution of the warrant to explain the scope of the warrant, including the area(s) to be searched and the items to be seized;
 - (2) consistent with the goals of the investigation, provide legitimate business operations and third parties reasonable access to seized records;
 - (3) avoid becoming a necessary percipient witness at the scene of the execution of the warrant but be readily available and accessible to respond to immediate questions or to assist in the preparation of additional warrant applications;

105D

- (4) seek to ensure that an inventory is filed as required by relevant rules; and
 - (5) seek to preserve exculpatory evidence obtained during a search and consider the impact of such evidence on the criminal investigation.
- (h) When searching an attorney's office, or any place where attorney-client or other privileged material is likely to be located or is discovered, the prosecutor should arrange for evidence to be recovered in such manner as to prevent or minimize any unauthorized intrusion into confidential relationships or information privileged under law.
- (i) The prosecutor should seek to prevent or minimize the disclosure of information to the public which a person or entity may consider private or proprietary.
- (j) The prosecutor should consider seeking to delay notice about the execution of a search warrant if such delay is authorized by law and if prompt disclosure of the execution of the warrant could reasonably be expected to result in:
 - (1) the endangerment of life or physical safety of an individual;
 - (2) the intimidation of potential witnesses;
 - (3) the flight from prosecution by a target of any investigation;
 - (4) the destruction of or tampering with evidence in any investigation;
or
 - (5) any other serious jeopardy to an investigation.
- (k) The prosecutor should not notify media representatives of a search before it occurs and should advise law enforcement agents acting with the prosecutor in the investigation not to do so.
- (l) The prosecutor should consider whether the papers supporting the search warrant should be sealed after the warrant is executed and should make application to do so only when the prosecutor believes that the public's interest in knowing of the warrant is outweighed by the need to maintain secrecy of the investigation or to prevent unfair publicity to the persons or organizations whose premises were searched.

105D

STANDARD 2.9 USE OF THE INVESTIGATIVE POWERS OF THE GRAND JURY

- (a) In deciding whether to use a grand jury, the prosecutor should consider the potential benefits of the power of the grand jury to compel testimony or elicit other evidence by:
 - (1) conferring immunity upon witnesses;
 - (2) obtaining evidence in a confidential forum;
 - (3) obtaining evidence from a witness who elects not to speak voluntarily to the police or prosecutor;
 - (4) obtaining documentary or testimonial evidence with the added reliability provided by the oath and the secrecy requirements of the grand jury;
 - (5) obtaining documentary evidence from a third party that may be difficult to obtain from a target; and
 - (6) preserving witnesses' accounts in the form of sworn testimony where the jurisdiction provides for recording or transcription of the proceedings.

- (b) In deciding whether to use a grand jury, the prosecutor should consider the potential risks including:
 - (1) revealing the existence or direction of an investigation;
 - (2) obtaining evasive or untruthful testimony from witnesses who are loyal to targets or fearful of them;
 - (3) relying on witnesses to obey the commands of subpoenas directing them to produce documents or physical evidence;
 - (4) granting immunity to witnesses:
 - (i) who are not believed culpable at the time of the grant but are later found to be culpable; or
 - (ii) who are later found to be more culpable than the prosecutor believed at the time of the grant;
 - (5) exposing grand jury witnesses to reputational, economic or physical reprisal; and

105D

- (6) exposing grand jury witnesses to collateral consequences such as lost time from employment or family obligations, financial costs of compliance, and potential damage to their reputation from association with a criminal investigation.
- (c) In pursuing an investigation through the grand jury, the prosecutor should:
- (1) only bring a matter before the grand jury with the primary purpose of seeking justice and to be mindful of the ex parte nature of proceedings;
 - (2) prepare adequately before conducting grand jury examinations;
 - (3) know and follow the laws of the jurisdiction and the rules, practices, and policies of the prosecutor's office;
 - (4) pose only legal and proper questions and, if within the knowledge of the prosecutor questioning may elicit a privileged or self-incriminating response, advise the witness of the existence of the applicable privilege; and
 - (5) unless prohibited by the law of the jurisdiction, ensure that grand jury proceedings are recorded.
- (d) The prosecutor should use grand jury processes fairly and should:
- (1) treat grand jurors with courtesy and give them the opportunity to have appropriate questions answered; however, the prosecutor should not allow questions that:
 - (i) elicit facts about the investigation that should not become known to the witness; or
 - (ii) call for privileged, prejudicial, misleading or irrelevant evidence;
 - (2) issue a subpoena ad testificandum only if the prosecutor intends to bring the witness before the grand jury;
 - (3) refrain from issuing a subpoena that is excessively broad or immaterial to the legitimate scope of the grand jury's inquiry;
 - (4) make reasonable efforts before a witness appears at the grand jury to determine that the testimony is needed, including offering the witness or witness' counsel a voluntary pre-appearance conference;

105D

- (5) grant reasonable requests for extensions of dates for appearance and production of documents when doing so does not impede the grand jury's investigation; and
 - (6) resist dilatory tactics by witnesses that undermine the grand jury's investigation, authority, or credibility.
- (e) The prosecutor should examine witnesses with courtesy and in a manner designed to elicit truthful testimony, and should:
- (1) consider warning a witness suspected of perjury of the obligations to tell the truth;
 - (2) insist upon definite answers that will:
 - (i) fully inform the members of grand jury; and
 - (ii) establish a clear record so that a witness committing perjury or contempt can be held responsible for such actions;
 - (3) inform grand jury witnesses of their right to consult with their attorneys to the extent provided by the policy, procedure or law of the jurisdiction; and
 - (4) seek a compulsion order only when the testimony sought is in the public interest, there is no other reasonable way to elicit such testimony, and the witness has refused to testify or has indicated an intent to invoke the privilege against self-incrimination.
- (f) In determining whether obtaining testimony from a culpable witness will outweigh the cost of granting immunity, a prosecutor should consider the following factors:
- (1) the relative culpability of the witness to be immunized as compared with the person against whom the testimony will be offered;
 - (2) the gravity of the crime(s) being investigated;
 - (3) the probability that the testimony would advance the investigation or an eventual prosecution;
 - (4) the gravity of the crime(s) for which the witness would be granted immunity;

