
ABA Standards for Criminal Justice
Pleas of Guilty
Third Edition



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The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the ABA House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards.

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INTRODUCTION

This chapter contains the Third Edition of the ABA Criminal Justice Standards on Guilty Pleas, which were last revised in 1979. The standards in this chapter deal principally with the plea of guilty and to some extent with the related, although less frequently used, plea of *nolo contendere*. They include not only standards for procedures to be followed by a court in taking the plea of guilty but also standards to govern the common practice of negotiating between prosecutors and defense counsel with a view to reaching agreement on terms upon which a guilty plea will be tendered.

In the twenty years since these standards were last considered, the context in which guilty pleas are negotiated and entered has changed in important ways. The adoption of sentencing guidelines and mandatory minimum sentences, both in the federal system and in many states, has reduced courts' sentencing discretion, tying the sentencing consequences of a guilty plea more directly to the agreement between the prosecution and the defendant. Meanwhile, the collateral consequences of convictions, including guilty pleas, have increased dramatically as a result of recidivist sentencing provisions and sentencing guidelines, as well as an increasing body of civil sanctions such as forfeitures, deportation, disqualification to receive government benefits, and the like. This has also diminished the significance of the distinction between pleading guilty to a felony or a misdemeanor, as the latter may also carry significant future consequences for the defendant.

As the direct and collateral consequences of guilty pleas have increased, practices in this area have likewise changed and evolved. Partly in response to the increasing severity of the consequences that follow from a plea of guilty, states and federal jurisdictions have developed a range of alternatives to guilty pleas, such as pretrial diversion programs, that offer a noncriminal resolution in less serious cases. The importance of defense counsel's role in advising his or her client has grown—as has the difficulty of fulfilling that task—and it has become increasingly important for the court to engage in a meaningful colloquy with the defendant to ensure that a guilty plea is being knowingly and voluntarily entered (and to protect the finality of pleas that are entered).

At the same time, guilty pleas continue to be the predominant method by which most criminal cases are resolved—approximately 93 percent of cases in the federal system and approximately 91 percent

in the states.¹ Thus, at the same time that collateral proceedings have created new pressures to challenge convictions based upon guilty pleas, the broad reliance of the criminal justice system on guilty pleas as a means of resolving cases has increased the importance of such resolutions. Guilty pleas also continue to have a significant effect in shaping public perceptions of the criminal justice system. Given the dominance of this mode of conviction, public confidence in the fair and effective administration of justice requires that the plea process itself be viewed as legitimate. As these Standards reflect, greater transparency and inclusiveness in the plea process further this goal.

In order to ensure that these standards have continued vitality, and that they address the important issues related to guilty pleas, the ABA Criminal Justice Standards Committee undertook to revisit the Second Edition of the Guilty Plea Standards and to issue a third edition.

Development of the Third Edition Standards

In 1996, the Standards Committee appointed a Subcommittee on Guilty Pleas to take stock of the standards, and to recommend changes needed to bring them up to date. Their work was presented to Standards Committee, and a two-year process of debate and drafting ensued, including numerous meetings of the Committee and Subcommittee. Participants in this process included judges, prosecutors, defense counsel, academics, and other practitioners from state and federal offices across the United States. In addition, many comments were received on drafts of the proposed Standards, which were widely circulated nationwide. After vigorous debate on the issues and practices in different jurisdictions, the participants reached a broad consensus on the rules that should apply. In November of 1996, a proposed Third Edition of the Guilty Plea Standards was presented to the Council for a first reading, and in April of 1997, the standards were adopted unanimously by the Council at the second reading. They were passed by the House of Delegates in August 1997.

The drafters concluded that major changes were not necessary in the overall organization and approach of the Guilty Plea Standards. The

1. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 1997 Report of the Director, Table D-7 (1998); U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*, 1997, *Felony Sentences in State Courts*, Table 5.47 (1998).

underlying philosophy of these standards, which seeks to strike a balance by ensuring the fairness of the process preceding the entry of a guilty plea, so as better to assure the finality of a conviction once a guilty plea has been entered and accepted, remains vital. At the same time, it was important to recognize that, increasingly, the subject area of guilty pleas cannot be isolated from the related issues of sentencing and the other types of penalties that are related to criminal misconduct. In light of changes in all of these areas, the Third Edition seeks to clarify the roles, and responsibilities, of the prosecutor, defense attorney and judge, respectively, with respect to guilty pleas.

While these standards are described in detail below, the principal changes include a new standard that addresses Pretrial Diversion, and new or amended provisions that address such issues as advice to the defendant on the collateral consequences of a guilty plea, negotiation of criminal and civil penalties and restitution as part of a plea agreement, and the interplay of discovery obligations and guilty plea negotiations. In addition, the proposed Standards include refinements of the role of the court, the prosecutor, and defense counsel, as well as recognition of the interests of the public at large and of individual victims in connection with the plea process.

Philosophy of the Guilty Plea Standards

These standards reflect the conclusion—as a matter of law and policy—that permitting the negotiated resolution of criminal cases through the entry of guilty pleas is an appropriate and beneficial part of the criminal justice system, and indeed, is necessary to ensure the continued functioning of the system in those cases that go to trial. The underlying philosophy that guides the Third Edition is that the guilty plea standards should and do emphasize the importance of both fairness and finality in guilty pleas. The procedures for negotiation of plea agreements, and for the acceptance of guilty or nolo contendere pleas, should be designed to ensure that the defendant is provided with the information and legal advice necessary to make an informed and voluntary plea. Once having entered a plea, however, it should be difficult to withdraw or attack that plea unless it can be demonstrated that the plea was not entered on a knowing or voluntary basis, or is otherwise unjust.

As a constitutional matter, the Supreme Court has long held that, although the availability of a lesser sentence through the plea bargain-

ing process may place pressure on the defendant to forego his trial rights, it is not unconstitutionally coercive to allow prosecutors to negotiate with defendants for the entry of a guilty plea. In *Bordenkircher v. Hayes*,² for example, the Court emphasized the “mutuality” of the process for defendants and prosecutors, each of whom may have “his own reasons for wanting to avoid trial.” The Court concluded that, advised by competent counsel, defendants are “presumptively capable of intelligent choice in response to prosecutorial persuasion,” and are unlikely to be driven to plead guilty despite their innocence. By tolerating the negotiation of pleas, the Court “has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.”³

In so holding, the Supreme Court has recognized the practical necessity of allowing some form of plea bargaining, and the reality that plea agreements allow an oversupply of cases to be processed through an under-funded criminal justice system.⁴ In describing plea bargaining as an “essential component of the administration of justice,” the Court has acknowledged the practical underpinnings of this conclusion: “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”⁵

The constitutionality of plea agreements, of course, is a separate issue from whether their use constitutes sound policy for the criminal justice system. Notably, plea agreements are endorsed not only by the ABA but also by the Federal Rules of Criminal Procedure,⁶ the Model Code of

2. 434 U.S. 357, 363 (1978).

3. *Id.* at 364 (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)). *Accord*, *Corbett v. New Jersey*, 439 U.S. 212, 221 (1978) (upholding sentencing scheme which allowed defendant to avoid life imprisonment by entering *nolo contendere* plea and holding that, as in *Bordenkircher*, “the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial”).

4. When a jurisdiction curtails the use of plea bargaining, the immediate result is to increase dramatically the number of cases that proceed to trial. *See, e.g.*, Roland Acevedo, Note: *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 *FORDHAM L. REV.* 987, 998 (1995) (guilty pleas decreased 11% and backlog of pending cases increased 24%).

5. *Santobello v. New York*, 404 U.S. 257, 260-261 (1971).

6. *FED. R. CRIM. P.* 11(e)(1) (prosecutor and defense counsel “may engage in discussions with a view toward reaching an agreement” on the terms of a plea of guilty).

Pre-Arrestment Procedure,⁷ and the Uniform Rules of Criminal Procedure.⁸ Only the National Advisory Commission has recommended against allowing plea agreements to be negotiated, and that position has not been followed.⁹

This body of standards recognizes the utility and necessity of allowing plea agreements. Even if the criminal justice system had all of the resources it could possibly use, there still would remain cases in which plea agreements would be appropriate. For example, a case that may appear to be one of first-degree murder at the time of indictment, may appear to the prosecutor as a manslaughter case once discovery procedures are completed and unknown facts are revealed. Despite the first-degree murder indictment, a plea to manslaughter in such a case may be to the mutual advantage of prosecution, defense, and the criminal justice system generally.

There are, moreover, potential benefits to the defendant from the entry of a guilty plea. The plea provides a means by which the defendant may acknowledge guilt and manifest a willingness to acknowledge responsibility for his or her conduct. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Also, plea agreements make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders. These considerations as well as others provide justifications for granting charge and sentence concessions to a defendant who enters a plea of guilty or *nolo contendere*.

At the same time, while it is not unconstitutional for prosecutors to seek to induce defendants to plead guilty, these standards recognize that defendants should have a right to go to trial, and as a matter of sound criminal justice policy, should not be unduly pressured to forego that right. Participants in the criminal justice system may feel pressured to conclude plea agreements due to a lack of sufficient resources in

7. MODEL CODE OF PRE-ARRESTMENT PROC. § 350.3(1) (1975) (“[a]t the request of either party, the parties shall meet to discuss the possibility” of negotiating a guilty plea agreement).

8. UNIF. R. CRIM. P. 443(a) (1987) (“[t]he parties may agree that the defendant will plead” on specified conditions).

9. NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.1 (1973).

many parts of the country. Every possible effort should be made, therefore, to persuade legislatures to appropriate such funds as are necessary for additional judges, prosecutors, defense lawyers, and other personnel. Even leaving aside financial issues, prosecutors and judges should keep in mind that the defendant always has a right to plead not guilty and to choose to go to trial. Neither should seek to compromise or threaten that right.

In sum, the objective of the following standards is not to bring about a substantial change in the practice whereby guilty pleas are negotiated and accepted. The objective instead is to formulate procedures that will maximize the fairness of the process and the likelihood that the defendant has entered such a plea knowingly and voluntarily, fully understanding the consequences. The corresponding benefit, to the system, is that following such procedures will also protect convictions entered on guilty pleas from later attack, and will enhance the finality of judgments so rendered.

Outline of the Standards

Part I of these standards concerns the process of "receiving and acting upon the plea." Significantly, this Part includes, among other things, standards addressing the advice that must be given to the defendant by the court before accepting a guilty plea (Standard 14-1.4), the court's inquiry to ensure that the defendant's plea is voluntary (Standard 14-1.5), and the steps to be taken by the court to ensure that there is a factual basis for the plea (Standard 14-1.6).

Part II of these standards concerns the "withdrawal of the plea." This addresses the standards for the defendant's withdrawal of a plea of guilty or *nolo contendere*, both before and after sentence, and the admissibility of statements made by the defendant in connection with proceedings on pleas that are later withdrawn.

Part III of these standards concerns "plea discussions and plea agreements." This Part sets forth basic standards describing the proper role of the prosecutor (Standard 14-3.1), defense counsel (Standard 14-3.2) and the court (Standard 14-3.3) in the plea negotiation and review process. This Part also addresses admissibility questions concerning *nolo contendere* pleas and pleas that are not accepted by the court.

Finally, the Third Edition contains a new Part IV, which approves the use of pretrial diversion programs, and sets forth some standards for the development of such programs.

BLACK-LETTER PLEAS OF GUILTY STANDARDS

PART I.

RECEIVING AND ACTING UPON THE PLEA

Standard 14-1.1. Pleading by defendant; alternatives

(a) A defendant may plead not guilty, guilty, or (when allowed under the law of the jurisdiction) nolo contendere. A plea of guilty or nolo contendere should be received only from the defendant personally in open court, except when the defendant is a corporation, in which case the plea may be entered, with due corporate authorization, by counsel or a corporate officer. A defendant may plead nolo contendere only with the consent of the court.

(b) As part of the plea process, appropriate consideration should be given to the views of the parties, the interests of the victims and the interest of the public in the effective administration of justice.

Standard 14-1.2. Pleading to other offenses

Upon entry of a plea of guilty or nolo contendere or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty or nolo contendere as to other crimes committed within the jurisdiction of coordinate courts of that government. Upon written approval of the prosecuting attorney of the governmental unit in which these crimes are charged or could be charged, the defendant should be allowed to enter the plea (subject to the court's discretion to refuse a nolo contendere plea). Entry of such a plea constitutes a waiver of the following: venue, as to crimes committed in other governmental units of the government; and formal charge, as to offenses not yet charged.

Standard 14-1.3. Aid of counsel; time for deliberation

(a) A defendant should not be called upon to plead until an opportunity to retain counsel has been afforded or, if eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interests.

(b) When a defendant has properly waived counsel and tenders a plea of guilty or nolo contendere, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, after the defendant received the advice from the court required in standard 14-1.4.

Standard 14-1.4. Defendant to be advised

(a) The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:

(i) the nature and elements of the offense to which the plea is offered, and the terms and conditions of any plea agreement;

(ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the mandatory minimum sentence, if any, on the charge, or any special circumstances affecting probation or release from incarceration;

(iii) that, if the defendant has been previously convicted of an offense and the offense to which the defendant has offered to plead is one for which a different or additional punishment is authorized by reason of the previous conviction or other factors, the fact of the previous conviction or other factors may be established after the plea, thereby subjecting the defendant to such different or additional punishment;

(iv) that by pleading guilty the defendant waives the right to a speedy and public trial, including the right to trial by jury; the right to insist at a trial that the prosecution establish guilt beyond a reasonable doubt; the right to testify at a trial and the right not to testify at a trial; the right at a trial to be confronted by the witnesses against the defendant, to present witnesses in the defendant's behalf, and to have compulsory process in securing their attendance;

(v) that by pleading guilty the defendant generally waives the right to file further motions in the trial court, such as motions to object to the sufficiency of the charging papers to state an offense or to evidence allegedly obtained in violation of constitutional rights; and

(vi) that by pleading guilty the defendant generally waives the right to appeal, except the right to appeal a motion that has been made, ruled upon and expressly reserved for appeal and the right to appeal an illegal or unauthorized sentence.

(b) If the court is in doubt about whether the defendant comprehends his or her rights and the other matters of which notice is required to be supplied in accordance with this standard, the defendant should be asked to repeat to the court in his or her own words the information about such rights and the other matters, or the court should take such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences.

(c) Before accepting a plea of guilty or *nolo contendere*, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.

(d) If the defendant is represented by a lawyer, the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel.

Standard 14-1.5. Determining voluntariness of plea

The court should not accept a plea of guilty or *nolo contendere* without first determining that the plea is voluntary. By inquiry of the prosecuting attorney, the defendant, and defense counsel, if any, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what discussions were had and what agreement has been reached. If the plea agreement contemplates the granting of charge or sentence concessions which are subject to judicial approval, the court should advise the defendant, consistent with standard 14-3.3(e), whether with-

drawal of the plea will be allowed if the charge or sentence concessions are rejected. The court should address the defendant personally to determine whether any other promises or any force or threats were used to obtain the plea.

Standard 14-1.6. Determining factual basis of plea

(a) In accepting a plea of guilty or nolo contendere, the court should make such inquiry as may be necessary to satisfy itself that there is a factual basis for the plea. As part of its inquiry, the defendant may be asked to state on the record whether he or she agrees with, or in the case of a nolo contendere plea, does not contest, the factual basis as proffered.

(b) Whenever a defendant pleads nolo contendere or pleads guilty and simultaneously denies culpability, the court should take special care to make certain that there is a factual basis for the plea. The offer of a defendant to plead guilty should not be refused solely because the defendant refuses to admit culpability. Such a plea may be refused where the court has specific reasons for doing so which are made a matter of record.

Standard 14-1.7. Record of proceedings

A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include the court's advice to the defendant (as required in standard 14-1.4), the inquiry into the voluntariness of the plea (as required in standard 14-1.5), and the inquiry into the factual basis of the plea (as required in standard 14-1.6). Such proceedings should be held in open court unless good cause is present for the proceedings to be held in chambers. For good cause, the judge may order the record of such proceedings to be sealed.

Standard 14-1.8. Consideration of plea in final disposition

(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to approve or grant charge and sentence concessions to a defendant who

enters a plea of guilty or *nolo contendere* when consistent with governing law and when there is substantial evidence to establish, for example, that:

(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iii) the defendant, by making public trial unnecessary, has demonstrated genuine remorse or consideration for the victims of his or her criminal activity; or

(iv) the defendant has given or agreed to give cooperation.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or *nolo contendere*.

PART II.

WITHDRAWAL OF THE PLEA

Standard 14-2.1. Plea withdrawal and specific performance

(a) After entry of a plea of guilty or *nolo contendere* and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant's plea.

(b) After a defendant has been sentenced pursuant to a plea of guilty or *nolo contendere*, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. A timely motion for withdrawal is one made with due diligence, considering the nature of the allegations therein.

(i) Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that:

(A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;

(B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's behalf;

(C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;

(D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or

(E) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement, which was either tentatively or fully concurred in by the court, and the defendant did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea; or

(F) the guilty plea was entered upon the express condition, approved by the judge, that the plea could be withdrawn if the charge or sentence concessions were subsequently rejected by the court.

(ii) The defendant may move for withdrawal of the plea without alleging that he or she is innocent of the charge to which the plea has been entered.

(c) As an alternative to allowing the withdrawal of a plea of guilty or nolo contendere, the court may order the specific performance by the government of promises or conditions of a plea agreement where it is within the power of the court and the court finds, in its discretion, that specific performance is the appropriate remedy for a breach of the agreement.

Standard 14-2.2. Withdrawn plea and discussions not admissible

(a) A plea of guilty or nolo contendere that has been withdrawn should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(b) Any statement made in the course of any proceedings concerning a plea of guilty or nolo contendere that has been withdrawn, or in plea discussions with the prosecuting attorney that result in a plea

of guilty or nolo contendere that is later withdrawn, should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings, except that such a statement may be admitted:

(i) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel; or

(ii) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

PART III.

PLEA DISCUSSIONS AND PLEA AGREEMENTS

Standard 14-3.1. Responsibilities of the prosecuting attorney

(a) The prosecuting attorney may engage in plea discussions with counsel for the defendant for the purpose of reaching a plea agreement. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant. Where feasible, a record should be made and preserved for all such discussions with the defendant.

(b) The prosecuting attorney should make known any policies he or she may have concerning disposition of charges by plea or diversion.