105D

- (5) the character and history of the witness being considered for immunity, including how these factors might affect the witness's credibility;
 - (6) the scope of the immunity that the witness would receive;
 - (7) the risk that the immunized witness would lie or feign lack of memory;
 - (8) the risk that the immunized witness would falsely claim responsibility for criminal acts committed by another; and
 - (9) the potential for the grand jury testimony to enhance truthful testimony by hostile or reluctant witnesses at trial or provide evidence to prove perjury if a witness lies at trial.
- (g) Ordinarily, the prosecutor should not seek to compel testimony from a close relative of a target of an investigation by threatening prosecution or offering immunity, unless:
- (1) the relative participated criminally in an offense or criminal enterprise with the target and the testimony sought would relate to that enterprise's activities;
 - (2) the testimony sought relates to a crime involving overriding prosecutorial concerns; or
 - (3) comparable testimony is not readily available from other sources
- (h) Ordinarily, the prosecutor should give notice to a target of a grand jury investigation and offer the opportunity for the target to testify without immunity before the grand jury. However, notice need not be provided if there is a reasonable possibility it will result in flight of the target, endanger other persons, or obstruct justice. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a waiver of that right.
- (i) A prosecutor with personal knowledge of non-frivolous evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. If evidence is provided to the prosecutor by the subject or target of the investigation and the prosecutor decides not to provide the evidence to the grand jury, the prosecutor should notify the subject, target or their counsel of that decision without delay, so long as doing so would not jeopardize the investigation or prosecution or endanger others.

105D

STANDARD 2.10 TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE

- (a) As used in these Standards, “technologically-assisted physical surveillance” includes: video surveillance, tracking devices, illumination devices, telescopic devices, and detection devices.
- (b) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the potential benefits, including:
 - (1) detecting the criminal possession of objects that are dangerous or difficult to locate; and
 - (2) seeing or tracing criminal activity by means that are minimally intrusive and limiting the risks posed to the public and law enforcement personnel.
- (c) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal and privacy implications for subjects, victims and third parties. The prosecutor should seek to use such surveillance techniques in proportion to the seriousness of the criminal activity being investigated and the needs of the particular investigation and in a manner designed to be minimally intrusive.
- (d) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal requirements applicable to the technique under consideration, and whether those requirements have been met.

STANDARD 2.11 CONSENSUAL INTERCEPTION, TRANSMISSION AND RECORDING OF COMMUNICATIONS

- (a) As used in these Standards “consensual interception” is an electronic, digital, audio or video interception and recording of communications to which one or more but not all participants in the communications has consented.
- (b) In deciding whether to use consensual interception, the prosecutor should consider the potential benefits, including obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.
- (c) In deciding whether to use consensual interception, the prosecutor should consider the potential risks, including:
 - (1) problems of audibility and admissibility;

105D

- (2) the danger of detection, including physical risk to those participating, and the risk of disclosure of the investigation;
 - (3) selective recording of communications by the cooperating party;
 - (4) the danger of obtaining false, misleading or self-serving statements by a party to the conversation who is aware or suspects that the conversation is being recorded;
 - (5) the risk that the consenting individual will conspire with the subject of the investigation to create false or misleading statements; and
 - (6) the risk that the import of a conversation will be distorted by the cooperating party.
- (d) To maximize the benefits and to minimize the risks of using consensual interception, the prosecutor should:
- (1) obtain written or recorded consent from the consenting individual;
 - (2) minimize to the extent practicable recording outside the presence of law enforcement agents and, if such a recording occurs or will occur:
 - (i) have law enforcement agents test and activate the recording equipment before the cooperating party meets with the subject;
 - (ii) minimize the necessity for the cooperating party to operate the recording equipment and, if it is necessary for the cooperating party to operate the equipment, provide that individual specific directions on how to operate the equipment and strict instruction to be present with it during such operation.
- (e) The prosecutor, in consultation with the law enforcement agents, should regularly review all or selected recordings obtained during consensual interceptions.
- (f) The prosecutor should take steps to ensure law enforcement agents comply with procedures relating to the acquisition of, custody of, and access to electronic equipment and recording media and to the secure preservation of any recordings produced whether they are obtained by consenting individuals or by law enforcement agents.