(c) The prosecuting attorney, in considering a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations or to remain silent as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere, including such terms of the sentence as criminal forfeiture, restitution, fines and alternative sanctions;

(ii) to dismiss, to seek to dismiss, or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo

contendere to another offense reasonably related to defendant's conduct;

(iii) to dismiss, to seek to dismiss, or not to oppose dismissal of other charges or potential charges if the defendant enters a plea of guilty or nolo contendere;

(iv) where appropriate, to enter an agreement with the defendant regarding the disposition of related civil matters to which the government is or would be a party, including civil penalties and/or civil forfeiture; or

(v) in lieu of a plea agreement, to enter an agreement permitting the diversion of the case from the criminal process where appropriate and permissible to do so.

(d) Similarly situated defendants should be afforded equal plea agreement opportunities.

(e) The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials before reaching a plea agreement.

(f) The prosecuting attorney should not knowingly make false statements or representations as to law or fact in the course of plea discussions with defense counsel or the defendant.

(g) The prosecuting attorney should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.

(h) In connection with plea negotiations, the prosecuting attorney should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges or the prosecuting attorney has no good faith intention of pursuing those charges.

Standard 14-3.2. Responsibilities of defense counsel

(a) Defense counsel should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea

unless appropriate investigation and study of the case has been completed.

(c) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(d) Defense counsel should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.

(e) At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Standard 14-3.3. Responsibilities of the judge

(a) The judge should not accept a plea of guilty or nolo contendere without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms and conditions be disclosed.

(b) If a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea or presentence report is received.

(c) The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

(d) A judge should not ordinarily participate in plea negotiation discussions among the parties. Upon the request of the parties, a

judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed. Discussions relating to plea negotiations at which the judge is present need not be recorded verbatim, so long as an appropriate record is made at the earliest opportunity. For good cause, the judge may order the record or transcript of any such discussions to be sealed.

(e) In cases where a defendant offers to plead guilty and the judge decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge shall so advise the defendant and permit withdrawal of the tender of the plea. In cases where a defendant pleads guilty pursuant to a plea agreement and the court, following entry of the plea, decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea shall be allowed if:

- (i) the judge had previously concurred, whether tentatively or fully, in the proposed charge or sentence concessions; or
- (ii) the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court.

In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted as set forth in standard 14-2.1.

Standard 14-3.4. Inadmissibility of nolo contendere pleas, pleas not accepted, and plea discussions

(a) A plea of nolo contendere should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(b) A plea of guilty or nolo contendere that is not accepted by the court should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(c) Any statement made in the course of any proceedings concerning a plea of nolo contendere or a plea of guilty or nolo contendere that is not accepted by the court, or in the course of plea discussions

with the prosecuting attorney that do not result in a plea of guilty or that result in a plea of *nolo contendere* or a plea of guilty or *nolo contendere* that is not accepted by the court, should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings, except that such a statement may be admitted:

(i) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel; or

(ii) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

PART IV.

DIVERSION AND OTHER ALTERNATIVE RESOLUTIONS

Standard 14-4.1. Diversion and other alternative resolutions

(a) Where the interests of justice will be served, the prosecuting attorney and the defense may agree that a prosecution be suspended for a specified period of time, after which time it will be dismissed if the offender has met specified conditions during the suspension period. Such a diversion may be appropriate, for example, where:

(i) the offender is charged with an offense designated as appropriate for diversion;

(ii) the offender does not have a prior criminal record that would make diversion inappropriate;

(iii) the offender poses no threat to the community under the conditions specified in the diversion program; and

(iv) the needs of the offender and the government can be better met outside the traditional criminal justice process.

(b) An agreement to diversion should be contained in a writing reflecting all of the conditions agreed upon. As a condition of diver-

sion, an offender may be required, where permissible under law, to waive speedy trial rights and to toll a statute of limitations, and may also be required to fulfill other appropriate conditions, for example, to enter a treatment program, to provide community service, to make restitution, and/or to refrain from drug use and criminal activity.

(c) Diversion programs should be governed by written policies setting forth the Standards for eligibility and the procedures for participation, so that all eligible offenders have an equal opportunity to participate. An offender's eligibility to participate in diversion should not depend on his or her ability to pay restitution or other costs.

(d) The development of other, alternative forms of noncriminal resolution for appropriate cases should also be encouraged.

COMMENTARY TO PLEAS OF GUILTY STANDARDS

PART I.

RECEIVING AND ACTING UPON THE PLEA

Standard 14-1.1. Pleading by defendant; alternatives

(a) A defendant may plead not guilty, guilty, or (when allowed under the law of the jurisdiction) nolo contendere. A plea of guilty or nolo contendere should be received only from the defendant personally in open court, except when the defendant is a corporation, in which case the plea may be entered, with due corporate authorization, by counsel or a corporate officer. A defendant may plead nolo contendere only with the consent of the court.

(b) As part of the plea process, appropriate consideration should be given to the views of the parties, the interests of the victims and the interest of the public in the effective administration of justice.

History of Standard

Subsection (b) has been rewritten, to reflect the view that the acceptance of any plea of guilty, and not simply a plea of nolo contendere, should involve consideration of the “views of the parties, the interests of the victims, and the interest of the public in the effective administration of justice.” In subsection (a), the need for “due corporate authorization” for a corporate plea is made explicit. The standard has also been reorganized slightly for clarity.

Related Standards

FED. R. CRIM. P. 11(a), (b)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.1(1), (2)

UNIF. R. CRIM. P. 444(a)

Commentary

Standard 14-1.1 sets forth the basic pleading alternatives available to the defendant, and addresses special considerations applicable to pleas of *nolo contendere*, which have been abolished or limited in a number of jurisdictions. In section (b) of this standard, the fundamental considerations that should guide the court in reviewing any plea are explained.

Standard 14-1.1(a)

Standard 14-1.1(a) recognizes three basic types of pleas that may be entered by the defendant: not guilty, guilty and *nolo contendere*. Some jurisdictions recognize variations of these pleas, or use other terms to describe them. For example, some recognize a “conditional plea of guilty,”¹ under which the defendant pleads guilty but, pursuant to statute or rule, is authorized to appeal specified issues that were litigated unsuccessfully before trial and may be dispositive of the case, such as whether evidence was seized from the defendant illegally following an arrest without probable cause. If the appeal is successful, the defendant’s guilty plea may be withdrawn.² Other jurisdictions recognize other varieties of pleas, such as pleas of “guilty but insane”³ or “not guilty by reason of insanity.”⁴ A variant of a *nolo contendere* plea called an “*Alford*” plea is sometimes used, under which the defendant does not admit guilt but concedes that there is sufficient evidence upon which a conviction may be based.⁵ Notwithstanding these different appellations, the variations of pleading used in different jurisdictions should fall into the three basic categories outlined in this standard, pleas of not guilty, guilty and *nolo contendere*.

1. See, e.g., FED. R. CRIM. P. 11(a)(2); ARK. R. CRIM. P. 24.3(b); IDAHO R. CRIM. P. 11(a)(2).

2. See, e.g., FED. R. CRIM. P. 11(a)(2).

3. See, e.g., MICH. R. CRIM. P. 6.301(A) (“guilty but mentally ill”); see also DEL. SUPER. CT. CRIM. R. 11(a)(1) (defendant may plead “guilty but mentally ill”); 725 ILL. COMP. STAT. ANN. § 5/115-2 (West 1992) (same); IND. CODE ANN. § 35-35-1-2(a) (West 1998) (same); KY. R. CRIM. P. 8.08 (same).

4. See, e.g., COLO. R. CRIM. P. 11(a); see also ALA. R. CRIM. P. 14.2(c) (a defendant may plead not guilty “by reason of mental disease or defect”); MD. R. CRIM. P. 4-242(a) (a defendant may enter a plea of “not criminally responsible by reason of insanity”); ME. R. CRIM. P. 11(A)(1) (same).

5. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Nolo Contendere Pleas

With respect to pleas of nolo contendere, Standard 14-1.1(a) acknowledges the existence of such pleas but provides that they may be entered only "with the consent of the court." This reflects the disfavored status of nolo pleas, and the restrictions on their use in many jurisdictions. A nolo contendere plea is permitted under the Federal Rules of Criminal Procedure and in approximately half of the states.⁶ However, other states do not recognize nolo pleas,⁷ while some specify that pleas of nolo may be used only in certain categories of cases.⁸ In the federal system, nolo pleas are rarely used,⁹ and must be approved centrally by Justice Department officials.¹⁰ In many states and under the federal rules, as under this standard, such a plea may be entered only with the consent of the court.¹¹ Rules placing limitations on the use of nolo pleas are consistent with the limited historical purposes of this special plea.

In general, the most significant effect of a nolo plea is that it may not be entered into evidence in a subsequent civil action as proof that the defendant committed the offense to which he or she pleaded guilty, nor can it be used for impeachment purposes against a defendant in any other criminal proceeding.¹² Otherwise, for purposes of the immediate

6. See FED. R. CRIM. P. 11(a)(1); WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 932 (2d ed. 1992).

7. See, e.g., *May v. Lingo*, 167 So. 2d 267 (Ala. 1964); *People v. Heinz*, 304 N.E.2d 298 (Ill. App. Ct. 1973); *Mahoney v. State*, 149 N.E. 444 (Ind. 1925); *State v. Kiewel*, 207 N.W. 646 (Minn. 1926); *State v. Norman*, 380 S.W.2d 406 (Mo. 1964); *People v. Daiboch*, 191 N.E. 859 (N.Y. 1934); see also, e.g., MONT. CODE ANN. § 46-12-204 (1998); WASH. R. CRIM. P. 4.2.

8. See, e.g., *State ex rel. Clark v. Adams*, 111 S.E.2d 336, 341 (W. Va. 1959) (courts unanimous in holding that nolo pleas may not be entered in capital cases); *Commonwealth ex rel. Monaghan v. Burke*, 74 A.2d 802 (Pa. 1950) (same).

9. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, 1997 Report of the Director, Table D-7 (1998) (reporting 55,913 pleas of guilty and 343 pleas of nolo contendere entered in U.S. District Courts for 12-month period ending September 30, 1998).

10. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.010 (Aspen Law & Bus. Supp. 1993-2).

11. See, e.g., FED. R. CRIM. P. 11(b) ("A defendant may plead nolo contendere only with the consent of the court."); ARIZ. R. CRIM. P. 17.1(c) ("A plea of no contest may be accepted only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."); CAL. PENAL CODE § 1016 (Deering 1998); FLA. R. CRIM. P. 3.170(a); HAW. R. P. 11(b); OHIO R. CRIM. P. 11(A); MD. R. CRIM. P. 4-242(a); MASS. CRIM. R. 12(a)(1); see also MODEL CODE OF PRE-ARRESTMENT PROC. § 350.1(2) (1975).

12. See, e.g., *United States v. Mapco Gas Co.*, 709 F. Supp. 895, 899 (E.D. Ark. 1989) (noting pendency of civil proceedings); *United States v. Yonkers Contracting Co.*, 697 F. Supp.

criminal proceeding, it usually has very similar effects to a guilty plea. When sentencing the defendant following a nolo plea, the judge may impose the same sentence as if the defendant had pleaded guilty. Judgment or sentence following entry of a nolo plea, similarly, is treated as a conviction for purposes of double jeopardy.¹³

The nolo plea has been criticized, since as a logical matter, an accused should either be guilty of the offense charged or not guilty, and there should not be room for a plea "in between." Thus, while it is easy to see why a person guilty of an offense would prefer to plead nolo contendere, thereby avoiding the effects of a guilty plea in a subsequent civil proceeding, this fact is not a sufficient justification for its continued existence. It may also be that, under certain exceptional circumstances, a person who is innocent of the offense charged would prefer the option to plead nolo contendere, thereby avoiding the risk of conviction by a hostile jury or difficulties in contesting charges because of a lack of witnesses. Again, however, the public at large has as much interest in the acquittal of the innocent as in the conviction of the guilty.

The principal argument for retaining the plea is based on practical considerations. Such a pleading form is said to be appropriate for the type of wrong which is not "malum in se," but rather "malum prohibitum," particularly those offenses of an economic nature. In such a case, it has been argued, the acceptance of the plea is the most realistic policy because it spares the court and the parties from lengthy and expensive trials in complex cases. This has been said to be especially true in anti-trust prosecutions.¹⁴

This standard is not intended to take a position in this debate. It does not endorse the continued use of nolo pleas, nor does it recommend that they be abolished. Rather, it simply recognizes that there are jurisdictions in which the nolo plea still exists, and this being the case, it is useful to have standards addressing the effect of such pleas where they exist (for example, answering questions as to the admissibility of such pleas, as addressed in Standard 14-3.4(a)). The Model Code of Pre-Arrestment Procedure adopts the same position concerning the nolo

779, 780 (S.D.N.Y. 1988) (same); *United States v. Jones*, 119 F. Supp. 288, 290 (S.D. Cal. 1954) ("[t]o avoid exacting an admission which could be . . . used [as an admission in other potential litigation] is the main, if not only, modern purpose of nolo contendere.").

13. 21 AM. JUR.2d *Criminal Law* § 738 (1998); 22 C.J.S. *Criminal Law* § 223 (1989 & Supp. 1999).

14. Annotation, *Pleas of nolo contendere or non vult contendere*, 152 A.L.R. 253, 295-96 (1944).

plea expressed in this standard,¹⁵ while the Uniform Rules of Criminal Procedure provide for, but do not necessarily endorse, a plea of “no contest.”¹⁶

At the same time, since some risks are involved in accepting nolo pleas without sufficient inquiry, the standards require the consent of the court before such a plea may be entered. Because of the unique features of the nolo plea, courts should look with caution at any attempt to misuse the criminal process for purposes of gaining personal advantages in related civil litigation. As noted, the chief difference between a nolo plea and a guilty plea is that a nolo plea is not admissible to establish fault in related civil litigation arising from a criminal act. Therefore, the defendant may have a personal financial interest in avoiding such liability. By the same token, a victim who is also suing in civil court seeking compensation for the defendant’s criminal acts may have a personal financial incentive to oppose entry of a nolo plea. In deciding whether to accept a nolo plea, the court should be guided by the public interest, rather than any private interest of the parties, and should not allow the prosecutor’s decision to allow a nolo plea in a particular case to be overridden by the victim’s personal financial interests.

Defendant’s Personal Appearance and Corporate Pleas

Standard 14-1.1(a) requires the defendant “personally” to enter the plea. This is a necessary corollary to Supreme Court decisions holding that a guilty plea must be rejected unless the defendant, in tendering the plea, intelligently and voluntarily relinquishes certain fundamental constitutional rights.¹⁷ Elsewhere these standards provide that “[t]he court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally in open court.”¹⁸

15. MODEL CODE OF PRE-ARREST PROC. § 350.1(2) (1975).

16. UNIF. R. CRIM. P. 444(a) (1987).

17. See, e.g., *Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (guilty plea must be both knowing and voluntary); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCarthy v. United States*, 394 U.S. 459, 464-67 (1969) (interpreting FED. R. CRIM. P. 11); cf. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of right to counsel must be knowingly and intelligently made).

18. See Standard 14-1.4(a). The requirement, in the above Standard and in Standard 14-1.4(a), that the defendant’s appearance take place in “open court” is modified by Standard 14-1.7, which allows plea proceedings to be held in chambers in the rare circumstances in which “good cause” exists for closing them.

When the defendant is a corporation, by necessity, this standard recognizes that such a plea may be entered by counsel or a corporate officer.¹⁹ For corporate pleas, a new provision has also been added requiring “due corporate authorization” for the plea. This is intended to ensure that the proper procedures have been followed to obtain the approval of the board of directors for the corporation. Unincorporated entities, similarly, should take those steps necessary to ensure that the organization has given due approval for the plea.

This requirement will advance the finality of guilty pleas, and will also ensure that the corporation has duly considered the effects of entering a guilty plea. Particularly in the federal system, there has been an increasing trend for prosecutors to seek guilty pleas by corporations. Corporate pleas present special considerations (such as those concerning the relationship, after the plea, between the corporation and individual officers or employees who may still be under investigation).²⁰ It is important for the corporate leadership to understand all the terms to which the corporation is agreeing. Moreover, a conviction for the corporation may carry potentially expensive collateral effects, including suspension or debarment from government programs.²¹ Such costs must be weighed against the advantages of a corporate guilty plea, such as obtaining credit under the Federal Sentencing Guidelines for the corporation’s “acceptance of responsibility” for the offense.²² The requirement for “due corporate authorization” should help to ensure that these issues have been appropriately aired before a corporate guilty plea is entered.

19. See, e.g., ARIZ. R. CRIM. P. 17.1(a) (“Such plea shall be accepted only when made by the defendant personally in open court, unless the defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer”); CAL. PENAL CODE §§ 1018, 1396 (Deering 1998) (“If an accusatory pleading is filed, the corporation may appear by counsel to answer the same, except that in the case of misdemeanors arising from operation of motor vehicles . . . a corporation may appear by its president, vice president, secretary or managing agent for the purpose of entering a plea of guilty”). But see, e.g., N.Y. CRIM. PROC. LAW § 220.50(2) (McKinney 1993) (only counsel may enter a guilty plea when defendant is a corporation).

20. For the types of terms typically requested in corporate plea agreements, see *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994), *aff’d*, 63 F.3d 25 (1st Cir. 1995).

21. See, e.g., 48 C.F.R. § 9.400, *et seq.* (1998) (administrative suspension and debarment practices governed by the Federal Acquisition Regulations (“FAR”) for procurement programs); 28 C.F.R. § 67.100, *et seq.* (1998) (Department of Justice regulations regarding procurement debarment following conviction).

22. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (1998).

Standard 14-1.1(b)

Standard 14-1.1(b) provides that “appropriate consideration should be given to the views of the parties, the interests of the victims, and the interest of the public in the effective administration of justice” as part of the plea process for any guilty or nolo contendere plea. While this provision had extended only to consideration of nolo pleas in the Second Edition of the guilty plea standards, the Committee concluded that the same considerations were applicable—perhaps more so—with respect to other pleas leading to a conviction of the defendant.

Consideration of the “views of the parties,” including the prosecution and the defense, is of course at the heart of the plea process in our adversarial system. Normally, before a guilty plea is entered, the prosecutor and the defendant will have agreed in advance on a written plea agreement, setting forth the terms and conditions of the plea, and possibly also the parameters of the sentence.

The views of the parties, however, are not the only consideration to be taken into account. It is also, of course, important that the “interests of the victims,” where there are victims of the offense, be expressed and taken into account in the guilty plea process. The wording of this standard, which has been revised in the Third Edition, is carefully framed both to acknowledge the importance of victims’ interests to the legitimacy of the criminal justice system, and to preserve the independent judgment and discretion of the prosecutor to negotiate plea agreements in the public interest.