105D

STANDARD 2.12 NON-CONSENSUAL ELECTRONIC SURVEILLANCE

- (a) As used in these Standards “non-consensual electronic surveillance” is the court-ordered interception of communications, actions, or events.
- (b) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential benefit of obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.
- (c) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential costs and risks, including:
 - (1) whether the suspected criminal activity being investigated is sufficiently serious and persistent to justify:
 - (i) the significant intrusion on the privacy interests of targets and innocent third parties;
 - (ii) the need to obtain periodic reauthorization for electronic surveillance; and,
 - (iii) the financial and resource costs associated with such surveillance.
 - (2) whether all requirements of the law are met.
- (d) The prosecutor, including an applicant, should be aware of the reporting requirements under federal and state law and heightened obligations and accountability to the court in connection with the application and use of non-consensual electronic surveillance.
- (e) Prior to the initiation of non-consensual electronic surveillance, the prosecutor should review the following with the law enforcement agents and contract personnel such as interpreters who will assist in the execution of the order:
 - (1) the scope of the order;
 - (2) obligations of the monitoring law enforcement agents and monitoring personnel to minimize the interception of privileged conversations and other conversations outside the scope of the order and to alert the prosecutor promptly when recording evidence of new crimes;
 - (3) the prohibition on listening without recording;

105D

- (4) rules related to protecting the integrity and chain of custody of recordings;
- (5) instructions to contact the prosecutor whenever a noteworthy event occurs, or there is a question regarding the execution of the order; and
- (6) the need to adhere to non-disclosure requirements.
- (7) The prosecutor should stay informed of actions of law enforcement agents and contract personnel throughout the use of non-consensual electronic surveillance and should take appropriate steps to determine whether the required procedures are being followed by those carrying out the surveillance.

STANDARD 2.13 CONDUCTING PARALLEL CIVIL AND CRIMINAL INVESTIGATIONS

- (a) In deciding whether to conduct a criminal investigation and throughout any such investigation that is undertaken, the prosecutor should consider whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.
- (b) When doing so would not compromise a proper prosecutorial interest, and to the degree permitted by law, the prosecutor should cooperate with other governmental authorities regarding their investigations for the purpose of instituting remedial actions that are of legitimate concern to such entities. In the course of such cooperation, the prosecutor:
 - (1) should retain sole control of the criminal investigation and maintain independent judgment at all times;
 - (2) should be aware of rules that prohibit or restrict the sharing or disclosure of information or material gathered through certain criminal investigative techniques;
 - (3) should not be a party to nor allow the continuation of efforts by civil investigative agencies or attorneys to use the criminal process for the purpose of obtaining a civil settlement; and
 - (4) may, in order to preserve the integrity of a criminal investigation or prosecution, ask a civil investigative agency to refrain from taking an investigative step or bringing an action but, in considering whether to do so, should consider the detriment to the public that may result from such forbearance.

105D

- (c) A prosecutor should consider the appropriateness of non-criminal or global (civil and criminal resolutions) dispositions suggested by subjects or targets, whether or not they choose to cooperate, and may consider proposals by them to include civil or regulatory sanctions as part of a disposition or cooperation agreement.

STANDARD 2.14 TERMINATING THE INVESTIGATION, RETENTION OF EVIDENCE AND POST-INVESTIGATION ANALYSIS

- (a) The prosecutor should diligently pursue the timely conclusion of criminal investigations.
- (b) The prosecutor's office should periodically review matters under investigation in the office and determine whether the interests of justice would be served by terminating the investigation.
- (c) The prosecutor should determine whether information obtained in investigations should be made available for civil enforcement purposes, administrative remedies, or for other purposes consistent with law and the public interest.
- (d) To the extent feasible, the prosecutor and members of the investigative agencies should analyze investigations retrospectively, to evaluate techniques and steps that worked well or that proved to be deficient.
- (e) Post-investigation analysis by the prosecutor's office should include seeking to identify ways other than prosecution to prevent, minimize or deter similar crimes from occurring in the future.
- (f) Prosecutors should be aware of the requirements and office practices regarding the preservation of investigative records and of their compliance obligations with regard to information access and privacy law provisions.
- (g) To the extent practicable, the prosecutor should, upon request, provide notice of termination of the investigation to subjects who became aware of the investigation.
- (h) Upon termination of the investigation and related proceedings, physical evidence other than contraband should be returned promptly to the person from whom it was obtained, absent an agreement, court order or requirement of law to the contrary.

STANDARD 2.15 GUIDANCE AND TRAINING FOR LINE PROSECUTORS

- (a) A prosecutor's office should be organized in a manner to provide line prosecutors guidance consistent with these Standards.

105D

- (b) To guide the exercise of discretion, a prosecutor's office should:
- (1) encourage consultation and collaboration among prosecutors;
 - (2) appoint supervisors with appropriate experience, strong skills and a commitment to justice and ethical behavior;
 - (3) require consultation and approval at appropriate supervisory levels for investigative methods of different levels of intrusiveness, risk and costs;
 - (4) provide regular supervisory review throughout the course of investigations;
 - (5) regularly review investigative techniques and promote best practices to reflect changes in law and policy;
 - (6) create and implement internal policies, procedures, and standard practices that teach and reinforce standards of excellence in performance, professionalism, and ethics;
 - (7) create and implement policies and procedures that protect against practices that could result in unfair hardships, the pursuit of baseless investigations, and the bringing of charges against the innocent; and
 - (8) develop and support practices designed to prevent and to rectify conviction of the innocent.
 - (9) determine what types of investigative steps require formal supervisory approval, and at what supervisory level, and,
 - (10) require line attorneys to consult with supervisors or experienced colleagues when making significant investigative decisions absent exigent circumstances.
- (c) A prosecutor's office should provide guidance and training by:
- (1) strongly encouraging consultation and collaboration among line assistants;
 - (2) appointing supervisors with appropriate experience and strong commitments to justice, and fostering close working relationships between supervisors and those they supervise;
 - (3) providing formal training programs on investigative techniques and the ethical choices implicated in using them; and

105D

- (4) creating internal policies and standard practices regarding investigations that memorialize and reinforce standards of excellence, professionalism, and ethics. In doing so:
 - (i) policy and practice materials should be regularly reviewed and updated and should allow flexibility for the exercise of prosecutorial discretion, and
 - (ii) written policies and procedures should not be a substitute for regular training for all office members and a commitment to mentoring less-experienced attorneys.
- (d) When a line prosecutor believes the needs of an investigation or some extraordinary circumstance require actions that are contrary to or outside of existing policies, the prosecutor should seek prior approval before taking such actions.
- (e) A prosecutor's office should develop policies and procedures that address the initiation and implementation of the investigative tools discussed in these Standards in advance of the specific needs of an investigation.