In general, there are two usual points at which victims may be heard in connection with the plea process. *First*, victims should be permitted and encouraged to consult with the prosecutors at all stages of the case to explain their view of the facts and the harm caused. Armed with this information—together with the prosecutor’s knowledge of the strengths and weaknesses of the evidence, the potential outcomes at trial, and the government’s resources—the prosecutor can determine whether it is appropriate to offer the defendant a guilty plea or plea of nolo contendere, and what the terms should be.²³ Just as the initial charging decision is the prosecutor’s responsibility,²⁴ so should the decision whether to offer the defendant a disposition by plea be left to the

23. See NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS § 68.1(q) (2d ed. 1991) (prior to negotiating a plea agreement, the prosecution should consider the victim’s physical and emotional injury, and any economic loss).

24. See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

judgment of the prosecutor, who can appropriately consider the victim's views, along with the other legal and factual considerations that inform the exercise of prosecutorial discretion. Provisions requiring the prosecutor to consult with victims in connection with the plea negotiation process are part of the law in some states.²⁵ Federal law requires that federal law enforcement personnel make their best efforts to ensure that the crime victim, among other things, has "[t]he right to confer with [the] attorney for the Government in the case" and "[t]he right to information about the conviction . . . of the offender."²⁶

Second, victims also play an important role in the sentencing process following a conviction on a guilty or nolo plea. There, through oral or written presentations, as provided by governing law, the views of victims may be heard on the severity of the defendant's conduct, the appropriate punishment, or other issues relevant to sentence.²⁷ The sentencing process is designed in part to allow the court to hear and consider such information, as part of the range of factors that goes into determining a correct and just sentence.

Both of these are entirely appropriate means for victims' interests to be taken into account as part of the plea process. Beyond these traditional roles, some jurisdictions have gone further and provided by law for a right for victims to participate in some manner in court proceedings at which a guilty plea is being considered.²⁸ Standard 14-1.1(a)

25. See, e.g., ARIZ. R. CRIM. P. 39(b) (granting victims the right to confer with the prosecution with respect to plea bargaining); 725 ILL. COMP. STAT. ANN. 120/4(6) (West 1992) (where practical and at victim's request, prosecutor shall consult with victim before making a plea offer or entering into plea negotiations); LA. REV. STAT. ANN. § 46:1844 (D)(2)(a) (West 1999); N.H. REV. STAT. ANN. § 21-M:8-k(I)(f) (1998); N.D. CENT. CODE §12.1-34-02 (1997) (prosecutor must explain the terms of the plea agreement to the victim, and inform the victim of the hearing on the plea).

26. 42 U.S.C. §§ 10606(b)(5) & (B)(7) (1994). The Department of Justice is presently revising its policy concerning consultation with victims and anticipates that an amended statement will be available in Fall 1999.

27. See *Payne v. Tennessee*, 501 U.S. 808 (1991); see also, e.g., DEL. CODE ANN., tit. 11, § 4331 (1995 & Supp. 1998); GA. CODE ANN. § 17-10-1.2 (1997); IOWA CODE § 901.5 (1994 & Supp. 1999); KY. REV. STAT. ANN. § 421.520 (Michie 1992); MD. ANN. CODE, art. 27, § 643D (1998); MISS. CODE ANN. § 99-19-161 (1994); N.Y. CRIM. PROC. LAW § 390.20 (McKinney 1994); WASH. REV. CODE § 9.94A.110 (1998 & Supp. 1999).

28. See, e.g., ARIZ. R. CRIM. P. 39(a) (granting victims the right to be heard before a plea of guilty is accepted); CONN. GEN. STAT. ANN. § 54-91c (West 1994 & Supp. 1999) (victim may address the court before the court accepts a plea to a lesser offense than the offense charged); MO. CONST., art. 1, § 32 (1995 & Supp. 1999) (granting victims the right to be informed of, and heard at, proceedings connected with guilty pleas); W. VA. CODE

takes no position as to whether victims should have a right to be heard by the court before acceptance of a guilty plea. Imposing a requirement that all victims be given a right to appear at a guilty plea hearing may pose a danger of threatening convictions where the victims could not all be identified, or located, before a guilty plea hearing. Consideration of the interests of the victims as “part of the plea process,” as provided in this standard, thus can but does not necessarily involve taking testimony from victims in court. Such information may also be communicated through the prosecutor, by letters from the victims, in a probation office report, or otherwise, so long as those interests are included and taken into consideration. This standard leaves it to individual jurisdictions to develop their own procedures.

Finally, this standard is not intended to suggest that the interests of victims should be overriding in reviewing a guilty plea, but rather to include their interests as one of a set of important considerations. In some cases, those who are technically victims of the defendant’s crime may themselves be participants or culpable of criminal offenses, or may have personal motivations in commenting on the plea which would mitigate against giving those views determinative weight. In cases where the prosecutor has decided to offer a nolo plea, as noted above, the victim may have a personal financial incentive to oppose that plea. It is the broader “interests of the victim” that are to be considered, and not necessarily the narrow views of the victims in a given case. And in every case, those interests must be weighed along with the broader consideration of the “interest of the public in the effective administration of justice,” as well as that of the parties’ views.

Standard 14-1.2. Pleading to other offenses

Upon entry of a plea of guilty or nolo contendere or after conviction on a plea of not guilty, the defendant’s counsel may request permission for the defendant to enter a plea of guilty or nolo contendere as to other crimes committed within the jurisdiction of coordinate courts of that government. Upon written approval of the prosecuting attorney of the governmental unit in which these crimes are charged or could be charged, the defendant should be allowed to enter the plea (subject to the court’s discretion to refuse a nolo contendere plea).

§ 61-11A-6 (1997) (victims should be notified of plea proceedings and be afforded the opportunity to give their views on plea negotiations in serious cases).

Entry of such a plea constitutes a waiver of the following: venue, as to crimes committed in other governmental units of the government; and formal charge, as to offenses not yet charged.

History of Standard

The Second Edition standard had used the term “state,” which was changed to the term “government” in the Third Edition, to make clear that this standard is intended to apply in both the state and federal systems.

Related Standards

FED. R. CRIM. P. 20

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.1(3)

MODEL PENAL CODE § 7.05(4)

NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.6(3)

UNIF. R. CRIM. P. 444(e)

Commentary

Standard 14-1.2 permits the entry of a single guilty plea to offenses committed in different jurisdictions within the same state or within different federal districts. This standard makes it possible for a defendant to seek a simultaneous disposition of all offenses he or she has committed in a state or in the federal system, including both those that have been formally charged against the defendant and those that “could be charged.” Such pleas are authorized by rule in federal cases.¹ Statutes similar to Standard 14-1.2 have also been enacted in a number of states.² The Model Code of Pre-Arrest Procedure and the

1. See FED. R. CRIM. P. 20 (permitting defendant to request transfer of a case from another venue to enter a guilty plea in jurisdiction where defendant is being held). Although Rule 20 does not require that a charge be pending in the district where the defendant wants to plead guilty, the rule makes it possible for consolidation of offenses pending in different federal jurisdictions, including the district where the defendant enters the guilty plea.

2. E.g., CONN. GEN. STAT. ANN. § 54-17a (West 1994); N.C. GEN. STAT. § 15A-1011(c) (1997); OR. REV. STAT. § 135.375(2) (1990); WIS. STAT. ANN. § 971.09(1) (West 1998); 730 ILL. COMP. STAT. ANN. § 5/5-4-2 (West 1992).

Uniform Rules of Criminal Procedure contain provisions that are nearly identical to this standard.³

It is not unusual for a defendant to have committed several crimes in more than one jurisdiction of a state (for example, a county or parish), or in more than one federal jurisdiction. Allowing for consolidated guilty pleas enables a defendant to be sentenced simultaneously on all charges that he or she is facing in that government's courts. This reduces the governmental resources that must be devoted to the cases, while also allowing the defendant to take full advantage of any concurrent sentencing options that may be available. By pleading to all offenses simultaneously, the defendant can complete his or her sentence without facing these additional charges, and can avoid the risk of having a detainer filed against the defendant on these other charges while serving his or her sentence.

The standard operates as follows. Assume a defendant is convicted on a plea or after trial in County A of a robbery committed in that county. Before sentencing, the defendant may request permission to plead guilty to a burglary committed in County B and a theft in County C. The prosecutors in Counties B and C would be notified of all relevant facts (the crime of which the defendant has been convicted, the crimes to which the defendant desires to plead, and the kind of plea offered). With the written consent of these prosecutors (who have sufficient knowledge about the offense from such sources as an information or, if then outstanding, an indictment), the defendant could enter the tendered pleas, together with a copy of the indictment or information in the cases in Counties B and C. If one prosecutor consented but the other did not, the defendant could choose to enter the tendered plea on the one additional offense, or could decline to enter any consolidated plea. The judge would then sentence as to all offenses for which the defendant offered to plead guilty. Such a procedure, however, would be limited to the jurisdiction of "coordinate courts." Thus, for example, a defendant could not enter a plea and be sentenced on a murder charge in a court that has jurisdiction only over misdemeanors.

A different approach is taken by the Model Penal Code. Rather than allow a defendant to plead guilty simultaneously to offenses committed in different jurisdictions, that code instead allows a defendant at sentencing to admit other crimes "in open court" and ask that they be

3. See MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.1(3) (1975); UNIF. R. CRIM. P. 444(e) (1987).

“taken into account” in the sentencing. Such an admission bars subsequent prosecution or conviction on the offenses, unless the court rejects the defendant’s request.⁴ This model is based on British practice,⁵ which does not appear to have been widely followed in the United States.

Standard 14-1.2, by contrast, requires that the defendant actually enter a plea of guilty to the other offenses being “taken into account.” This ensures specificity as to the offense being admitted and thus “taken into account,” and subjects the defendant to whatever sentence may be imposed for any or all of the offenses to which a guilty plea is entered.

Need for Prosecutor’s Consent

Standard 14-1.2 requires the “written approval of the prosecuting attorney” from the other jurisdiction which charged or could charge the charges to which the defendant wishes to plead. While the National Advisory Commission’s standards also include a provision that authorizes a defendant to plead guilty to other offenses committed within a state, it does not require that permission be obtained from the prosecutor of the other jurisdiction (simply the concurrence of the prosecutor in the instant case).⁶ Accompanying commentary concedes, however, that obtaining such permission “undoubtedly would be prudent and sound judgment.”⁷ Standard 14-1.2, in contrast, reflects the belief that it is not appropriate to accept a guilty plea without the agreement of the prosecutor with jurisdiction over the offense. Ascertaining whether such permission is forthcoming should not ordinarily be time-consuming.

Defendant’s Written Request

In providing that a request for a consolidated guilty plea be made by “defendant’s counsel,” Standard 14-1.2 is intended to ensure that such consolidated pleas be entered only on advice of counsel. If the defendant has entered a proper waiver of counsel, of course, the request may be made by the defendant personally. However, given the particular dangers when consolidated pleas are entered by uncounselled defendants, such a waiver of counsel should be properly entered with respect to each offense to which a plea will be entered by the defendant.

4. See MODEL PENAL CODE § 7.05(4) (1962).

5. See *id.*, Commentary to § 7.05(4), at 265-66.

6. See NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.6(3) (1973).

7. *Id.*, Commentary at 167.

It may also be advisable in all cases to have the defendant's request memorialized in writing. In the federal system, for example, the defendant himself or herself must "state in writing" a request to transfer cases in order to enter a guilty plea in another venue.⁸ Requiring the defendant's personal request, in writing, before transfer of cases for a consolidated disposition is a good practice, as it makes clear that the defendant has knowingly waived his or her objections to venue. This is important, because Standard 14-1.2 provides that entry of a consolidated guilty plea "constitutes a waiver" of any objections the defendant may have as to venue (for the crimes committed in other jurisdictions) and as to formal charge (as to offenses not yet charged).

Standard 14-1.3. Aid of counsel; time for deliberation

(a) A defendant should not be called upon to plead until an opportunity to retain counsel has been afforded or, if eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interests.

(b) When a defendant has properly waived counsel and tenders a plea of guilty or *nolo contendere*, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, after the defendant received the advice from the court required in standard 14-1.4.

History of Standard

Subsection (b) has been amended to omit a provision that required a delay between the date an unrepresented defendant was "held to answer" and the date he or she was "called upon to plead." This provision was determined to be unwieldy by requiring a defendant without counsel to attend two initial appearances in every case, even those involving minor charges. The standard retains the more fundamental provision requiring a "reasonable time for deliberation" after an uncounselled defendant has received advice from the court and before he or she may enter a plea of guilty or *nolo contendere*.

8. See FED. R. CRIM. P. 20 (permitting transfer of a case upon defendant's written request to plead to that case in another venue).

Related Standards

ABA, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-8.2

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.2

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.5

UNIF. R. CRIM. P. 444(b)

Commentary

The ABA standards on Providing Defense Services, which set out detailed standards concerning legal representation for the defendant, provide that counsel "should be provided in all proceedings for offenses punishable by death or incarceration."¹ This right to counsel will be applicable in the majority of cases in which defendants may wish to enter a guilty plea. Standard 14-1.3 complements this provision, addressing both the need to allow the defendant time to obtain and consult with counsel, and the special issues presented by a defendant who desires to enter a guilty plea without legal representation.

Standard 14-1.3(a)

As a matter of constitutional principle, the right to counsel applies to the taking of a guilty plea in both felony and misdemeanor cases, at least those cases in which conviction could result in a loss of liberty.² Thus, Standard 14-1.3(a) provides that a defendant may not be called upon to enter a plea until he or she has retained counsel, been provided appointed counsel, or entered a waiver of legal representation (a subject addressed in greater detail below). By allowing the defendant time to

1. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-5.1 (3d. ed. 1992).

2. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Courts have indicated that entry of a guilty plea is a "critical stage" to which the right to counsel attaches. See, e.g., *Moore v. Michigan*, 355 U.S. 155 (1957); *United States v. Myers*, 265 F. Supp. 483 (E.D. Pa. 1967). Cf. *United States v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir. 1996) (plea withdrawal hearing is critical stage requiring counsel), *cert. denied*, 519 U.S. 1068 (1997); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972) (plea negotiations held to be a "critical stage").

retain counsel or have counsel appointed before any plea will be accepted, this standard is important to the fairness of the process. A similar provision is contained in the Model Code of Pre-Arrest Procedure.³

Standard 14-1.3(a) provides, further, that a defendant who has counsel may not be required to enter a plea if his or her lawyer “makes a reasonable request for additional time to represent the defendant’s interests.” Such a provision, similarly, is necessary as a constitutional and practical matter. Just as a defendant is denied the effective assistance of counsel guaranteed by the Sixth Amendment if counsel is not afforded an adequate opportunity to prepare for trial,⁴ a violation of the Sixth Amendment may also occur where a defendant is called upon to plead but his or her counsel has not had sufficient chance to engage in plea discussions with the prosecuting attorney.⁵ Moreover, it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead. Instead, a reasonable interval should elapse between assignment of counsel and the pleading stage. Allowing for such “additional time” will permit plea discussions to go forward, where appropriate, and will also provide the time necessary for legal and factual investigation and for client-counsel discussions as to what plea would be most appropriate.

Standard 14-1.3(b)

Standard 14-1.3(b) is limited to the circumstances in which a defendant wishes to enter a guilty plea without the benefit of counsel. In such cases, certain additional procedural protections are appropriate.

Guilty Pleas by Uncounselled Defendants

Under Supreme Court case law, a defendant has a right to represent himself or herself in a criminal case if the court is satisfied that he or she meets certain competency standards.⁶ While *Faretta v. California* addresses the defendant’s right to represent himself or herself at trial, the same reasoning should extend to guilty pleas. A defendant who meets that standard should also have a right to self-representation in

3. MODEL CODE OF PRE-ARREST PROC. § 350.2(1) (1975).

4. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *State v. Borchert*, 934 P.2d 170 (Mont. 1997).

5. See generally *In re Hawley*, 433 P.2d 919 (Cal. 1967).

6. See *Faretta v. California*, 422 U.S. 806 (1975).

entering a guilty plea. Moreover, where the offense charged is not one for which the Constitution provides a right to appointed counsel,⁷ or where the defendant does not meet statutory requirements for appointment of counsel, a defendant might reasonably opt for self-representation rather than incur the expense of retaining counsel.

At the same time, significant issues are raised by uncounselled guilty pleas. Elsewhere, the standards emphasize the importance of effective assistance of counsel in cases resolved by guilty plea as well as by trial. Thus, Standard 14-1.4(d) prohibits the court from accepting a guilty plea “where it appears that the defendant has not had the effective assistance of counsel.” As this reflects, effective investigation by defense counsel, exercise of the defendant’s statutory and constitutional rights of discovery, and a thorough understanding of applicable defenses to a criminal charge are important elements in ensuring that the defendant has entered a knowing and voluntary guilty plea.⁸ Defendants who lack or decline counsel may enter guilty pleas that they would not have entered had they had the benefit of legal advice. The reasons for this are many.

An uncounselled defendant may not appreciate the full range of consequences that may flow from a criminal conviction, even for a minor offense. Criminal sentencing has become increasingly complex in many jurisdictions, and collateral consequences have become increasingly prevalent and increasingly severe.⁹ Given the complex calculations required by federal and state sentencing guidelines, a defendant without counsel in a federal case generally lacks the knowledge effectively to represent himself or herself in plea discussions, to negotiate with the government over a recommended sentencing calculation, to seek the factual stipulations that have become an important part of a federal plea agreements, or to predict the punishment that may follow.¹⁰ An uncounselled defendant also may not understand that admissions of other criminal conduct, while evidencing genuine remorse and accep-

7. See *Scott v. Illinois*, 440 U.S. 367 (1979).

8. See also Standard 14-3.2 (concerning defense counsel’s responsibilities in advising defendant concerning the entry of a guilty plea).

9. See Standards 14-1.4, 14-3.2.

10. For the same reason, in federal cases involving an uncounselled defendant, it may be desirable for the court to exercise the option to wait until the presentence investigation report has been prepared, and the uncounselled defendant has had the opportunity to review the report, before ruling on whether the guilty plea will be accepted. See FED. R. CRIM. P. 11(e)(2).

tance of responsibility, may also lead to a much harsher sentence under the federal sentencing guidelines, which tie punishment to all relevant conduct, not merely the offense of conviction.¹¹

Likewise, an uncounselled defendant may not be aware of the repercussions of a conviction for future employment, receipt of government benefits, immigration status, or future sentencing under guidelines or recidivist statutes. In both the state and federal systems, the increasing number of "repeat offender" statutes and other laws that enhance the defendant's punishment based on prior convictions mean that the future consequences of entering a guilty plea, even in a minor case, may be great. An uncounselled defendant facing a criminal charge that will not involve a prison sentence may think there is no disadvantage to pleading guilty, without understanding the implications of such a conviction if he or she were to be convicted of another crime in the future.¹² Even a more extensive colloquy between the court and the defendant cannot substitute for a confidential give and take between the defendant and counsel on these issues.