STANDARD 2.16 SPECIAL PROSECUTORS, INDEPENDENT COUNSEL AND SPECIAL PROSECUTION UNITS

- (a) As used in these Standards, a "special prosecutor" or an "independent counsel" is a prosecutor serving independently from the general prosecution office under a particularized appointment and whose service in that role typically ends after the purpose of the appointment is completed. A "special prosecution unit" is typically a unit that focuses on a particular type of crime, criminal activity, or victim.
- (b) Although the special prosecutor and the special prosecution unit are removed from the responsibilities of a general prosecution office, a prosecutor in this role should:
 - (1) be bound by the same policies and procedures as regular prosecutors in their jurisdiction, unless to do so would be incompatible with their duties;
 - (2) base judgments about the merits of pursuing a particular investigation upon the same factors that should guide a regular prosecutor, including the seriousness of the offense, the harm to the public, and the expenditure of public resources, and
 - (3) in choosing matters to investigate, consider the danger that the narrow focus or limited jurisdiction of the prosecutor or the unit will

lead to the pursuit of what would, in a general prosecution office, be considered an insubstantial violation, or one more appropriately resolved by civil or administrative actions.

STANDARD 2.17 USE OF INFORMATION, MONEY, OR RESOURCES PROVIDED BY NON-GOVERNMENTAL SOURCES

- (a) The prosecutor may use information provided by non-governmental sources that is pertinent to a potential or existing criminal investigation. However, consistent with the principles in Standard 2.1, the prosecutor should make an independent evaluation of the information and make an independent decision as to whether to allocate or continue to allocate resources to investigating the matter.
- (b) If the law of the jurisdiction permits the acceptance of financial or resource assistance from non-governmental sources, the decision to accept such assistance should be made with caution by the chief public prosecutor or an accountable designee after careful consideration of:
 - (1) the extent to which the law of the jurisdiction permits the acceptance of financial or resource assistance;
 - (2) the extent to which the offer is in the public interest, as opposed to an effort to achieve the limited private interests of the non-governmental sources;
 - (3) the extent to which acceptance may result in foregoing other cases;
 - (4) the potential adverse impact on the equal administration of the criminal law;
 - (5) the extent to which the character and magnitude of the assistance might unduly influence the prosecutor's subsequent exercise of investigative and prosecutorial discretion;
 - (6) the likelihood that the community may view accepting the assistance as inconsistent with the fair and equal administration of criminal justice;
 - (7) the likelihood that accepting assistance from private sources may create an appearance of undue influence over law enforcement; and
 - (8) the extent to which financial or resource assistance would enhance or enable the investigation of criminal activity;

105D

- (c) The prosecutor should consider the risk that encouraging information gathering from non-governmental sources may lead to abusive, dangerous or even criminal actions by private parties.
- (d) The office of the prosecutor should have procedures designed to protect the independent exercise of investigative discretion from being influenced by the receipt of outside financial or resource assistance, including careful accounting and recordkeeping of the amounts and terms of such assistance and clear disclosure that providing assistance will not guide the exercise of investigative or prosecutorial discretion.
- (e) The prosecutor, consistent with the law of the jurisdiction, should disclose significant non-governmental assistance to relevant legislative or public bodies having oversight over the prosecutor's office and, when appropriate, the public.
- (f) Non-governmental assistance should be disclosed to affected parties as part of the discovery process.

STANDARD 2.18 USE OF SENSITIVE, CLASSIFIED OR OTHER INFORMATION IMPLICATING INVESTIGATIVE PRIVILEGES

- (a) The prosecutor should be alert to the need to balance the government's legitimate interests in protecting certain information from disclosure, and the legitimate interests and Constitutional rights of the public and of defendants favoring disclosure.
- (b) When appropriate, the prosecutor should request court orders designed to protect the disclosure of law enforcement means and methods, informant identities, observation posts, and such other information that might jeopardize future investigations or the safety or reputation of persons directly or indirectly involved in an investigation.
- (c) In investigations believed to have the potential to include classified or sensitive information, prosecutors should seek to obtain the relevant information and consult laws, regulations and other requirements for handling such information before making any charging decisions.

PART 3: PROSECUTOR'S ROLE IN RESOLVING INVESTIGATION PROBLEMS

STANDARD 3.1 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED LAW ENFORCEMENT MISCONDUCT

- (a) If the prosecutor has reason to suspect misconduct or unauthorized illegal activity at any level of the prosecutor's office or in any agency or department engaged in a criminal investigation, the prosecutor should promptly report the suspicion and the reason for it to appropriate supervisory personnel in the prosecutor's office who have authority to address the problem, or to the appropriate inspector general's office, or similar agency, if reporting within the prosecutor's own office is problematic. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.
- (b) If the prosecutor has reason to believe that a criminal investigation or prosecution is, or is likely to be, adversely affected by incompetence, lack of skilled personnel or inadequate resources in the prosecutor's office or in any other relevant agency or department, the prosecutor should promptly report that belief and the reason for it to supervisory personnel in the prosecutor's office.
- (c) A supervisory prosecutor who receives an allegation of misconduct, unauthorized illegal conduct, or who receives an allegation of incompetence, inadequate resources, or lack of skilled personnel that is, or is likely to, adversely affect a criminal investigation, should undertake a prompt and objective review of the facts and circumstances or refer the matter to an appropriate agency or component responsible for addressing such allegations. When practicable, the line prosecutor making any such allegations should not be involved in subsequent investigation(s) relating to the allegation(s).
- (d) If the prosecutor's office concludes that there is a reasonable belief that personnel in any agency or department have engaged in unauthorized illegal conduct, the prosecutor's office should initiate a criminal investigation into the conduct or seek the initiation of such an investigation by an appropriate outside agency or office.
- (e) If the prosecutor's office concludes that there was not unauthorized illegal conduct, but concludes that there was incompetence or non-criminal misconduct, the prosecutor's office should take appropriate action to notify the relevant agency or department, and if within the prosecutor's own office, to impose sanctions for the conduct.

105D

- (f) Decisions on how to respond to allegations of unauthorized illegal conduct, misconduct, or significant incompetence should generally be made without regard to adverse consequences on pending cases or investigations.

STANDARD 3.2 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED JUDICIAL MISCONDUCT

- (a) Although judges are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the judiciary.
- (b) If a line prosecutor has reason to believe that there is significant misconduct or illegal activity by a member of the judiciary, the line prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.
- (c) Upon receiving from a line prosecutor, or from any source, an allegation of significant misconduct or illegal conduct by a member of the judiciary, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.
- (d) If the prosecutor's office has a reasonable belief that a member of the judiciary has engaged in criminal conduct, the prosecutor's office should initiate, or seek the initiation of, a criminal investigation.
- (e) If the prosecutor's office concludes that a member of the judiciary has not engaged in illegal conduct, but has engaged in non-criminal misconduct, the prosecutor's office should take appropriate action to inform the relevant officer of the judicial authorities. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.
- (f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a judge before whom the prosecutor's office practices. In some instances, this may require the appointment of a "pro tem" or "special" prosecutor or use of a "fire-wall" within the prosecutor's office.

STANDARD 3.3 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED MISCONDUCT BY DEFENSE COUNSEL

- (a) Although defense counsel are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a

105D

means of harassment or abuse that may impact the independence of the defense counsel or the Constitutionally protected right to counsel.

- (b) If a line prosecutor has reason to believe that defense counsel is engaging in criminal conduct, is violating the duty to protect a client, or is engaging in unethical behavior or misconduct, the prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.
- (c) Upon receiving from a line prosecutor, or from any source, an allegation of misconduct or illegal conduct by defense counsel, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.
- (d) If the prosecutor's office has a reasonable belief that defense counsel has engaged in illegal conduct, the prosecutor's office should initiate, or seek the initiation of, an investigation into the conduct.
- (e) If the prosecutor's office concludes that defense counsel has not engaged in illegal conduct, but has engaged in non-criminal misconduct as defined by the governing ethical code and the rules of the jurisdiction, the prosecutor's office should take appropriate action to inform the appropriate disciplinary authority.
- (f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a defense counsel including, if appropriate, the appointment of a pro tem or special prosecutor or use of a "fire-wall" within the prosecutor's office. At a minimum, an investigation of defense counsel's conduct should be conducted by a prosecutor who has not been involved in the initial matter or in ongoing matters with that defense counsel.
- (g) The prosecutor investigating defense counsel should consider whether information regarding conduct by defense counsel should be provided to a judicial officer involved in overseeing aspects of the investigation in which the misconduct occurred.
- (h) The prosecutor investigating defense counsel who is representing a client in a criminal matter under the jurisdiction of the prosecutor's office ordinarily should notify the attorney and the court in a timely manner about the possibility that potential charges against the attorney may create a conflict of interest.

105D

STANDARD 3.4 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED MISCONDUCT BY WITNESSES, INFORMANTS OR JURORS

- (a) If a line prosecutor has reason to believe that there has been illegal conduct or non-criminal misconduct by witnesses, informants, or jurors, the prosecutor should seek supervisory review of the matter.
- (b) Upon receiving an allegation of unauthorized illegal conduct or non-criminal misconduct by witnesses, informants or jurors, the prosecutor's office should undertake a prompt and objective review. If there is a reasonable belief that there has been illegal conduct or non-criminal misconduct, the prosecutor's office should initiate an investigation into the conduct. All relevant evidence should be preserved in the event it must be disclosed if criminal charges are filed against the individual alleged to have engaged in the conduct.
- (c) If the misconduct relates to the official duties of a juror or witness, it must also be reported to an appropriate judicial officer.

STANDARD 3.5 ILLEGALLY OBTAINED EVIDENCE

- (a) If a prosecutor reasonably believes that evidence has been illegally obtained, the prosecutor should consider whether there are potential criminal acts that should be investigated or misconduct that should be addressed or reported. The prosecutor should be familiar with the laws of their jurisdiction regarding the admissibility of illegally obtained evidence.
- (b) The prosecutor should take appropriate steps to limit the taint, if any, from the illegally obtained evidence and determine if the evidence may still be lawfully used.
- (c) The prosecutor should notify the parties affected by the illegal conduct at the earliest time that will not compromise the investigation or subsequent investigation, or at an earlier time if required by law.