An unrepresented defendant also frequently lacks sufficient knowledge of the law to be able effectively to assert his or her rights to obtain information about the case. In federal and state systems, recent years have seen the growth of discovery rules, which give the defendant the right to receive certain evidence in advance of a criminal trial.¹³ An uncounselled defendant is likely to be disadvantaged during plea negotiations by unfamiliarity both with the discovery rules and with the informal procedures for negotiating charge and sentence concessions.¹⁴

In addition to the risk that a defendant may not appreciate the gravity of a conviction in a less serious case, there is also the danger that a decision to plead guilty to a serious charge without the "guiding hand of counsel" may be a consequence of despair or confusion. An uncounselled defendant's second thoughts after entering a guilty plea that he or she later regrets and seeks to challenge undermine the finality of judgments based on guilty pleas and create a potential for unfair convictions.

Dealing with uncounselled defendants also creates difficulties for prosecutors, who often feel uncomfortable conducting plea negotiations

11. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1998).

12. See, e.g., *Nichols v. United States*, 511 U.S. 738 (1994); *Parke v. Raley*, 506 U.S. 20 (1992).

13. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY (3d ed. 1996).

directly with the defendant. Prosecutors may rightly be concerned that plea discussions may entail the exchange of information about the probability of a conviction at trial that could implicate the defendant's privilege against self-incrimination, or that discussions directly with the defendant may produce misunderstandings about the terms of a plea agreement. In addition, a lay person dealing directly with a lawyer for the adverse party is almost always at a disadvantage.¹⁵ A lawyer familiar with the risks or benefits of particular terms or concessions in a plea agreement may, even unwittingly, take advantage of the naivete and inexperience of an uncounselled defendant.

For all of these reasons, courts should be reluctant to accept guilty pleas that are negotiated and entered without the advice and participation of counsel. Indeed, some laws prohibit courts from accepting guilty pleas from uncounselled defendants in certain types of cases (for example, cases that carry the death penalty).¹⁶ Standard 14-1.3 does not take the position that uncounselled guilty pleas should be prohibited, since such a rule would be in tension with the defendant's recognized right to forgo counsel and represent himself.¹⁷ Moreover, it would impose a significant burden on the courts to require that all defendants be represented by counsel in order to plead guilty, even in misdemeanor cases involving no prison sentence.

At the same time, additional procedural protections are clearly appropriate in this area. Thus, Standard 14-1.3(b) requires the court to provide "a reasonable time for deliberation, set by rule or statute," between the uncounselled defendant's statement that he or she wishes to plead guilty and the acceptance of that plea, and also requires that the waiver of counsel be "proper," a subject addressed below. By requiring such a delay—and the defendant's "reaffirmation" of the guilty plea thereafter—it ensures that the defendant has had adequate time to reconsider the plea after being informed of its consequences. This stan-

14. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 4-6.1, Commentary at 204 (3d. ed. 1993) (prosecutors' plea negotiation "standards and rules of thumb are not to be found in codes, case reports and other sources of law"); *id.*, Standard 4-6.2, Commentary at 207 (suggesting that defendants ought not to be present at plea negotiations, which are "best conducted on a level of mutual professional respect:").

15. Cf. ABA MODEL RULES OF PROFESSIONAL CONDUCT 4.2 (1975).

16. See, e.g., CAL. PENAL CODE § 1018 (West 1985 & Supp. 1999) (court may not accept an uncounselled guilty plea to a felony punishable by death or life without parole); cf. MASS. GEN. LAWS ANN. ch. 278, § 29B (West 1992) (permitting withdrawal of uncounselled guilty plea).

17. See *Faretta v. California*, 422 U.S. 806 (1975).

dard reflects the view that courts should be very cautious before accepting guilty pleas from uncounselled defendants, and should discourage defendants from acting without the benefit of legal advice.¹⁸

The Model Code of Pre-Arrestment Procedure includes a similar provision, which states that the court shall not accept a guilty or nolo plea from a defendant unless "it is entered or reaffirmed at least three days after the defendant received the [required] advice from the court,"¹⁹ unless the offense is a misdemeanor and the sentence does not provide for incarceration.²⁰ Standard 14-1.3(b), by contrast, does not contain specified limits but instead requires a "reasonable time for deliberation," which may vary depending on the nature of case and the severity of the sentence.

In the second edition of the Guilty Plea Standards, this standard also prohibited a court from calling upon the defendant to plead until "reasonable time, set by rule or statute, following the date defendant was held to answer." The omission of this language from the Third Edition is not intended to suggest that vigilance is no longer necessary to protect defendants without counsel. Rather, imposing such a requirement in every case introduced an undesirable degree of rigidity by requiring two initial court appearances even in those cases, such as misdemeanor traffic offenses, in which a defendant might wish to enter a plea immediately rather than being required to return to the jurisdiction for a second appearance. In fact, in most cases, as a practical matter, the proceedings required to ensure that the defendant has properly waived counsel will necessitate a delay between the initial court appearance and the entry of a plea.

Waiver of the Right to Counsel

As noted, Standard 14-1.3(b) requires that the defendant have "properly waived counsel" before the court may accept a guilty plea from an unrepresented defendant. This is an important principle which should

18. See, e.g., *People v. White*, 436 N.E.2d 507 (N.Y. 1982) (trial court may allow defendant to forgo presence of retained counsel and enter plea of guilty to petty offense, but only after searching inquiry to assure defendant understands choice); *State v. Burford*, 1999 WL 395562 **1 (La. Ct. App. June 16, 1999) (when a defendant enters an uncounseled guilty plea to DWI, court must advise him of the dangers and disadvantages of self-representation).

19. MODEL CODE OF PRE-ARRESTMENT PROC. § 350.2(2)(a) (1975).

20. *Id.* at § 350.2(b).

be strictly applied. It may be difficult for courts, particularly courts of limited jurisdiction which handle petty offenses in large volume, to devote significant time to protecting the defendant's right to counsel before entering a guilty plea. Unless caseload pressures significantly diminish, or funding increases significantly, it will be difficult for judges to conduct a lengthy inquiry into the defendant's understanding of the consequences of waiving counsel, or to defer acceptance of a guilty plea until the defendant has had an opportunity to consult with counsel.

Nevertheless, it is important to have a strong aspirational standard in this area because recent developments have only increased the potential importance of convictions for minor offenses. A defendant who believes that a *nolo contendere* plea to a traffic offense is of no consequence may come in for an abrupt awakening if convicted of a more serious offense.²¹ Safeguards that may be adequate to assure the reliability of a conviction that results only in a small fine may be inadequate to inspire the desired degree of confidence if the conviction is later used substantially to enhance a subsequent prison sentence.

Given all of the problems, outlined above, that can arise where a defendant represents himself in entering a guilty plea, it is important that procedures for accepting waivers of counsel in the guilty plea context be designed to ensure that the defendant fully appreciates the risks of entering a guilty plea without legal representation. Where there is a constitutional or statutory right to appointed counsel, a court would be well-advised to use at least the following steps for the "proper" waiver of counsel in the guilty plea context, consistent with these standards and with the related ABA standards on Providing Defense Services:

Advising Defendant of Right to Counsel. The defendant should be advised at the earliest possible time of his or her right to be represented by counsel and, if indigent, to have counsel appointed to represent him or her. As Standard 5-6.1 of the standards on Providing Defense Services states, "counsel should be provided to the accused as soon as feasible,"²² and information concerning the right to counsel should similarly be provided to the defendant at the earliest possible point.

21. See, e.g., *Nichols v. United States*, 511 U.S. 738 (1994).

22. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-6.1 (3d ed. 1992).

Requiring Defendant to Meet with Counsel. Before accepting a guilty plea from an uncounselled defendant, the court should require the defendant to meet with appointed counsel for consultation purposes. Such a meeting is required by Standard 5-8.2(b) of the standards on Providing Defense Services in any proceeding involving the possibility of incarceration.²³ The Uniform Rules of Criminal Procedure similarly require the defendant's pre-waiver consultation with a lawyer.²⁴ Some courts have recognized explicitly that counsel may be assigned for this limited purpose.²⁵

Inquiry on Defendant's Request to Waive Counsel. If the defendant persists in seeking to waive the right to counsel and enter a guilty plea, as a matter of constitutional law, the court must conduct an inquiry to determine whether the waiver is knowing and voluntary,²⁶ and whether the defendant is competent to defend himself in connection with the guilty plea proceedings.²⁷ The scope of such an inquiry is spelled out in Standard 5-8.2(a) of the standards on Providing Defense Services. It provides that no waiver of counsel should be accepted until the court has conducted "a thorough inquiry" into the defendant's ability to comprehend the offer of counsel and his or her "capacity to make the choice intelligently and understandingly,"

23. See *id.*, Standard 5-8.2(6) Standard 5-8.2(b) ("No waiver [of counsel] should be accepted unless the accused has at least once conferred with a lawyer.").

24. See UNIF. R. CRIM. P. 711(b) (1987) ("The court, in the case of a misdemeanor may and, in the case of a felony, shall refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel.").

25. See, e.g., *State v. Doe*, 621 P.2d 519 (N.M. Ct. App. 1980) (juvenile cannot waive mandatory initial appointment of counsel); *State ex rel. J.M. v. Taylor*, 276 S.E.2d 199 (W. Va. 1981) (juvenile may waive counsel only on advice of counsel).

26. See *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (defendant must "knowingly and intentionally" forgo right to counsel).

27. See *Godinez v. Moran*, 509 U.S. 389, 396, 398-400 (1993) (the competency standard for standing trial—whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him"—applies to decisions to plead guilty or waive the right to counsel); *Faretta*, 422 U.S. at 835 (defendant who is "literate, competent, and understanding" may exercise right to self-representation).

and concludes that the defendant “understands the right and knowingly and intelligently relinquishes it.”²⁸ No such waiver should be found where the defendant “is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors,” nor should a “failure to request counsel or an announced intention to plead guilty . . . of itself be construed to constitute a waiver of counsel.”²⁹ It is advisable that such an inquiry occur before and separate from any proceeding to accept a guilty, nolo or *Alford* plea.

Record of Proceedings. The inquiry into the defendant’s waiver of counsel should be conducted on the record, to preserve evidence that the right to counsel was knowingly and voluntarily waived before any guilty plea was entered.³⁰ Such on-the-record proceedings are required by Standard 5-8.2(a) of the chapter on Providing Defense Services,³¹ and are consistent with Standard 14-1.7 of this chapter, which requires a record to be kept of all proceedings at which a guilty plea is entered.

Stand-by Counsel. Where the defendant waives the right to counsel and elects to represent himself in guilty plea pro-

28. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-8.2(a) (3d ed. 1992). See also UNIF. R. CRIM. P. 771(a) (1987) (detailing elements the defendant must understand before waiving counsel, including the fact that “in the event of a plea, [defense counsel can assist] in consulting with the prosecuting attorney as to the possible reduced charges or lesser penalties”).

29. *Id.*

30. See, e.g., *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967) (a conviction of an uncounselled defendant who has not knowingly and voluntarily waived counsel cannot be used to enhance a later sentence). Cf. *Nichols v. United States*, 511 U.S. 738 (1994) (a sentencing court may consider a defendant’s previous uncounselled misdemeanor conviction in sentencing him for a subsequent offense as long as the uncounselled misdemeanor conviction did not result in a sentence of imprisonment); *Custis v. United States*, 511 U.S. 485 (1994) (with sole exception of convictions obtained in violation of right to counsel, defendant in federal sentencing proceeding has no right to collaterally attack validity of state convictions used to enhance his sentence under the Armed Career Criminal Act).

31. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-8.2(a) (3d ed. 1992) (“A waiver of counsel should not be accepted unless it is in writing and on the record.”).

ceedings, the court should consider appointing stand-by counsel to assist the defendant in connection with the plea negotiations and hearing on the plea, particularly in serious cases.³²

It may not be practicable or desirable to follow all of the above steps where the case does not involve a statutory or constitutional right to appointed counsel. In such cases, the court's inquiry into the waiver of counsel should nonetheless be designed to ensure that the defendant has knowingly and voluntarily chosen to represent himself in entering a guilty plea, fully appreciating the risks of that course.

In some jurisdictions, even where the defendant has waived counsel earlier in the proceedings, it is the practice to require an additional, specific waiver of the right to counsel in connection with the entry of a guilty plea.³³ Such a procedure is a salutary device which ensures fairness to the defendant as well as enhancing the finality of convictions.

Standard 14-1.4. Defendant to be advised

(a) The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:

(i) the nature and elements of the offense to which the plea is offered, and the terms and conditions of any plea agreement;

(ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the mandatory minimum sentence, if any, on the charge, or any special circumstances affecting probation or release from incarceration;

32. See *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984); UNIF. R. CRIM. P. 711(c) (1987) ("Notwithstanding acceptance of a waiver [of counsel,] the court may appoint standby counsel to assist" the defendant.); see also ABA STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6.3-6(b) (3d ed. 1999). ("When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.").

33. See OHIO R. CRIM. P. 11(C) ("Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by . . . counsel . . . waives this right."); cf. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-8.2(b) (3d ed. 1992) ("If a waiver [of counsel] is accepted, the offer [to allow defendant to confer with a lawyer] should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.").

(iii) that, if the defendant has been previously convicted of an offense and the offense to which the defendant has offered to plead is one for which a different or additional punishment is authorized by reason of the previous conviction or other factors, the fact of the previous conviction or other factors may be established after the plea, thereby subjecting the defendant to such different or additional punishment;

(iv) that by pleading guilty the defendant waives the right to a speedy and public trial, including the right to trial by jury; the right to insist at a trial that the prosecution establish guilt beyond a reasonable doubt; the right to testify at a trial and the right not to testify at a trial; the right at a trial to be confronted by the witnesses against the defendant, to present witnesses in the defendant's behalf, and to have compulsory process in securing their attendance;

(v) that by pleading guilty the defendant generally waives the right to file further motions in the trial court, such as motions to object to the sufficiency of the charging papers to state an offense or to evidence allegedly obtained in violation of constitutional rights; and

(vi) that by pleading guilty the defendant generally waives the right to appeal, except the right to appeal a motion that has been made, ruled upon and expressly reserved for appeal and the right to appeal an illegal or unauthorized sentence.

(b) If the court is in doubt about whether the defendant comprehends his or her rights and the other matters of which notice is required to be supplied in accordance with this standard, the defendant should be asked to repeat to the court in his or her own words the information about such rights and the other matters, or the court should take such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences.

(c) Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.

(d) If the defendant is represented by a lawyer, the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel.

History of Standard

Subsection (a)(i) has been amended to reflect that the court must ensure that the defendant understands not simply the nature and elements of the offense to which the plea is offered, but also the “terms and conditions of any plea agreement.” Subsection (a)(v) has been amended in order more accurately to reflect the law concerning the defendant’s waiver of the right to file any further motions in the trial court following entry of a guilty plea. Waiver of the defendant’s right to file an appeal is addressed in a new, separate subsection (a)(vi). An important change is the addition of a new subsection (c). This calls upon the court to advise the defendant that there may be collateral consequences that flow from the entry of his or her guilty plea, and that he or she should consult with defense counsel if the defendant needs additional information about these consequences.

Related Standards

FED. R. CRIM. P. 11(c)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4

NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.7

UNIF. R. CRIM. P. 444(c)

Commentary

Standard 14-1.4 addresses the advice the court must give a defendant before accepting a plea of guilty or nolo contendere. This advice is critical to the operation of the standards as whole. It is intended to ensure that the defendant’s plea is knowing and intelligent, a fundamental element of a valid guilty plea.¹ While not all the advisements contained in this standard are constitutionally required for the acceptance of a valid guilty plea, all are important as a matter of sound crim-

1. See, e.g., *Bousley v. United States*, 118 S.Ct. 1604, 1609 (1998) (“A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent.”) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

inal justice policy. Thus, while the failure to give particular advisements may not constitute error invalidating the conviction, a question which will turn on the jurisdiction's law, compliance with this standard will help to assure that the defendant appreciates the significance of the plea, and will protect the plea from attack in any later proceedings.

Standard 14-1.4(a) (Court's advice to defendant)

Under Standard 14-1.4(a), the court may not accept a guilty or nolo plea from the defendant without first addressing the defendant "personally" and making inquiry to ensure that the plea is made with appropriate knowledge and understanding. Addressing the defendant personally is important under *Boykin v. Alabama*,² in which the Supreme Court reversed a guilty plea conviction of a defendant represented by appointed counsel where the record did not affirmatively show that the plea was voluntarily and intelligently entered. Unless the defendant is addressed personally, a court cannot reasonably expect to determine that the plea meets the constitutional requirements of the *Boykin* decision.³ The requirement that the defendant be addressed personally by the court is consistent with the Model Code of Pre-Arrest Procedure,⁴ the Federal Rules of Criminal Procedure,⁵ and the Uniform Rules of Criminal Procedure.⁶

Standard 14-1.4 also provides that the defendant's plea be taken in "open court." This corresponds with the Federal Rules of Criminal Procedure⁷ and reflects the judgment that the business of the criminal courts is the public's business, as well as the legal presumption of open judicial proceedings reflected in our Constitution and common law. As a general matter, pleas of guilty or nolo contendere, therefore, should not be taken in chambers or otherwise conducted in a manner that makes it impossible for the public to attend. The standards recognize a

2. See 395 U.S. 238 (1969).

3. See, e.g., *United States v. Martinez-Martinez*, 69 F.3d 1215 (1st Cir. 1995); *McBain v. Maxwell*, 466 P.2d 177, 178 (Wash. Ct. App. 1970). But see, e.g., *United States v. Hobson*, 686 F.2d 628 (8th Cir. 1982) (group explanation of rights sufficient to meet requirement that court "personally" address the defendant); *State v. Parisien*, 469 N.W.2d 563, 566 (N.D. 1991) (plea not infirm where court did not repeat for each defendant in the group questions which applied to all defendants, as court expressly required each defendant to respond individually).

4. See MODEL CODE OF PRE-ARREST PROC. § 350.4(1) (1975).

5. See FED. R. CRIM. P. 11(c).

6. See UNIF. R. CRIM. P. 444(c)(1) (1987).

7. See FED. R. CRIM. P. 11(c); see also UNIF. R. CRIM. P. 444(c)(1) (1987).

narrow exception where the court finds “good cause” for the proceedings to be held in chambers.⁸ As explained in the commentary to Standard 14-1.7, however, this is intended to cover those relatively rare situations where, for example, public knowledge of a guilty plea or the terms thereof could threaten an ongoing criminal investigation or create a serious threat of personal harm to the defendant entering the plea.⁹

The advisements set forth in Standards 14-1.4(a)(i) through (a)(vi) are critical to the entry of a valid plea. If a defendant does not understand these matters, the plea has not been entered intelligently. The requirement that the court ensure “that the defendant understands” the effects of the plea is consistent with the Federal Rules of Criminal Procedure¹⁰ as well as the Uniform Rules of Criminal Procedure.¹¹ Where the court is uncertain whether the defendant understands the court’s advice, Standard 14-1.4(b) prescribes certain additional steps to be taken, as described below.

Standard 14-1.4(a)(i) (Nature of offense and terms of plea agreement)

Obviously, a defendant cannot plead intelligently without understanding the offense with which he or she is charged. The Supreme Court stated many years ago that “real notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process.”¹² Standard 14-1.4(a)(i) thus requires that the defendant be advised of the “nature and elements of the offense to which the plea is offered.”

The requirement to inform the defendant of the “elements” of the offense is deliberately included in this standard. In *Henderson v. Morgan*,¹³ the Supreme Court held that a guilty plea to second-degree murder was involuntary where the defendant had not been informed that intent to cause death was an element of the crime. Thus, at least as

8. See Standard 14-1.7.

9. *Press-Enterprise Co. v. Supreme Court*, 464 U.S. 501, 510 (1984) (judicial proceedings in criminal cases may not be closed to public unless specific, on-the-record findings are made *demonstrating* that “closure is essential to preserve higher values and is narrowly tailored to serve that interest”).

10. See FED. R. CRIM. P. 11(c) (court must “determine the defendant understands” effects of pleading guilty).

11. See UNIF. R. CRIM. P. 444(c)(1) (1987) (court must “determin[e] that the defendant fully understands” implications of the plea).

12. See *Smith v. O’Grady*, 312 U.S. 329, 334 (1941); see also *Bousley v. United States*, 118 S.Ct. 1604, 1609 (1998).

13. 426 U.S. 637 (1976).

to the intent element of an offense, such advice is constitutionally required. Although the Court in *Henderson* stopped short of holding that a trial court must explain all of the elements of an offense to which a defendant pleads,¹⁴ this standard nevertheless recommends that such advice be given.

Recently, in *Bousley v. United States*,¹⁵ the Supreme Court again strongly indicated that accurate advice regarding the elements of the crime is necessary to a valid plea. Bousley pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1) in 1990. Thereafter, the Court held in a separate case that this statute required a showing of the "active employment of the firearm."¹⁶ Bousley sought federal habeas relief, claiming that his guilty plea was not knowing and intelligent because he was misinformed by the District Court as to the nature of the charged crime. The Court held that such a plea colloquy could indeed be constitutionally deficient, and that if the record revealed that neither the defendant, his counsel, nor the court correctly understood the essential elements of the crime with which he was charged, his guilty plea would indeed be constitutionally invalid.¹⁷

Beyond these constitutional requirements, explaining the elements of the charge helps to assure that the defendant fully appreciates the nature of the offense to which he or she is pleading, and allows the defendant to measure those elements against the conduct in which he or she engaged. Moreover, since a guilty plea is an admission of all elements of the charge, a defendant, in fairness, should be formally advised of those elements before the plea is accepted.

New language has been included requiring that the court ensure the defendant understands, as well, "the terms and conditions of any plea

14. The Supreme Court in *Henderson* found that there was no need in that case "to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense," and "assum[ed] it does not." However, the Court found that "intent is such a critical element of the offense of second degree murder that notice of that element is required." *Id.* at 647 n.18. The *Henderson* decision has subsequently been applied by the Court without citing this limitation. See, e.g., *Marshall v. Lonberger*, 459 U.S. 422, 436-37 (1983) (where defendant challenged conviction based on claim that judge did not inform him guilty plea was to attempting to kill victim, court finds *Henderson* test met where judge advised defendant he was charged with "attempting on [the victim] with a knife" and that he was "pleading guilty to this indictment," which expressly stated that defendant had knowingly attempted to kill victim).

15. 118 S. Ct. 1604 (1998).

16. *Bailey v. United States*, 516 U.S. 137, 144 (1995).

17. 118 S. Ct. at 1609.

agreement." In virtually every case in which the defendant is offering to plead guilty, the prosecutor and defense counsel will have agreed in advance on the terms of the plea. In federal cases, such agreements may be fairly complex, are usually reduced to writing, and may cover such related matters as forfeiture, restitution, or civil penalties, or may stipulate to facts. It is important that the court ensure that the defendant personally understands the terms of the agreement that have been negotiated by his or her counsel. Where the defendant has waived counsel, such advice from the court may be the only chance to determine that the defendant appreciates the significance of the terms to which he or she has agreed.

Finally, while not expressly included in a description of the elements of the offense, some courts will also advise the defendant that even if the elements of the offense are met, he or she may have affirmative defenses.¹⁸ Such advice is particularly advisable where the facts of the case raise a "red flag" to the court suggesting that the defendant may have a viable defense were the case to proceed.

Standard 14-1.4(a)(ii) (Maximum sentence)

Under Standard 14-1.4(a)(ii), the defendant must be advised of the "maximum possible sentence" on the charge to which the plea is entered, as well as any "mandatory minimum sentence" that may apply. Such requirements are contained, similarly, in the Federal Rules of Criminal Procedure,¹⁹ the Uniform Rules of Criminal Procedure,²⁰ and the Model Code of Pre-Arrest Procedure.²¹ State statutes commonly require that defendants be advised of the maximum sentence before acceptance of a guilty plea.²² Many states also mandate that

18. See, e.g., *People v. Costanza*, 665 N.Y.S. 2d 487, 488 (1997) (if plea allocution raises a possible affirmative defense, court must make inquiry and ensure defendant is waiving defense in pleading guilty); *Commonwealth v. Thompson*, 351 A.2d 280, 282-83 (Pa. 1976) (trial court erred in failing to instruct defendant on affirmative defense of self-defense at time of acceptance of plea); *People v. Olmedo*, 167 Cal. App. 3d 1085, 1093 (Cal. Ct. App. 1985) ("failure to instruct on the elements of a crime, a lesser included offense, or an affirmative defense constitutes a denial of the constitutional right to jury trial").

19. See FED. R. CRIM. P. 11(c)(1).

20. See UNIF. R. CRIM. P. 444(c)(1)(ii), (iii) (1987).

21. See MODEL CODE OF PRE-ARREST PROC. § 350.4(1)(e)(i) and (ii) (1975).

22. See, e.g., ALA. R. CRIM. P. 14.4(a)(1)(ii); ARK. R. CRIM. P. 24.4(c); DEL. SUPER. CT. CRIM. R. 11(c)(1); IDAHO CRIM. R. 11(c)(2); 725 ILL. COMP. STAT. § 5/115-2 (West 1993); KAN. STAT. ANN. § 22-3210(2) (1995 & Supp. 1998); MASS. R. CRIM. P. 12(c)(3)(B); MINN. R. CRIM. P. 15.01(10)(a); MONT. CODE ANN. § 46-12-210(1)(a)(iii) (1997).

defendants be advised of any mandatory minimum sentences applicable as well.²³

As used in this standard, the “maximum possible sentence” is used to mean the maximum sentence that is possible as a practical matter under the circumstances of the defendant’s particular case. This would include any additional punishment possible by virtue, for example, of the fact that the crime falls in a category for which aggravated sentencing is available under the laws of the jurisdiction, such as a crime committed while armed.²⁴ Similarly, if the defendant is pleading guilty to more than one offense and consecutive sentences could be imposed on those charges, the defendant is to be advised of the maximum sentence when calculated “including that possible from consecutive sentences.”²⁵ Most courts hold that failure to advise the defendant of the maximum sentence may be grounds for reversal of a conviction.²⁶ Similarly, a court’s failure to advise a defendant of the mandatory minimum sentence may require the plea to be set aside.²⁷ A court’s failure to inform a defendant of mandatory minimum and maximum sentences may amount to harmless error.²⁸

The standard provides further that the defendant should be apprised “of any special circumstances affecting probation or release from incar-

23. See, e.g., ARK. R. CRIM. P. 24.4(b); DEL. SUPER. CT. CRIM. R. 11(c)(1); MASS. R. CRIM. P. 12(c)(3)(B); MINN. R. CRIM. P. 15.01(10)(b); MONT. CODE ANN. § 46-12-210(1)(a)(ii) (1997); W. VA. R. CRIM. P. 11(c)(1); WYO. R. CRIM. P. 11(b)(1).

24. See, e.g., D.C. CODE ANN. § 22-3202 (1996); HAW. REV. STAT. ANN. §§ 706-656, 707-701 (Michie 1999) (court shall sentence a person who has been convicted of murder to life imprisonment without possibility of parole in the murder of a peace officer while in the performance of his duties, or a person known by the defendant to be a witness in a murder prosecution, or a person by a hired killer); 61 PA. STAT. ANN., tit. 61, § 331.21 (West 1964 & Supp. 1999) (“The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth . . . except convicts condemned to death or serving life imprisonment. . .”).

25. Cf. UNIF. R. CRIM. P. 444(c)(1)(ii) (1987); MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.4(e)(i) (1975).

26. See, e.g., *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1059, 1450-51 & n.1379 (1999) (collecting cases).

27. See, e.g., *United States v. Goins*, 51 F.3d 400, 403-05 (4th Cir. 1995) (court’s failure to advise defendant of mandatory minimum sentence constituted reversible error); *United States v. Seigel*, 102 F.3d 477, 481 (11th Cir. 1996) (court’s failure to advise defendant of mandatory minimums required the plea to be set aside); *United States v. Padilla*, 23 F.3d 1220, 1221, 1224 (7th Cir. 1994) (court’s failure to advise defendant of mandatory minimum penalty and accurate maximum penalty entitled defendant to withdraw plea).

28. See *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1059, 1450-51 & n.1379 (1999) (collecting cases).

ceration." For example, if a defendant were to be ineligible for parole in the event of a guilty plea and conviction, this fact should be made known in advance of the plea. A similar requirement is contained in the Federal Rules of Criminal Procedure.²⁹ Courts generally hold, however, that the failure to advise the defendant of applicable parole terms or eligibility factors does not invalidate a plea or constitute ineffective assistance of counsel.³⁰

Standard 14-1.4(a)(iii) (Repeat offender or enhancement statutes)

Standard 14-1.4(a)(iii) addresses so-called repeat offender or recidivist statutes, such as the "three strikes" statutes that have been adopted in a number of states³¹ and in the federal system.³² These statutes typically provide for enhanced penalties for defendants who have certain

29. See FED. R. CRIM. P. 11(c)(1) (defendant must be advised of the effect of any special parole or supervised release term); *State v. Kovack*, 453 A.2d 521 (N.J. 1982) (defendant must be made aware of parole ineligibility before plea).

30. See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts."); *United States v. Roberts*, 5 F.3d 365, 368 (9th Cir. 1993); *Johnson v. Puckett*, 930 F.2d 445, 448 n.2 (5th Cir.), cert. denied, 502 U.S. 890 (1991); *Fama v. United States*, 901 F.2d 1175, 1178 (2d Cir. 1990) cert. denied, 499 U.S. 954 (1991); *United States v. Ballard*, 919 F.2d 255, 258 (5th Cir. 1990); *Holmes v. United States*, 876 F.2d 1545, 1548-49 (11th Cir. 1989) (*Hill* "[makes] clear that a trial court's failure to inform the defendant of his parole eligibility is not a basis for invalidating a guilty plea on voluntariness grounds."); *Worthen v. Meachum*, 842 F.2d 1179, 1182 (10th Cir. 1988); see also *People v. Reed*, 72 Cal. Rptr.2d 615, 618-20 (1998).

31. See D.C. CODE ANN. § 22-104 (1996) ("If any person . . . convicted of a criminal offense . . . was previously convicted of a criminal offense . . . such person may be sentenced to pay a fine in an amount not more than one and one-half times the maximum fine prescribed for the [first] conviction . . . and sentenced to imprisonment for a term not more than one and one-half times the maximum term of imprisonment prescribed for [the first] conviction."); NEB. REV. STAT. ANN. § 29-2221(1) (Michie 1995) ("Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . shall, upon conviction of a felony committed in this state, . . . be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years"); WIS. STAT. ANN. § 939.62 (West 1996 & Supp. 1998) ("If the actor is a repeater . . . [a] maximum term of one year or less may be increased to not more than 3 years"). But see *State v. Barton*, 609 P.2d 1353 (Wash. 1980) (defendant need not be advised of possible habitual criminal proceeding since such a proceeding is merely a collateral consequence of a guilty plea).

32. See, e.g., 18 U.S.C. § 3559 (1994).

types of prior convictions, or who have previously been convicted of the same crime.³³ Under this standard, before the court accepts the defendant's guilty plea, it must advise the defendant that, if such a statute applies, and if it is established during sentencing that the defendant has a prior conviction, enhanced punishment may follow. This provision closely resembles provisions in the Model Code of Pre-Arrestment Procedure³⁴ and the Uniform Rules of Criminal Procedure.³⁵

It is important to give this advice before the plea is accepted because ordinarily, at that point, before a sentencing report is prepared, the judge will not know of the defendant's past record, if any. If there is any chance that such a statute will apply, the court should give this advice. Presumably, the defendant will be aware if there are prior convictions, and can seek advice from defense counsel as to the ramification of those convictions.³⁶ In some jurisdictions, the prosecution is required to give written advance notice if he or she intends to rely on the fact of prior convictions in connection with sentencing.³⁷

The reference, in this standard, to "other factors" which may increase the punishment (other than prior convictions) is to make clear that the provision applies not only to repeat offender statutes but also to laws that provide for increased punishment on other grounds, for example, when the defendant is a professional criminal or a leader of a continuing criminal conspiracy.³⁸

Standard 14-1.4(a)(iv) (Waiver of trial rights)

Standard 14-1.4(a)(iv) calls upon the court to enumerate the trial-related rights that the defendant is giving up by pleading guilty. In *Boykin v. Alabama*,³⁹ the Supreme Court specified three federal constitu-

33. E.g., HAW. REV. STAT. ANN. § 706-606.5 (Michie 1999) (differential sentencing for second and third-time).

34. See MODEL CODE OF PRE-ARRESTMENT PROC. § 350.4(1)(e)(iii) (1975).

35. See UNIF. R. CRIM. P. 444(c)(1)(ii) (1987).

36. Because defendants at times may not recall, or may not know, the details of their prior convictions, it is part of the responsibilities of defense counsel to seek such information as part of the investigative process before recommending entry of a guilty plea. See Standard 14-3.2(b).

37. See, e.g., 21 U.S.C. § 851 (1994); D.C. CODE ANN. § 23-111 (1996).

38. See 21 U.S.C. § 848 (1994 & Supp. II 1996) (continuing criminal enterprise).

39. 395 U.S. 238, 243 (1969).

tional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers—which the court will not presume the defendant to have waived where the guilty plea record is silent.⁴⁰ This standard requires, therefore, that the defendant be advised that he or she has these three rights and will waive them by pleading guilty.⁴¹ Further, the standard provides that the defendant be informed that he or she is waiving the following additional constitutional rights that have been made applicable to the states, namely: the right to a speedy trial,⁴² the right to insist at a trial that proof of guilt be established beyond a reasonable doubt,⁴³ and the right to present witnesses in one’s own behalf through the use of compulsory process.⁴⁴ The “right to testify at trial” is included along with the “right not to testify at trial” to make clear to the defendant that he or she would have the right to testify if he or she did not exercise the constitutional right to remain silent. A similar provision is contained in the Uniform Rules of Criminal Procedure.⁴⁵

While not enumerated in this standard, a court may also find it prudent to mention other rights of which the defendant should be advised. Thus, a court may want to explain that the defense at trial would be afforded, if it wished, an opportunity to cross-examine prosecution witnesses⁴⁶ and that, if the defendant decided not to testify at trial, the prosecution would be forbidden to comment to the jury respecting the defendant’s failure to do so.⁴⁷ A court may also want to explain to the accused that the assistance of counsel would be available at trial. While not all of these warnings may be constitutionally required, the more

40. *Id.* at 244; see also *Mitchell v. United States*, 119 S. Ct. 1307, 1309 (1999); *Godinez v. Moran*, 509 U.S. 389, 397 n.7 (1993); *Parke v. Raley*, 506 U.S. 20, 29 (1992).

41. Even with a valid waiver at the plea colloquy stage, however, the defendant’s waiver of the right against self-incrimination is limited to that proceeding. In *Mitchell v. United States*, 119 S. Ct. 1307, 1309 (1999), the Supreme Court held that, in the federal system, a guilty plea does not waive the defendant’s Fifth Amendment privilege against self-incrimination in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. The Court further held that a trial court may not draw an adverse inference from the defendant’s silence. *Id.*

42. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

43. See *In re Winship*, 397 U.S. 358 (1970).

44. See *Washington v. Texas*, 388 U.S. 14 (1967).

45. UNIF. R. CRIM. P. 444(c)(1)(iv) (1987).

46. See *Pointer v. Texas*, 380 U.S. 400 (1965) (defendant in a criminal case has both the right to confront witnesses and right to cross-examine).

47. See *Griffin v. California*, 380 U.S. 609 (1965).

information the defendant is given about the consequences of the plea, the more likely it is that his or her choice will be informed and that his or her conviction will be accorded finality.

Standard 14-1.4(a)(v) (Waiver of right to file further motions)

Standard 14-1.4(a)(v) informs the defendant that the entry of a guilty plea “generally waives the right to file further motions in the trial court.” The defendant should understand, in particular, that after pleading guilty, the defendant will no longer be able to raise objections to “the sufficiency of the charging papers,” to “evidence allegedly obtained in violation of constitutional rights,” or other similar arguments.⁴⁸ In fairness to the defendant, it is important that he or she understand that there is a pretrial right to object to illegally seized evidence and to the sufficiency of the charging papers. Standard 14-1.4(a)(v) is similar to a provision contained in the Model Code of Pre-Arrest Procedure, under which the defendant must be advised before pleading guilty that “at the trial evidence obtained in violation of his constitutional rights may not be used against him,” and that he may move to exclude such evidence.⁴⁹

The term “generally” is included so as to convey to the defendant that the matter in the trial court will essentially be concluded with the plea, while not suggesting to the defendant, erroneously, that no further motions of any kind may be filed. A detailed list of the exceptions to this general rule might be confusing or misleading to unsophisticated defendants.