STANDARD 3.6 RESPONDING TO POLITICAL PRESSURE AND CONSIDERATION OF THE IMPACT OF CRIMINAL INVESTIGATIONS ON THE POLITICAL PROCESS

- (a) The prosecutor should resist political pressure intended to influence the conduct, focus, duration or outcome of a criminal investigation.
- (b) The prosecutor should generally not make decisions related to a criminal investigation based upon their impact on the political process
- (c) When, due to the nature of the investigation or the identity of investigative targets, any decision will have some impact on the political process (such

as an impending election), the prosecutor should make decisions and use discretion in a principled manner and in a manner designed to limit the political impact without regard to the prosecutor's personal political beliefs or affiliations.

- (d) The prosecutor should carefully consider the language in Standard 1.5 ("Contacts with the Public During the Investigative Process") when making any statements or reports regarding a decision to prosecute, or to decline to prosecute, in a matter that may have some impact on the political process.

STANDARD 3.7 REVIEW AND OVERSIGHT OF CRIMINAL INVESTIGATIONS BY GOVERNMENT AGENCIES AND OFFICIALS

- (a) Prosecutors' offices should attempt to respond in a timely, open, and candid manner to requests from public officials for general information about the enforcement of laws under their jurisdiction or about law reform matters. However, if public officials seek information about ongoing or impending investigations, the prosecutors' offices should consider the potential negative impact of providing such information and should inform public officials about such concerns.
- (b) Generally, responses to public officials should be made by high-ranking officials in the prosecutor's office who have policy-making authority. Prosecutors' offices should resist allowing line-attorneys to respond to requests for information by public officials.
- (c) Generally, responses to information requests by public officials should be through testimony or by providing pertinent statistics and descriptive and analytical reports, and not by providing information about particular matters. Prosecutors' offices should resist requests for materials that are subject to deliberative process or work product privileges related to pending criminal investigations or closed investigations whose materials have not otherwise been made public, and should oppose disclosure of information that would adversely affect a person or entity.
- (d) Prosecutor's offices may respond to requests about the handling of fully adjudicated cases. Absent unusual circumstances, information about adjudicated cases should be provided by high-ranking officials with policy-making authority, and not by line attorneys.
- (e) The Prosecutor's office should establish clear and consistent policies to address its responsibilities under public disclosure laws and with regard to the public's potential access to closed matters. The Prosecutor's office should provide sufficient resources to make prompt and appropriate replies to any public disclosure requests.

105D

REPORT

Background

The proposed *ABA Criminal Justice Standards on Prosecutorial Investigations* address the need for more detailed and in-depth guidance for prosecutors who are actively engaged in the conduct of criminal investigations. The archetype of a criminal investigation (police investigate, prosecutors prosecute) has evolved. When the primary focus of law enforcement is on prosecuting street crime, with complaining victims willing to cooperate and most criminal conduct consisting of single incidents, the traditional division between police and prosecutor works well. However, crime that is systematic, ongoing, and more complex, requires greater involvement of a prosecutor during investigations. Complex legal rules concerning search and seizure, the right to counsel, electronic surveillance and related issues require lawyers to assist police in complex investigations. In some instances, Congress and state legislatures formally have given prosecutors control over sophisticated investigative techniques. For example, a prosecutor may be statutorily designated as counsel to a grand jury, with the legal responsibility for resolving immunity questions. In the federal system, as another example, prosecutors have the exclusive responsibility for applying for authorization to conduct electronic surveillance, and are required to monitor and control its execution by law enforcement agents.

Surprisingly, little work on the prosecutor's role in investigations appears in academic literature, and only a few pages in the *ABA Criminal Justice Standards on the Prosecution Function* address investigative issues. In the summer of 2002 the Standards Committee appointed a Task Force on Prosecutorial Investigations and charged it with the responsibility of drafting Standards to fill that gap.

General Principles

While the proposed Standards lay out a number of basic principles, perhaps none are more critical than the need for the prosecutor to exercise independent judgment throughout the process and to avoid reaching premature conclusions concerning the guilt, or role, of persons who appear during the course of the investigation. A prosecutor's office is an institution, with an appointed or elected official as manager of its operations during his or her tenure. Thus, the Standards make clear there is a need for the office to establish policies and procedures and to promote regular communication among colleagues and supervisors.

The detailed Standards guide prosecutors through the numerous important decisions they must make before and during an investigation, based on a clear understanding of their implications -- for the case, the prosecutor, the subject or potential subject of the investigation, and the public.

105D

Major Areas of Coverage of these Standards

Working with police and other law enforcement agents: Police and other criminal investigators operate under the supervision of their own department, bureau or agency, and are not generally subject to direct supervision by prosecutors. As prosecutors have become more involved in the earliest stages of criminal investigations, their ability to work effectively with law enforcement agents has become important and at times difficult. The Standards guide the prosecutor in working with law enforcement agents in a manner that recognizes and respects the prerogatives and expertise of law enforcement agents, while maintaining the independent judgment and perspective that is central to the function of the public prosecutor.

Victims, potential witnesses and targets during the investigative process: During the investigative stage of a case, the police and prosecutors may interview or learn about persons without knowing whether they will ultimately be considered victims, witnesses, defendants or possible future cooperating defendants. The Standards are designed to guide prosecutors in their consideration of the appropriate resolution of the status of those subject to a criminal investigation.

Contacts with the public during the investigative process: As highlighted by recent instances of severe prosecutorial misconduct during criminal investigations, the prosecutor's role with respect to contact with the public is fraught with risks to innocent parties, victims and the public's respect for the criminal justice process. These Standards are designed to guide the prosecutor in how best to address the issue of public communication regarding the criminal investigation.