Standard 14-1.4(a)(vi) (Waiver of appeal rights)

Standard 14-1.4(a)(vi) has been created as a separate standard addressing the defendant’s waiver of appeal rights. It is important that

48. Most jurisdictions have adopted the view that by pleading guilty a defendant waives all nonjurisdictional objections to the manner in which evidence was acquired against the defendant. See, e.g., *State v. Schroeder*, 593 N.W.2d 76 (Wis. Ct. App. 1999) (defendant’s guilty plea waived right to evidentiary hearing to determine reason for delay); *Commonwealth v. Rounsley*, 717 A.2d 537 (Pa. 1998) (entry of guilty plea waives objections to sufficiency of evidence); *State v. Pettus*, 986 S.W.2d 540 (Tenn. 1999) (guilty plea waives all nonjurisdictional defects); *Brooks v. State*, 573 So.2d 1350 (Miss. 1990) (same).

49. MODEL CODE OF PRE-ARREST PROC. § 350.4(1)(d) (1975).

the defendant fully understand, and be directly advised by the court, that entry of a guilty plea will end the case for almost all purposes, and that the general right to appeal the conviction is among the rights the defendant is waiving by entering the plea. Thus, this standard makes clear, first, that entry of a guilty plea "generally waives the right to appeal," and second, that the most significant appeal rights not automatically waived by a guilty plea are the right to challenge "an illegal or unauthorized sentence," and the right to challenge the underlying conviction on grounds that have been "expressly reserved for appeal."

While the Uniform Rules of Criminal Procedure would permit appeals of rulings on evidentiary issues even after the entry of a guilty plea,⁵⁰ the general rule is that the entry of a plea of guilty waives all "nonjurisdictional" objections to the conviction, *i.e.*, all objections not going to the power of the court to enter a judgment of conviction.⁵¹ A plea of guilty is generally held automatically to waive the defendant's right to appeal on constitutional or evidentiary objections relating to the case, such as motions to suppress evidence or claims of illegal search and seizure.⁵² The only appeal right that is usually preserved automatically is the right to challenge the sentence imposed by the trial judge as exceeding its authority under the plea agreement or under governing law.⁵³

50. *See, e.g.*, UNIF. R. CRIM. P. 444(f) (1987) (defendant who pleads guilty should be permitted to appeal a pretrial motion to suppress evidence or a pretrial motion that, if granted, would be dispositive).

51. *See, e.g.*, WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3D § 175 (1999); CAL. PENAL CODE § 1237.5 (Supp. 1999) *See generally Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1059, 1442 (1999) (discussing federal cases).

52. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (defendant who pleads guilty cannot raise constitutional claims relating to the deprivation of rights prior to entry of the guilty plea). The law is somewhat unsettled as to when a guilty plea will be found to waive the right to argue that the conviction on the guilty plea violates the Double Jeopardy clause. The Supreme Court has distinguished between guilty pleas to charges that are barred by the Double Jeopardy clause on their face, *Menna v. New York*, 423 U.S. 61 (1975) (entry of plea of guilty held not to waive double jeopardy claim), and guilty pleas which, as a matter of fact, are inconsistent with the defendant's extra-record claim that two indictments alleged a single conspiracy, *United States v. Broce*, 488 U.S. 563 (1989) (valid plea of guilty held to preclude later attempt to set aside conviction on double jeopardy grounds).

53. *See* 18 U.S.C. § 3742 (1994 & Supp. II 1996); FED. R. CRIM. P. 32(c)(5); MD. CODE ANN., tit. 27, § 645A (1996 & Supp. 1998). Some states bar all appeals from conviction on a guilty plea. *See, e.g.*, ALA. CODE § 15-15-26 (1995); MISS. CODE ANN. § 99-35-101 (1994).

As reflected in Standard 14-1.4(vi), however, there is an exception to this principle where the parties have expressly preserved an appeal issue in the plea agreement. In both the federal and many state systems, rules allow for the entry of such "conditional" pleas.⁵⁴ Conditional pleas are also expressly endorsed by the ABA's Criminal Justice Standards on Criminal Appeals.⁵⁵ Such rules permit the defendant to enter a plea of guilty on the condition that he or she may appeal to challenge the conviction on a specified evidentiary, statutory, or constitutional point. If the appeal is successful, the guilty plea may be withdrawn.⁵⁶ This standard reflects and recognizes this principle, as well as the general rule that most appeal rights are waived by entry of a plea of guilty or *nolo contendere*.

Of course, the defendant's waiver of the general right to appeal does not and cannot encompass a waiver of rights to challenge the integrity of the guilty plea proceeding itself.⁵⁷ While the defendant usually waives the right to appeal those objections that could have been pursued had the case gone to trial, the defendant does not waive the right, on appeal, to challenge defects in the guilty plea hearing, to argue that the guilty plea was not knowing or voluntary, or to appeal denial of a motion to withdraw a guilty plea.⁵⁸ In terms of the advice given to the defendant at the guilty plea hearing, however, because such appeal

54. See FED. R. CRIM. P. 11(a)(2); see also, e.g., ARK. R. CRIM. P. 24.3(b); CONN. GEN. STAT. ANN. § 54-94a (West 1994); MONT. CODE ANN. § 46-12-204 (1997); NEV. REV. STAT. ANN. § 174.035(3) (Michie 1997); Cf. *Doggett v. United States*, 505 U.S. 647 (1992) (enforcing plea agreement containing government's consent to allow defendant to appeal denial of a motion to dismiss).

55. See, ABA STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL APPEALS, Standard 21-1.3(c) (2d ed. 1980) ("Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, . . . a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues.").

56. See, e.g., FED. R. CRIM. P. 11(a)(2) (authorizing "conditional pleas," in which the defendant reserves the right to "review of the adverse determination of any specified pretrial motion").

57. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL APPEALS, Standard 21-1.3, Commentary (2d ed. 1980) ("Errors may occur in taking guilty pleas, and appellate review should be available.").

58. See, e.g., *Bousley v. United States*, 118 S. Ct. 1604 (1998) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.") (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)); *United States v. Broce*, 488 U.S. 563, 569 (1989) ("when the judgment of conviction upon a guilty plea has become final and the offender seeks to

rights relate to the very proceeding in which the advice is being given, it would make little sense to include this limitation in the advice given by the court, and could be needlessly confusing.

A related issue has arisen in the federal system because of the practice of many federal prosecutors to require the defendant to waive most or all rights to challenge the sentence on appeal or through collateral attack as a condition of entering a plea agreement.⁵⁹ This practice has followed from the adoption of the U.S. Sentencing Guidelines and accompanying legislative amendments which give federal defendants who plead guilty the right to appeal the calculation of their sentence.⁶⁰ This rule creates an incentive for defendants routinely to appeal from sentencing on a guilty plea even where there may be no significant legal or factual issue. Such appeals increase the burden on the appellate courts.⁶¹

As a constitutional matter, a defendant may choose to waive rights as part of a plea agreement,⁶² including rights of appeal.⁶³ In the federal system, all appellate courts to consider the issue have upheld a

reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary"); *United States v. DeWalt*, 92 F.3d 1209 (D.C. Cir. 1996); *United States v. Medina-Silverio*, 30 F.3d 1 (1st Cir. 1994) (no basis for finding plea voluntary or intelligent); *United States v. Ivory*, 11 F.3d 1411 (7th Cir. 1993) (appealing denial of motion to withdraw plea); *Ballentine v. State*, 445 A.2d 1033 (Md. 1982) (appeal based on lack of voluntariness). Of course, a claim of ineffective assistance of counsel also falls in the category of rights that the defendant does not waive by entering a guilty plea. Depending on the circumstances of the case, however, such a claim may have to be raised through a collateral attack on the conviction rather than a direct appeal.

59. See, e.g., *United States v. Michlin*, 34 F.3d 896, 897 (9th Cir. 1994); *United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994).

60. See 18 U.S.C. §§ 3742(a)(2), (a)(3) (1994 & Supp. II 1996) (defendant may appeal from a sentence if it "was imposed as a result of an incorrect application of the sentencing guidelines" or "is greater than the sentence specified in the applicable guideline range").

61. See, e.g., *United States v. Bushert*, 997 F.2d 1343, 1347 (11th Cir. 1993) (noting that Sentencing Reform Act "greatly expanded a defendant's right to obtain appellate review of his sentence"), cert. denied, 513 U.S. 1051 (1994).

62. See *United States v. Mezzanato*, 513 U.S. 196 (1995) (express waiver of protection against impeachment use of plea agreement is enforceable).

63. See, e.g., *People v. Olson*, 264 Cal. Rptr. 817, 819 (Cal. Ct. App. 1989) (right to appeal may be waived in a plea bargain); *People v. Smith*, 535 N.Y.S.2d 732 (N.Y. App. Div. 1988) (same), aff'd, 541 N.E.2d 1022 (N.Y. 1989); *People v. Rodriguez*, 480 N.W.2d 287, 289 (Mich. Ct. App. 1991) ("to pronounce invalid *per se* an agreement by a defendant to waive an appeal as of right would operate in many cases to reduce substantially the incentive of prosecutors to offer what particular defendants and their attorneys might regard as worthwhile inducements to forego that right.").

defendant's express waiver, as part of a plea agreement, of the right to appeal his or her sentence where the waiver was knowing and voluntary.⁶⁴ Even an express waiver of the right to appeal a sentence, however, will not be construed to bar appeal of a sentence that has been imposed in excess of the statutory maximum or on the basis of unconstitutional considerations.⁶⁵

The question remains whether requiring certain types of waiver on sentencing issues is desirable or appropriate. Some argue that such practices "undermine the error correcting function of the courts of appeals in sentencing" and create a regime in which the appellate courts may never have the opportunity to review an illegal, unconstitutional or factually unfounded sentence, contrary to the congressional intent in adopting the Federal Sentencing Guidelines system.⁶⁶ This skewing effect may be particularly extreme where the government seeks a unilateral waiver of sentencing appeal rights, which allows the government but not the defendant to appeal sentencing errors. Those opposed to this practice have also emphasized that a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed.⁶⁷

64. See generally *Bushert*, 997 F.2d at 1347 (discussing cases); see also, e.g., *United States v. Price*, 95 F.3d 364, 369 (5th Cir. 1996); *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995), cert. denied, 516 U.S. 1002 (1995); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829-30 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990).

65. See, e.g., *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996) (cannot waive right to appeal a restitution penalty imposed in violation of law); *United States v. Petty*, 80 F.3d 1384 (9th Cir. 1996) (waiver of appeal does not preclude review of substantial violations of plea agreement arising after waiver); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147-49 (4th Cir. 1995) (waiver of appeal does not preclude review where restitution order was illegally imposed); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994) (waiver denied effect where sentencing hearing was conducted in violation of defendant's Sixth Amendment right to counsel); *United States v. Pruitt*, 32 F.3d 431 (9th Cir. 1994) (claims of ineffective assistance of counsel can be reviewed despite waiver); *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) (waiver not given effect where sentence was imposed on the basis of an unconstitutional use of naturalized status); *Bushert*, 997 F.2d at 1350 (defendant who waives right to appeal sentence does not "subject himself to being sentenced entirely at the whim of the district court"); *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992) (cannot bar review of sentences exceeding statutory maximum). Some courts have condemned appeal waivers entirely. See, e.g., *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997).

66. *Raynor*, 989 F. Supp. at 49.

67. *Id.*

Others argue that if such waivers seek to foreclose all review even of egregious errors in the sentencing process, public confidence in the justice system will be undermined. Requiring waivers of collateral as well as direct appellate review rights is particularly troublesome because this eliminates all avenues by which even severe sentencing errors may be corrected. Because the standard of review on a collateral challenge is already very high,⁶⁸ to ask the defendant to give up this avenue of review may foster the impression that the justice system is not concerned with potential miscarriages of justice that may occur in rare cases. At the same time, allowing for routine review of lower courts' sentencing calculations is costly and burdensome. It is argued that appeal waivers are good public policy because they promote "finality of judgments and sentences" and because they conserve prosecutorial and judicial resources.⁶⁹

While the Committee and the Council debated adopting a standard on this issue, they decided not to take a position at this time on the propriety of requesting the defendant's voluntary waiver of appeal rights as part of the plea process. Like the Federal Rules Advisory Committee,⁷⁰ however, the Standards provide that if the parties enter into such waivers as a part of a plea agreement, the judge in the plea colloquy should verify that the defendant's decision with respect to the waiver is knowing and intelligent.⁷¹

Standard 14-1.4(b) (Defendant's comprehension of rights)

Standard 14-1.4(b) addresses the circumstances in which the court has doubts as to whether the defendant comprehends his or her rights, or other aspects of the court's inquiry into the voluntariness of the plea. A

68. See *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979) (collateral attack on guilty plea conviction must show constitutional or jurisdictional error, a "complete miscarriage of justice," or a proceeding "inconsistent with the rudimentary demands of fair procedure"); see also 28 U.S.C. §§ 2254(d); 2254(a); 2255 (1994 & Supp. III 1997).

69. See, e.g., *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992).

70. In the 1999 amendments to FED. R. CRIM. P. 11, the Committee added a requirement that judges inform the defendant of, and determine that the defendant understands, "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." FED. R. CRIM. P. 11(c)(6), advisory committees note (effective Dec. 1, 1999).

71. See Standard 14-1.4(a)(vi) (defendant to be advised regarding waiver of appeal rights).

court cannot be expected to explain to a defendant in detail all of the rights that are relinquished by pleading guilty or *nolo contendere*. On the other hand, where the defendant does nothing more than state that he or she understands the advisements, there may occasionally be doubts by the court as to whether the defendant truly comprehends the rights mentioned.⁷² Accordingly, where the court is uncertain about the defendant's understanding, perhaps because of the defendant's lack of education or intelligence or poor English language skills, this standard provides that the court should take such "steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences." The court, aided by defense counsel, should ensure that defendants not proficient in English have the benefit of translators in order to ensure a completely knowing plea.

This may include, for example, asking the defendant "to repeat to the court in his or her own words" the information given by the court about his or her rights and other matters. If communication with the defendant proves difficult, another step would be to adjourn the proceedings to enable counsel to confer with the defendant. Of course, if at any time during the plea proceedings the defendant expresses a wish to consult with counsel, the court should facilitate such a request by taking a recess or otherwise permitting the defendant time for a private consultation.

Concerns about the defendant's comprehension of the consequences of the plea may be particularly acute where the defendant has chosen to waive counsel. In such circumstances, the court should be alert to whether the defendant truly understands and has voluntarily and knowingly entered the plea. The court may wish, for example, to go into more detailed questioning with an uncounselled defendant than it would in an ordinary case, where the defendant has had the benefit of counsel, or may wish to refer the defendant to standby counsel if it is apparent that the defendant has additional questions.

72. See, e.g., *Aleman v. State*, 957 S.W.2d 592, 594 (Tex. Ct. App. 1997) (conviction reversed where record reflects defendant does not speak or understand English, but was deprived of access to interpreter); *Hunt v. State*, 487 N.E.2d 1330, 1334 (Ind. Ct. App. 1986) (court failed to inquire whether defendant knew and understood English at acceptance of guilty plea); *State v. Copeland*, 765 P.2d 1266 (Utah 1988) (guilty plea involuntary where defendant believed he was choosing between prison or state hospital); *Commonwealth v. Jasper*, 372 A.2d 395 (Pa. 1976) (where the record indicated that defendant was seventy-nine years old, had no formal education, and was taking medication for head injuries, his monosyllabic responses to the court were not sufficient to show understanding of the consequences of a guilty plea).

Standard 14-1.4(c) (Collateral consequences)

Standard 14-1.4(c) is a new standard which calls upon the court to inform the defendant, in general terms, that there may be “additional consequences” from entering the plea, “including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant’s immigration status.” This standard is placed in its own section to make clear that the court’s advice concerning potential collateral consequences of a plea falls into a different category than its advice concerning the rights listed in Standard 14-1.4(a), and to avoid any implication that the omission of such advice would necessarily render a plea invalid.

As this standard reflects, there are an increasing number and range of collateral consequences that may result from a guilty plea. Some such effects may imperil a defendant’s livelihood or the financial well being of his family or business. Those with a fairly direct financial effect are sentencing consequences such as mandatory restitution⁷³ and criminal forfeiture orders.⁷⁴ Less direct but potentially no less serious may be the collateral estoppel effect that a guilty plea may exert in subsequent civil or regulatory proceedings lodged against the individual or corporate offender.⁷⁵ Depending upon the law of the forum, a criminal judg-

73. See, e.g., 18 U.S.C. §§ 2248 (sexual abuse), 2259 (sexual exploitation and other abuse of children), 2264 (domestic abuse and stalking), 2327 (telecommunications fraud), 3663A (crimes of violence, offenses against property under Title 18, including fraud, and tampering with consumer products offenses) (1994 & Supp. II 1996); U.S. SENTENCING GUIDELINES MANUAL § 8B1.1(a) (1998) (organizational sentencing); see also 18 U.S.C. § 3663 (1994) (permissive restitution). The majority rule in federal court is that a failure to advise a defendant regarding his or her restitution obligations does not affect the defendant’s substantial rights and thus does not warrant invalidation of the plea. See *United States v. McCarty*, 99 F.3d 383, 386 (11th Cir. 1996) (collecting cases).

74. See, e.g., 18 U.S.C. § 1963(a) (1994) (RICO); 18 U.S.C. § 982 (1994 & Supp. II 1996) (money laundering); 21 U.S.C. § 853 (1994 & Supp. II 1996) (Comprehensive Drug Abuse Prevention Act).