Initiating or continuing a criminal investigation: Then Attorney General (later Justice) Robert Jackson wrote that the power to investigate is "the most dangerous power of the prosecutor." The decision to initiate or continue a criminal investigation is one in which prosecutors have immense and largely unreviewable discretion. These Standards offer guidance in what should and should not be considered in making such determinations.

Selecting investigative techniques: Selecting appropriate investigative techniques is a decision that formerly was reserved solely for law enforcement agents. Today, the prosecutor is often central to such decisions, particularly when the techniques to be utilized impact significant legal and Constitutional concerns. These Standards provide guidance in choosing to use, or move away from, basic investigative techniques and costlier, riskier or more intrusive means of investigation.

The use of undercover agents, undercover operations, confidential informants, cooperation agreements and cooperating persons: Substantial risks are involved in the use of these significant investigative techniques. The Standards address the benefits and risks associated with their selection and use.

105D

Arrest, subpoenas, search warrants, the grand jury, technologically-assisted surveillance, consensual and non-consensual interception and recording: These are traditional areas of involvement for the prosecutor in the criminal justice process. The Standards provide guidance as to the benefits and risks associated with these tools, as well as guidance in the prosecutor's particular role and conduct in the use of these powers.

Parallel proceedings: Government entities increasingly utilize parallel administrative, civil and criminal proceedings. The Standards provide prosecutors with guidance in addressing the relative value of civil and criminal sanctions and the need to maintain certain barriers between the civil and criminal investigative processes.

Terminating investigations; post-investigation analysis; guidance and training: The proposed Standards are intended, among other things, to guide prosecutors in determining when it is appropriate to conclude a criminal investigation, and how to utilize past investigations to reduce opportunities for future criminal activity. The Standards are also designed to guide the prosecutor's office in the need to provide sufficient consultation, collaboration, oversight and training for prosecutor's engaged in criminal investigations.

Special prosecutors, independent counsel, and special prosecution units: Special or independent prosecutors,, by definition, have a narrow scope of inquiry. Unlike a typical prosecutor's office, the special prosecutor (or the specialized prosecution unit) does not have other matters to turn to if a particular area of inquiry proves fruitless. The Standards are intended to guide the prosecutor in such a role so that the subjects of their investigations fare neither worse nor better than the subjects of any other criminal investigations and so that decisions about the use of public resources in such investigations are made in a balanced and dispassionate fashion.

Use of information, money or resources by non-governmental sources: Accepting resources from a party-in-interest has the potential to influence the independence of the prosecutor engaged in a criminal investigation. The proposed Standards are designed to help ensure that a prosecutor who may consider accepting monetary or non-monetary assistance for the pursuit of a criminal investigation avoids the appearance or the reality of impropriety in the administration of the criminal law.

Prosecutor's role in addressing suspected misconduct by law enforcement personnel, judges, defense counsel, witnesses, informants or jurors: The Standards provide guidance to the prosecutor who believes that participants in the criminal justice process may have been involved in misconduct or violations of law.

The Standards' Approach

The widely varying circumstances of criminal investigations in which prosecutors may be involved preclude categorical answers to many questions that a prosecutor may face. Therefore, the approach taken in this set of Standards differs somewhat from that taken in most of the other Criminal Justice Standards. Rather than state unequivocally

105D

what investigating prosecutors should or should not do, many of these Standards enumerate relevant factors (e.g., risks and benefits) that prosecutors should consider prior to making decisions about initiating, continuing, and terminating criminal investigations or pursuing specific investigation strategies. The drafters expect that a clear course of action will often emerge from this exercise, e.g., when the risks clearly outweigh the benefits or vice-versa. Even when the weight is more evenly distributed and the appropriate decision not so clear-cut, consideration of relevant factors prior to making a decision will, at a minimum, reduce the likelihood that prosecutors will be caught off guard by the adverse consequences of their decisions and will increase the probability of their being prepared to mitigate or otherwise deal with such consequences.

These Standards are, ultimately, designed to further the ABA's efforts to develop standards that support Justice Sutherland's observation of the unique role of the prosecutor in the criminal justice process to see "that justice is done[1]." This effort has been reflected in the ABA's prior support for the obligation to avoid and rectify the convictions of innocent people, an endeavor which these Standards would support. These new Standards would enable the ABA to perform a critical role in supporting and encouraging prosecutors to retain their independence and responsibility to the equal and fair administration of justice during the conduct of criminal investigations.

Respectfully Submitted,

Section on Criminal Justice
Stephen A. Saltzburg, Chair

February 2008

[1] United States v. Berger, 295 U.S. 78, 88 (1935)

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Criminal Justice Section

Submitted By: Stephen Saltzburg, Section Chair

1. Summary of Recommendation(s).

Traditionally, police were responsible for investigating crime and prosecutors were responsible for prosecuting it. In recent years, however, as crime has become more organized, sophisticated and complex, prosecutors have become involved in the investigative stage of the criminal justice process. Their involvement has grown as investigative tools and the rules for investigations have become more sophisticated and intricate. The proposed Standards are designed to increase prosecutors' awareness of the myriad issues they may face in handling investigations and to provide guidance for dealing with them appropriately.