75. Collateral estoppel may prevent a defendant from relitigating an issue that the defendant has already litigated and lost, or conceded, in the criminal case. The law of the forum in which the plea is entered controls the issue of whether that plea will have collateral estoppel effects in a subsequent criminal action. The issue that will most often arise when a civil litigant seeks to collaterally estop a defendant who has pled guilty to criminal charges is whether the plea constitutes an actual adjudication of the issue in question. Some commentators, and many states, provide that a defendant who pleads guilty to criminal charges will not be collaterally estopped in a subsequent criminal case.

ment may make the imposition of civil damages and other remedies against the defendant much more likely. Thus, for example, once a taxpayer pleads guilty to tax evasion, the taxpayer is precluded under the doctrine of collateral estoppel from litigating the issue of civil fraud for the year(s) of conviction⁷⁶ and the interest and penalties alone may double or triple the amount originally due the government. Similarly, collateral estoppel may apply to preclude the defendant from contesting the civil forfeiture of significant assets.⁷⁷

The potential loss of a governmental license is another common collateral consequence that may have a profound economic impact. Defendants may lose licenses to engage in activities, such as driving or flying, necessary to their making a living.⁷⁸ They may also be barred from

See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. 6 (1982) (collateral estoppel "does not apply where the criminal judgment was based on ... a plea of guilty" because of lack of "actual adjudication"); 1B MOORE'S FEDERAL PRACTICE, para. 0.4181[1] (1992); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4474 (1981); *United States v. One Parcel of Real Property*, 900 F.2d 470, 473 (1st Cir. 1990) ("pellucid" under Massachusetts law that guilty pleas should not have been given collateral estoppel effect); *Eaton v. Eaton*, 575 A.2d 858, 866-67 (N.J. 1990) (guilty plea does not estop pleading party from contesting the admitted fact in subsequent proceedings). But see *State v. Gonzalez*, 641 A.2d 1060 (N.J. Super. Ct. App. Div. 1994) (casino employee who pled guilty to drug charges was precluded from relitigating issue of his guilt in license revocation proceedings). However, other jurisdictions, and in particular, in successive federal criminal and civil cases, the plea will constitute actual adjudication and may have collateral estoppel effect. See, e.g., *Blohm v. Commissioner*, 994 F.2d 1542 (11th Cir. 1993) (Alford plea given collateral estoppel effect); *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983) (guilty plea to bankruptcy fraud estops claims in petition for bankruptcy discharge); *Brazzell v. Adams*, 493 F.2d 489, 490 (5th Cir. 1974) ("general rule is that collateral estoppel applies equally whether the prior criminal adjudication was based on a jury verdict or a guilty plea.").

76. See, e.g., IAN M. COMISKY, ET AL. TAX FRAUD AND EVASION, vol. 1, § 8.03[3] (1995).

77. See, e.g., 18 U.S.C. § 981 (1994) (civil money laundering forfeiture); 18 U.S.C. § 984 (1994) (civil forfeiture of fungible property); 21 U.S.C. § 881 (1994 & Supp. 1999) (narcotics related forfeiture); *United States v. Real Property*, 976 F.2d 515, 518-19 (9th Cir. 1992) (guilty plea to drug charge would ordinarily estop defendant from contesting civil forfeiture of real property on which drugs were found); *United States v. United States Currency in the Amount of \$41,807*, 795 F. Supp. 540, 544 (E.D.N.Y. 1992) (guilty plea to currency reporting charge covered all money forfeited and collaterally estopped defendant from contesting civil forfeiture of seized money).

78. See, e.g., 49 U.S.C. §§ 44103, 44106, 44703(e), 44709, 44710 (1994) (pilot's license and aircraft registration are mandatorily revocable for a federal felony involving controlled substances); 47 U.S.C. § 312a (1994) (private radio operator's license may be revoked for convictions involving controlled substances or Title 47 (communications) offenses).

obtaining, or may lose, licenses without which they cannot engage in a certain trade or profession. For example, in many states a wide variety of business activities are licensed and regulated, including automobile sales, real estate sales, home repair, insurance, teaching, day-care, health-care, contractors, attorneys, liquor store or restaurant operators, accountants, and cemetery operators. The entry of a guilty plea may affect a defendant's ability to secure or retain such occupational or professional licenses.

Governmental debarments and suspensions are a similar category of collateral consequence. A convicted felon may be legally debarred or suspended from contracting with governmental entities.⁷⁹ Defendants who plead guilty to certain offenses may also be barred from engaging in certain types of businesses, professional activities, or from serving in the armed forces.⁸⁰ For example, if a defendant pleads guilty to fraud or any felony arising out of a contract with the Department of Defense, a ban of at least 5 years will preclude the defendant from holding various positions with a federal contractor or subcontractor.⁸¹ Other statutory occupational restrictions abound; a defendant convicted of a felony may not hold certain labor organization posts, jobs with a bank or insurance company, or deal as a registered SEC, CFTC or NASD actor.⁸²

Guilty pleas may have even more serious ramifications for the defendant's personal life and privacy interests. For example, conviction of certain offenses may result in the termination of parental responsibilities,⁸³ a

79. See, e.g., 48 C.F.R. §§ 9.400, *et seq.* (1998) (administrative suspension and debarment practices governed by the Federal Acquisition Regulations ("FAR") for procurement programs). Almost all federal government departments and agencies have procurement debarment regulations. See, e.g., 28 C.F.R. § 67.100, *et seq.* (1998) (Department of Justice regulations re: procurement debarment following conviction).

80. See 10 U.S.C. § 504 (1994) (felony conviction makes offender ineligible for enlistment in the United States armed services).

81. See 10 U.S.C. § 2408 (1994 & Supp. II 1996).

82. See 12 U.S.C. §§ 1785, 1818(g)(1)(c), 1829, 2265 (1994 & Supp. II 1996) (banking, FDIC, Farm Credit and credit unions); 7 U.S.C. § 12a(2)(d) (1994 & Supp. II 1996) (CFTC); 10 U.S.C. § 2408 (1994 & Supp. II 1996) (Department of Defense); 29 U.S.C. §§ 504, 1111 (1994) (labor); 18 U.S.C. § 1033(e)(1)(A) (1994) (interstate insurance business); 17 C.F.R. 201.102(e)(2) (Commodities & Securities); 19 C.F.R. § 111.53(b) (1998) (Customs).

83. See, e.g., MONT. CODE ANN § 41-3-609(1)(d) (1997) ("The court may order a termination of the parent-child legal relationship upon a finding . . . [that] the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born.").

requirement that the offender register as (and be publicly revealed to be) a sex offender,⁸⁴ and submit to mandatory substance abuse⁸⁵ or HIV testing.⁸⁶ A defendant's—and in some cases, the defendant's family's—access to critical governmental benefits such as public assistance payments,⁸⁷

84. See, e.g., 42 U.S.C. §§ 4071 (1994) (federal reporting and registration system), 14072(i) (1994 & Supp. II 1996) (federal offense to register under federal and state laws); ALASKA STAT. §§ 12.63.100 (defining sex offense), 12.63.010 (requiring registration of sex offenders and child kidnappers) (Michie 1998); ALASKA R. CRIM. P. 11(c)(4) (requiring court to give defendant notice of sex offender registration requirements prior to plea); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1999) (registration requirement for persons convicted of any sex or kidnapping offense).

85. See, e.g., VA. CODE ANN. §§ 18.2-251.01 (substance abuse screening and assessment for felony convictions); 19.2-299.2 (alcohol and substance abuse screening and assessment for designated Class 1 misdemeanor convictions) (Michie Supp. 1999).

86. See, e.g., ALA. CODE § 22-11A-17 (1997); ARK. CODE ANN. § 16-82-101(d)(1) (Michie 1987 & Supp. 1997); CAL. PENAL CODE § 1202.1(a) (West 1982 & Supp. 1999); FLA. STAT. ANN. § 960.003(4) (West 1996 & Supp. 1999); GA. CODE ANN. § 17-10-15(c) (1997); KY. REV. STAT. ANN. § 510.320(3) (Michie 1990 & Supp. 1998); MICH. COMP. LAWS ANN. § 333.5129(4) (1992 & Supp. 1999); MO. ANN. STAT. § 191.663(2) (1994 & Supp. 1998). Some jurisdictions permit under certain circumstances, see ARIZ. REV. STAT. ANN. § 13-1415 (West Supp. 1998); ARK. CODE ANN. § 16-82-101(b)(1) (Michie 1987 & Supp. 1997); GA. CODE ANN. § 17-10-15(b); MICH. COMP. LAWS ANN. § 333.5129(1), (3) (1992 & Supp. 1999); N.D. CENT. CODE § 23-07.7-01 (Supp. 1997), or require, see DEL. CODE ANN., tit. 10, § 1077(a) (Supp. 1998) (upon victim's request); FLA. STAT. ANN. § 960.003(2) (same) (West 1996 & Supp. 1999); TENN. CODE ANN. § 39-13-521 (1997), (compelled HIV testing prior to conviction where a defendant is alleged to have committed certain, usually sexual, offenses).

87. See, e.g., ARK. CODE ANN. § 20-76-409 (Michie 1991 & Supp. 1997) (no person who has been convicted of any state or federal felony which has as an element of the distribution or manufacture of a controlled substance is eligible for assistance from state programs funded under part A of title IV of the Social Security Act, food stamps or public assistance, and the amount of benefits provided to family members of a persons rendered ineligible by such a conviction is reduced); LA. REV. STAT. ANN. § 46:233.2 (West 1999) (no person who has been convicted of any state or federal felony which has as an element the possession, use, or distribution of a controlled substance is eligible for cash assistance from state programs funded under part A of title IV of the Social Security Act or food stamps for one year following the person's release from incarceration); MINN. STAT. ANN. § 256D.024 (West 1998) ("assistance units" involving applicants convicted under federal or state law of any felony that has as an element of the possession, use, or distribution of controlled substances and who has not completed drug rehabilitation treatment are not eligible for public assistance for five years after completion of sentence); N.J. STAT. ANN. § 44:10-48(7) (West Supp. 1999) (persons convicted under federal state law of any felony that have as an element the possession, use, or distribution of controlled substances and who have not completed drug rehabilitation treatment are not eligible for assistance for dependent children).

public housing,⁸⁸ social security⁸⁹ or pension⁹⁰ payments, and veteran's benefits⁹¹ may be imperiled by a guilty plea. Conviction may also carry with it the loss of civil rights, including the right to vote and to serve as a juror,⁹² the ability to carry firearms,⁹³ and the possibility of holding public office.⁹⁴

88. *See, e.g.*, 24 C.F.R. § 966.4 (1998) (HUD lease requirements for public housing provide that drug-related activity is ground for eviction); MO. REV. STAT. § 99.103 (1994) ("no housing authority in any city with a population of four hundred thousand or more inhabitants, and whose jurisdiction covers more than one county, shall rent or lease accommodations to any person who, within the preceding five years, has been convicted of a crime involving prostitution or the possession or sale of controlled substances" and the remaining members of any family living in public accommodations who becomes ineligible because a member of the family is convicted of such a crime may reapply to the housing authority for accommodations).

89. *See, e.g.*, 42 U.S.C. § 402(u) (1994 & Supp. II 1996) (sentencing court may order withholding of old age and survivors insurance benefits where the offense is within the category of national security); *id.* § 402 (x) (no old age and survivors insurance benefits shall be paid to prisoners who are not enrolled in an approved rehabilitation program).

90. *See, e.g.*, 5 U.S.C. § 8312 (1994) (a federal employee will lose his pension benefits for convictions relating to espionage, treason, sedition, or perjury), *id.* § 8314 (a willful refusal to testify or produce records in court, grand jury, or court martial or congressional proceedings blocks federal pension payments).

91. For example, conviction of certain national security related offenses will result in forfeiture of many military veteran benefits, including pensions, disability, hospitalization, loan guarantees, burial in a national cemetery and insurance under NSLI and USGLI. *See* 38 U.S.C. §§ 1505(a), 1911, 1954, 6104(a), 6105(a) (1994).

92. The right to vote in federal, state and local elections are determined by state law. *See Richardson v. Ramirez*, 418 U.S. 24 (1974). Thus, for example, if an offender is convicted in California, he would lose the right to vote while imprisoned, but would automatically regain the right as soon as his sentence was completed. CAL. CONST. art. II, § 4. A convicted felon cannot serve as a juror in California state courts. CAL. CIV. PROC. CODE § 203(a)(5) (West 1982 & Supp. 1999). A convicted felon may, however, sit on a federal jury if an individual's civil rights have been restored under state law. 28 U.S.C. § 1865(b)(5) (1994); *see also United States v. Hefner*, 842 F.2d 731, 732 (4th Cir.) (section 1865 applies only where state has taken an affirmative act—such as a gubernatorial pardon or amnesty—to restore civil rights), *cert. denied*, 488 U.S. 868 (1988). *Cf. Michael A. Fletcher, Voting Rights for Felons With Support; 13% OF BLACK MEN INELIGIBLE WITH BAN*, WASH. POST, Feb. 22, 1999, at A1 (study showing criminal convictions prevent 1 of 5 African-American men from voting in 10 states).

93. For example, federal law prohibits federal felons from obtaining, receiving, transporting, or possessing firearms, which covers both handguns and rifles. *See* 18 U.S.C. §§ 922(g)(1), 921(a)(3) (1994). Some federal felonies, however, such as antitrust, restraint of trade and unfair trade practices violations, are exempt from the firearms ban. *See* 18 U.S.C. § 921(a)(20)(A) (1994). Various states also ban the possession of firearms by felons. *See, e.g.*, CAL. PENAL CODE § 12001(b), 12021(a)(1) (West 1992 & Supp. 1999).

94. Disqualification to hold federal office may result from a federal conviction. *See* U.S. CONST. art. I, § 3. Certain federal convictions would preclude holding a public office

A serious and growing issue in a significant number of cases involving non-citizens is the grave immigration consequence that may flow from a guilty plea.⁹⁵ Under federal law, the initiation of deportation proceedings automatically follows conviction of any offense on a long list.⁹⁶ Indeed, in a growing number of states, the court is required to inform the defendant of the potential immigration consequences of a guilty plea.⁹⁷ Moreover, federal caselaw notes that, while the failure to warn a

in California, see CAL. CONST. art. VII, § 8; CAL. GOV'T CODE § 1021 (West 1995); CAL. PENAL CODE §§ 74,88,165 (West 1999); *Helena Rubenstein Int'l v. Younger*, 139 Cal. Rptr. 473 (Cal. Ct. App. 1977), but not in the District of Columbia, where a felon may serve as Mayor or City Councilman, see D.C. CODE ANN. §§ 1-225, 1-241 (1999).

95. See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation "may result . . . in loss of both property and life; or of all that makes life worth living").

96. The Immigration and Nationality Act ("INA"), in the wake of the 1996 amendments by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, constitutes a great threat to non-citizen defendants who are considering a plea of guilty. An alien is "removable" for convictions involving "aggravated felonies," crimes involving moral turpitude, crimes "related to" controlled substances, firearms crimes, and miscellaneous offenses. See 8 U.S.C. §§1101(a)(43) (aggravated felony), 1227(a)(2) (general criminal grounds for removal) (1994). In the AEDPA, Congress expanded the definition of "aggravated felonies" to include many common and obscure offenses, and provided that this redefinition be retroactive, putting at risk of removal aliens who had previously pleaded to certain offenses thinking that such pleas did not put at risk their immigration status. The expansion of the "aggravated felony" list is significant because conviction of an aggravated felony generally means certain and speedy deportation given that the defendant will not, under the statute, be eligible for most discretionary relief from removal. Under the amended INA, then, a plea deal that might otherwise seem attractive—for example, a suspended 1-year sentence for misdemeanor theft—may often look considerably different once it is determined that that plea would in fact be deemed an "aggravated" felony conviction leading to the alien client's swift deportation.

97. See, e.g., CONN. GEN. STAT. ANN. § 54-1j (West 1994 & Supp. 1999); D.C. CODE ANN. § 16-713 (1997) (court must advise non-citizen defendant prior to acceptance of guilty plea of potential immigration consequences; failure to so advise, upon defendant's motion, requires court to vacate the judgment and permit the defendant to withdraw guilty plea); FLA. R. CRIM. P. 3.172(c)(8); HAW. REV. STAT. ANN. § 802E (Michie 1999); MASS. GEN. LAWS ANN. ch. 278, § 29D (1992 & Supp. 1999); MONT. CODE ANN. § 46-12-210(f) (1997); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney Supp. 1999) (court must advise non-citizen defendant prior to acceptance of guilty plea of potential immigration consequences of plea; failure to so advise "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction"); OHIO REV. CODE ANN. § 2943.031 (Banks-Baldwin 1997); OR. REV. STAT. § 135.385(2)(d) (1997); TEX. CRIM. P. CODE ANN. § 26.13(a)(4) (West 1989); WASH. REV. CODE ANN. § 10.40.200 (West 1990) (court must advise non-citizen defendant prior to acceptance of guilty plea of potential immigration consequences; failure to so advise, upon defendant's motion, requires court to vacate the judgment and permit the defendant to withdraw guilty plea); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

defendant of the immigration consequences of conviction does not affect the soundness of the conviction,⁹⁸ the better practice is to include such a notice in the court's colloquy with the defendant.⁹⁹ Such a notice should not, however, require the defendant to disclose to the court his or her immigration status.¹⁰⁰

The final category of collateral consequences is privately imposed collateral sanctions. For example, offenders may suffer higher insurance rates, particularly after a guilty plea in traffic cases. Pleas to more serious cases may result in restrictions on employment opportunities, residence, and admission to professions or educational institutions.¹⁰¹

Ordinarily, the primary burden to ensure that the defendant is aware of any collateral consequences that may apply in his or her case must fall on the defense counsel. A new provision outlining this responsibility

98. See, e.g., *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992) (stating that "[t]he circuits that have addressed the issue of failure of counsel to inform an accused of the likely deportation consequences arising out of a guilty plea have all held that deportation is a collateral consequence of the criminal proceeding and therefore the failure to advise does not amount to ineffective assistance of counsel," and collecting cases), *cert. denied*, 507 U.S. 1039 (1993); *Alanis v. State*, 583 N.W.2d 573, 578-79 (Minn. 1998) (fact that defendant was not advised by counsel or the court of possible immigration consequences of plea does not invalidate plea); *State v. McFadden*, 884 P.2d 1303, 1305-06 (Utah Ct. App. 1994) (collecting state cases and holding that "counsel's performance is not deficient by the mere failure to apprise a noncitizen defendant that entry of a guilty plea might subject defendant to deportation"); *Limani v. Alaska*, 880 P.2d 1065, 1067 (Alaska Ct. App. 1994) (trial court's failure to advise defendant of possible deportation consequence of plea did not provide ground for plea withdrawal).

99. See *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985) ("[i]t is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty"); see also, e.g., *United States v. Rosario*, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring) ("[t]he possibility of being deported can be—and frequently is—the most important factor in a criminal defendant's decision how to plead."), *cert. denied*, 498 U.S. 942 (1990).

100. See, e.g., CONN. GEN. STAT. ANN. § 54-1j(b) (West 1994 & Supp. 1999) ("The defendant shall not be required at the time of the plea to disclose his legal status in the United States to the court."); FLA. R. CRIM. P. 3.172(c)(8) ("It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the admonition regarding immigration collateral consequences] shall be given to all defendants in all cases."); OHIO REV. CODE ANN. § 2943.031(C) (Banks-Baldwin 1997) ("the defendant shall not be required at the time of entering a plea to disclose to the court his legal status in the United States").