2. Approval by Submitting Entity.

The proposed Standards were approved by the Criminal Justice Section Council on November 3, 2007 at the second of the two Council readings required under the procedures for adoption of ABA Criminal Justice Standards.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In February 1992, the House of Delegates approved a Third Edition of the ABA Criminal Justice Standards on the Prosecution Function. Part III of those Standards relates to "Investigation for Prosecution Decision." The set of Standards currently being proposed will supplement the Third Edition Standards (and the Fourth Edition which is currently being developed) by providing much greater detail about the prosecutor's role and responsibilities in the investigatory context.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Third Edition Prosecution Function Standards (see #3, above) would be supplemented by the proposed Standards. The proposed Standards are consistent with relevant provisions of Model Rule 3.8 of the Model Rules of Professional Conduct relating to the Special Responsibilities of a Prosecutor

105D

and with the ABA policy on the waiver of the attorney-client privilege adopted in August 2005. Among other ABA policies reflected in the proposed Standards are those relating to electronic surveillance, technologically-assisted physical surveillance, the grand jury, and victims.

5. What urgency exists which requires action at this meeting of the House?

In light of the increasing involvement of prosecutors in greater numbers and more complex investigations, the sooner the Standards are available, the sooner investigations are likely to reflect thoughtful consideration of the myriad issues highlighted in the Standards.

6. Status of Legislation. (If applicable.)

We are aware of no pending legislation.

7. Cost to the Association. (Both direct and indirect costs.)

The only direct costs associated with approval of the recommendation will be a modest fee for the Task Force reporter to prepare commentary to the Standards, meeting expenses for the Standards Committee to review, revise, and approve the draft commentary, and expenses associated with printing the Standards. Funds for these purposes have been anticipated in the Standards Committee budget for 2007-08. Staff lobbying of the Standards, as other ABA policies, would continue to be undertaken by existing Governmental Affairs staff, with assistance from existing Criminal Justice Section staff.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Throughout the drafting process, drafts have been widely circulated both within and without the ABA. Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda, the report is being circulated to staff and chairpersons or executive directors of the following:

ABA

Business Law

Coalition for Justice

Governmental Affairs

Government and Public Sector Lawyers

General Practice, Solo and Small Firm

Gun Violence, Special Committee on

Environmental Law, Standing Committee

Ethics and Professional Responsibility, Standing Committee

Immigration Commission
Individual Rights and Responsibilities Section
Judicial Division
Law & National Security, Standing Committee
Legal Aid & Indigent Defendants, Standing Committee
Litigation Section
National Conference of State Trial Judges
Professional Services Division
State and Local Government Law Section
Substance Abuse, Standing Committee
Taxation Section

As requested by the Rules and Calendar Committee, it was subsequently also sent to the Chair, Chair-Elect and Staff Director of the Young Lawyers Division.

Other

Administrative Office of the U.S. Courts
Conference of Chief Justices
National Association of Attorneys General
National Association of Criminal Defense Lawyers
National Association of Prosecutor Coordinators
National Center for State Courts
National District Attorneys Association
National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

Irwin H. Schwartz, Chair, Standards Committee
710 Cherry Street
Seattle WA 98104
PH: 206/623-5084
FX: 206/623-5951
E-mail: irwin@ihschwartz.com

Ronald Goldstock, Chair, Prosecutorial Investigations Task Force
15 Hall Avenue
Larchmont NY 10538
PH: 914/834-8989
FX: 914/833-3412
E-Mail: ipsig@abanet.org

105D

Susan Hillenbrand, Staff Contact
ABA Criminal Justice Section
740 15th Street NW
Washington DC 20005
PH: 202/662-1503
FX: 202/662-1501
E-mail: hillenbrands@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Professor Stephen A. Saltzburg, CJS Delegate to the House of Delegates
George Washington University School of Law
720 20th Street NW
Washington DC 20006
PH: (202) 994-7089; (202)489-7464 (cell)
E-mail: ssaltz@mainl.nlc.gwu.edu

Neal R. Sonnett, CJS Delegate to the House of Delegates
Law Offices of Neal R. Sonnett
One Biscayne Tower
Two S. Biscayne Boulevard
Miami FL 33131
PH: (305) 358-2000
E-mail: nsonnett@sonnett.com

Executive Summary

1. **Summary of the recommendation**

The Criminal Justice Section recommends that the ABA adopt the *ABA Criminal Justice Standards on Prosecutorial Investigations*, dated November 2007, to supplement the *ABA Criminal Justice Standards on the Prosecution Function*.

2. **Summary of the issue which the recommendation addresses**

The recommendation addresses issues that confront prosecutors involved in the investigatory stage of the criminal justice process. These include working with law enforcement agencies; contacts with victims, potential witnesses, opposing counsel and the public, decisions to initiate or continue investigations; using undercover agents and confidential informants; employing subpoenas, search warrants, the grand jury, and surveillance techniques; use of non-governmental resources; and responding to suspected misconduct by judges, defense counsel, witnesses, informants, or jurors, among many others. The recommendation also addresses the need for oversight of investigations by government agencies and officials.

3. **How the proposed policy position will address the issue**

The proposed Standards will provide guidance to prosecutors who become involved in investigations, sensitize them to the issues and potential pitfalls and guide them through their decision making.

4. **A summary of any minority views or opposition which have been identified**

Throughout the rigorous Standards drafting and approval process, the proposed Standards were circulated widely both within and without the ABA, and as a result, underwent a number of changes to address concerns raised at Task Force, Standards Committee, and Criminal Justice Section Council levels. The National District Attorneys Association has objected to the proposed Standards on the grounds that they should be viewed as "best practices" rather than as "Standards." The U.S. Department of Justice objects to proposed Standard 1.4(g) ["The prosecutor should not routinely seek to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage"] as "being inconsistent with the Department's charging guidance contained in the *McNulty* and *Thompson* memorandums." [Note: The proposed Standard is consistent with the ABA policy on this subject adopted in August 2005.]