101. See, e.g., ANTHONY G. AMSTERDAM, 1 TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 205, at 346 (1988).

ity has also been included in Standard 14-3.2, governing the duties of defense counsel. It is also appropriate that the court take a role in this area, however, because of the number and extent of such collateral effects, which may be critical considerations to an individual defendant in deciding whether to enter a plea. In some cases, the collateral consequences may be far disproportionate to the direct effects of the conviction itself.

If after receiving the general advice from the court concerning the collateral consequences of a plea, the defendant has questions or needs additional information, Standard 14-1.4(c) makes clear that the appropriate course is for the court to advise the defendant to consult with defense counsel.

Standard 14-1.4(d) (Ineffective assistance of counsel)

Standard 14-1.4(d) provides that the court should not accept a defendant's plea where "it appears the defendant has not had the effective assistance of counsel."¹⁰² A similar provision is contained in the Uniform Rules of Criminal Procedure.¹⁰³

When a defendant enters a guilty plea without the effective assistance of counsel, the conviction can be subject to successful attack in post-conviction proceedings.¹⁰⁴ Thus, this standard provides that a court may not accept a plea from a defendant where it appears that the representation afforded to him or her was ineffective. While the standard does not specifically require the court to inquire whether the defendant is satisfied with the services rendered by counsel, many judges routinely ask defendants this question, and it may be advisable for a court to do so as part of this inquiry.¹⁰⁵ Regardless of whether such a direct question is asked, the court should be alert to statements of the defendant or defense counsel that raise questions concerning the competence of the representation.

102. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (setting out standard for effective assistance of counsel). See generally Annotation; *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas*, 10 A.L.R. 4TH 8, § 3 (1981).

103. See UNIF. R. CRIM. P. 444(b)(2) (1987) (court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel").

104. See *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1059, 1455 & n.1389 (1999) (collecting cases).

105. Cf. UNIF. R. CRIM. P. 444(b)(1) (1987) (the court "shall inquire whether the defendant is satisfied with the lawyer's representation").

Standard 14-1.5. Determining voluntariness of plea

The court should not accept a plea of guilty or *nolo contendere* without first determining that the plea is voluntary. By inquiry of the prosecuting attorney, the defendant, and defense counsel, if any, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what discussions were had and what agreement has been reached. If the plea agreement contemplates the granting of charge or sentence concessions which are subject to judicial approval, the court should advise the defendant, consistent with standard 14-3.3(e), whether withdrawal of the plea will be allowed if the charge or sentence concessions are rejected. The court should address the defendant personally to determine whether any other promises or any force or threats were used to obtain the plea.

History of Standard

There are stylistic and conforming changes only.

Related Standards

FED. R. CRIM. P. 11(d), (e)(2)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.3(3), 350.4(2), 350.5(1), 350.6

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standards 3.6, 3.7

UNIF. R. CRIM. P. 444(c)(2)

Commentary

Like the preceding standard, which addressed the defendant's knowledge of the consequences of entering a guilty plea, Standard 14-1.5 is another critical provision that seeks to ensure that the defendant's plea is entered voluntarily. The Supreme Court has made clear that a guilty plea entered by a defendant involuntarily violates due process of law.¹ The court's duty to ensure that the defendant's plea is voluntary is recognized as a fundamental procedural requirement.²

1. *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969).

2. See, e.g., UNIF. R. CRIM. P. 444(c)(2) (1987) ("The court may not accept the plea without first determining that it is voluntary."); ALA. R. CRIM. P. 14.4(a)(2); ARIZ. R. CRIM.

As part of the inquiry into voluntariness, Standard 14-1.5 provides that the court should inquire into whether the “tendered plea is the result of prior plea discussions.” The fact that the prosecutor has convinced the defendant to enter a plea agreement by promising to dismiss charges or to obtain sentence concessions does not by itself render the guilty plea involuntary.³ Nonetheless, it is important that the terms of any agreement be clearly stated and reviewed with the defendant.⁴ Thus, the standards make clear that if plea discussions resulted in a written agreement, the court should require that agreement to be placed in the record, and if there is no agreement in writing, should require the parties to describe on the record the terms they have reached.⁵

In order to determine whether the plea is voluntary, it is essential that the court address the defendant personally to determine whether he or she was in any way threatened, coerced, or pressured into pleading guilty,⁶ and whether any promises were made to the defendant that are

P. 17.3; ARK. R. CRIM. P. 24.5; COLO. REV. STAT. ANN. § 16-7-207(1)(d) (West 1998); DEL. SUPER. CT. CRIM. R. 11(d); FLA. R. CRIM. P. 3.172(a); IDAHO CRIM. R. 11(c)(1); IND. CODE ANN. § 35-35-1-3 (West 1998).

3. *Brady v. United States*, 397 U.S. 742, 749-755 (1970). The Supreme Court, moreover, has recognized plea bargaining as an indispensable component of the criminal justice system. See, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-261 (1971).

4. See also Standard 14-1.4(a)(i).

5. See also Standard 14-3.3(a); cf. FED. R. CRIM. P. 11(e)(2) (“If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement . . .”).

6. See, e.g., *United States v. Torres*, 129 F.3d 710, 715-716 (2d Cir. 1997) (court did not abuse discretion in denying withdrawal based on allegations of coercion when court asked defendants at original hearing if they were pressured and they said no); *United States v. Taylor*, 139 F.3d 924, 927, 932 (D.C. Cir. 1998) (allegations of economic coercion properly rejected since trial counsel completed trial before defendant pleaded guilty and defendant stated at Rule 11 hearing that he had not been coerced); *United States v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir. 1996) (rejection of withdrawal of guilty plea based on later allegations of coercion was not an abuse of discretion where each defendant originally informed the district court that the plea had not been coerced), *cert. denied*, 519 U.S. 1068 (1997); *United States v. Carr*, 80 F.2d 413 (10th Cir. 1996) (after defendant told trial court that no one was forcing him to plead guilty he was unable to withdraw plea based on allegations of coercion and duress); *Oliver v. State*, 973 S.W.2d 580, 583 (Mo. Ct. App. 1998) (defendant was unable to demonstrate plea was the result of coercion where he originally assured trial court he had not been coerced or forced to plead guilty); *State v. McAdoo*, No. 97-3440-CR, 1999 WL 366671 (Wis. Ct. App. Jun. 8, 1999) (where defendant told trial court that no threats or promises were made regarding the plea agreement, later allegations of pressure from family to plead guilty did not require withdrawal of plea).

not stated in the plea agreement. Both the Federal Rules of Criminal Procedure⁷ and the Uniform Rules of Criminal Procedure,⁸ similarly require that the court inquire whether any force or threats were used to obtain the plea.

Particular voluntariness issues may be presented by prosecutorial attempts to induce every defendant in a multi-defendant case to plead guilty, so called "wired pleas."⁹ Such pleas are considered to pose a greater risk of coercion than an independent plea because of the added pressures that the defendants may bring on each other to plead guilty in such circumstances.¹⁰ The case law generally holds that the prosecutor should bring the "wired" nature of the defendant's plea to the attention of the court, to allow a proper inquiry into the voluntariness of the plea under the totality of the circumstances.¹¹ The standards would require the fact that the defendant is entering a "wired plea" to be disclosed to the court as part of the court's inquiry under Standard 14-1.4(i) into the "terms and conditions" of the plea, as well as its inquiry under this Standard into "what [plea] discussions were had and what agreement has been reached."¹²

Where the plea agreement contemplates charge or sentence concessions that are subject to judicial approval, to avoid any possibility of the defendant being misled, the defendant should be so advised. The court should explain further, "whether withdrawal of the plea will be

7. See FED. R. CRIM. P. 11(d) ("The court shall not accept a plea of guilty or nolo contendere without first . . . determining that the plea is voluntary and not the result of force or threats.")

8. See UNIF. R. CRIM. P. 444(c)(2) (1987) ("The court shall address the defendant personally and determine whether any other promise or any force or threat was used to obtain the plea.")

9. See *United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993) ("Though package deal plea agreements are not per se impermissible, they pose an additional risk of coercion not present when the defendant is dealing with the government alone."); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 374 n.8 (1978).

10. *United States v. Farley*, 72 F.3d 158, 164 n.5 (D.C. Cir. 1995); see also *United States v. Carr*, 80 F.3d 413, 416-417 (10th Cir. 1996); *United States v. Hernandez*, 79 F.3d 1193 (D.C. Cir. 1996); *United States v. Martinez-Molina*, 64 F.3d 719, 732-34 (1st Cir. 1995); *State v. Danh*, 516 N.W.2d 539 (Minn. 1994); *State v. Tietjens*, 729 P.2d 914 (Ariz. 1986) (en banc); *In re Ibarra*, 666 P.2d 980 (Cal. 1983).

11. *Farley*, 72 F.3d at 164 n.5; *Martinez-Molina*, 64 F.3d at 733; *Caro*, 997 F.2d at 660 ("the prosecutor must alert the district court to the fact that codefendants are entering a package deal"); *Tietjens*, 729 P.2d at 916; *Ibarra*, 666 P.2d at 986.

12. See, e.g., *Bhagwat v. State*, 658 A.2d 244 (Md. Ct. App. 1995) (improper to condition plea agreement with co-defendant on promise not to testify on behalf of defendant).

allowed if the charge or sentence concessions are rejected.” In most guilty pleas entered in federal court, for example, the court is not bound to accept sentencing concessions, even where the parties have unanimously agreed,¹³ nor does the court’s rejection of such concessions generally provide grounds for withdrawing the plea.¹⁴

Standard 14-1.6. Determining factual basis of plea

(a) In accepting a plea of guilty or *nolo contendere*, the court should make such inquiry as may be necessary to satisfy itself that there is a factual basis for the plea. As part of its inquiry, the defendant may be asked to state on the record whether he or she agrees with, or in the case of a *nolo contendere* plea, does not contest, the factual basis as proffered.

(b) Whenever a defendant pleads *nolo contendere* or pleads guilty and simultaneously denies culpability, the court should take special care to make certain that there is a factual basis for the plea. The offer of a defendant to plead guilty should not be refused solely because the defendant refuses to admit culpability. Such a plea may be refused where the court has specific reasons for doing so which are made a matter of record.

History of Standard

The standard has been amended to delete subsection (b), which had provided that “generally” the court may require the defendant to make a “detailed statement in the defendant’s own words” concerning the commission of the offense to which the defendant is pleading guilty. Instead, subsection (a) has been amended to provide that as part of its inquiry into the factual basis for the plea, “the defendant may be asked to state on the record whether he or she agrees with, or in the case of a *nolo contendere* plea, does not contest, the factual basis as proffered.” In addition, the title of the standard has been changed.

13. See FED. R. CRIM. P. 11(e)(1)(B).

14. See FED. R. CRIM. P. 11(e)(2); *Carnine v. United States*, 947 F.2d 924, 930-31 (7th Cir. 1992) (court does not have to give defendant an opportunity to withdraw his plea if it rejects sentencing suggestions under FED. R. CRIM. P. 11(e)(1)(B), but must do so if such sentencing is part of the agreement under FED. R. CRIM. P. 11(e)(1)(C)).

Related Standards

FED. R. CRIM. P. 11(f)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.4(3), (4)

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.7

UNIF. R. CRIM. P. 444(c)(3)

Commentary

Standard 14-1.6 concerns the need for the court to assure itself, by adducing facts at the taking of a guilty plea or plea of *nolo contendere*, that there is sufficient evidence upon which the defendant could be convicted if he or she elected to stand trial.¹ The Supreme Court has not squarely held that a factual basis for a guilty plea is constitutionally mandated, although it strongly intimated that such a requirement exists where a defendant seeks to enter an *Alford* plea.² Several lower courts have held that a trial judge is not constitutionally required to inquire into the factual basis for a non-*Alford* guilty plea.³ Rules of procedure and statutes requiring the establishment of a factual basis are common.⁴

1. See *Godwin v. United States*, 687 F.2d 585 (2d Cir. 1982) ("factual basis" requirement means at least that when an essential element is factually disputed, circumstances must appear on the record to warrant conclusion that defendant's innocent version is unworthy of belief).

2. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) ("In view of the strong factual basis for the plea demonstrated by the State and Alford's dearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.") (emphasis added).

3. See, e.g., *Meyers v. Gillis*, 93 F.3d 1147, 1151 (3d Cir. 1996); *Higgason v. Clark*, 984 F.2d 203, 207 (7th Cir.), cert. denied, 508 U.S. 977 (1993); *Riggins v. McMackin*, 935 F.2d 790, 794-95 (6th Cir. 1991); *Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985); *People v. Wisner*, 326 N.E.2d 198 (Ill. App. Ct. 1975). Where a defendant claims innocence, however, courts have held that a factual basis is constitutionally required. See *Stano v. Dugger*, 921 F.2d 1125, 1140 (11th Cir. 1991) (factual basis for plea constitutionally required if defendant proclaims his or her innocence), cert. denied, 502 U.S. 835 (1991); *Pierce v. State*, 484 So.2d 506 (Ala. Crim. App. 1985) (same).

4. E.g., ARIZ. R. CRIM. P. 17.3 ("Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that . . . there is a factual basis for the plea. . . ."); CAL. PENAL CODE § 1192.5 (West 1982 & Supp. 1999); COLO. REV. STAT. ANN. § 16-7-207(2)(f) (West 1998); DEL. SUPER. CT. CRIM. R. 11(c); FLA. R. CRIM. P. 3.170(j); ILL. SUP. CT. R. 402(c); KAN. STAT. ANN. § 22-3210(4) (1995 & Supp. 1998); ME. R. CRIM. P. 11(E); MINN. R. CRIM. P. 15.01; N.C. GEN. STAT. § 15A-1022(c) (1997); OR. REV. STAT. § 135.395 (1997); TEX. CRIM. PROC. CODE ANN. § 1.15 (West 1977 & Supp. 1999); WIS. STAT. ANN. § 971.08(1)(b) (West 1998).

The Uniform Rules of Criminal Procedure require, similarly, that a factual basis be established to support the plea.⁵

A factual basis for a guilty plea serves several important purposes. First, it assures that a defendant who seeks to plead guilty is in fact guilty. Our system has concluded, in order to protect the innocent, that persons whose conduct does not fall within the charges brought by a prosecutor should not be permitted to plead guilty. Nor should defendants be coerced into foregoing their trial rights. Unless the court inquires into the factual basis for the plea, there is a risk of innocent persons being adjudicated guilty. Putting the factual basis on the record promotes public confidence in the integrity of the result. In addition, the inquiry into a factual basis for the plea, when made a matter of record, eliminates the need for post-conviction factfinding proceedings when a plea is challenged. Finally, the information developed in assessing the factual foundation of the plea is also often quite useful to the court at sentencing.

It should be noted, however, that while there must be a factual basis for believing the offense was committed, the prosecutor need not establish a separate factual basis for other terms of a guilty plea such as forfeiture. In *Libretti v. United States*, the Supreme Court held that the court need not establish a factual basis for criminal forfeitures to which the defendant has consented in a plea agreement.⁶

Standard 14-1.6(a)

In assessing the factual foundation for the plea, Standard 14-1.6(a) gives the court significant flexibility to "make such inquiry as may be necessary to satisfy itself that there is a factual basis for the plea." While the second edition had suggested that "generally" the court should require the defendant "to make a detailed statement in the defendant's own words concerning the commission of the offense," this provision has been eliminated as unduly restrictive and inconsistent with actual practice in many cases. Instead, Standard 14-1.6(a) indicates that as part of the court's inquiry, the defendant "may" as appropriate be "asked to state on the record" whether he or she agrees with the factual basis proffered (or, in the case of a *nolo contendere* plea, does not contest those facts).

Some courts routinely ask the defendant to speak in his or her own words and explain the facts to support the plea. However, there may

5. See, e.g., UNIF. R. CRIM. P. 444(c)(3) (1987).

6. 516 U.S. 29 (1995).

be problems with this approach, particularly in the federal system, where the defendant may volunteer or be asked for facts that are unnecessary to support the conviction and that may be damaging to the defendant in connection with sentencing.⁷ Other appropriate procedures for establishing a factual basis for the plea include having the prosecutor make a proffer of what the state is prepared to prove, accepting the parties' stipulation on a set of facts, and, in rare cases, calling witnesses to testify concerning the defendant's conduct.

Of course, where the court is in doubt as to the defendant's comprehension, Standard 14-1.4(b) recognizes that the court may also ask the defendant to provide such information "in his or her own words." This procedure should be used, for example, where the court has a "red flag" to suggest that defense counsel has not adequately explored a defense that may be available, or otherwise believes that hearing testimony from the defendant personally is necessary to satisfy the court that there is a factual basis for the guilty plea. In other cases, simple affirmations by the defendant, based on a detailed proffer from counsel, should be sufficient. Whatever method is used, it is essential that the court ensure that adequate facts are established in the record to support the offense.

There may be cases in which, while the defendant wishes to offer a guilty plea, he or she does not agree with the prosecutor's version of the facts as stated. The court need not resolve such disputes before accepting a guilty plea, so long as the court finds that the defendant's version of the facts would be sufficient to support conviction. Indeed, in some cases, allowing the defendant to present his or her disagreement with the prosecutor's statement of the facts during the plea hearing may serve the salutary purpose of permitting the defendant publicly to air his or her factual disputes without requiring a trial to resolve those disputes.

Standard 14-1.6(a) requires a factual basis for the *nolo contendere* plea as well as the plea of guilty, although recognizing that the basis for such a plea may be established in a different manner.⁸ Because sentencing power of the court is not reduced upon entry of the *nolo* plea, the standard concludes that it is equally important to make certain that

7. *Cf. Mitchell v. United States*, 119 S.Ct. 1307 (1999) (guilty plea does not waive defendant's Fifth Amendment right against self-incrimination so that trial court may not draw adverse inference from defendant's silence at sentencing).

8. *Compare* CT. FED. R. CRIM. P. 11(f) (requiring factual basis for "plea of guilty" only); *see also Clary v. State*, 315 So. 2d 20 (Fla. App. 1975) (trial court not required to make factual basis determination before accepting a plea of *nolo contendere*).

the defendant is actually guilty of the offense to which the nolo plea is offered. Although insistence upon a factual basis may make the nolo plea less attractive to defendants because disclosure of their conduct will be made public, this is a reasonable price in return for the benefits the nolo plea confers upon the defendant.

No attempt is made, in this standard, to specify a particular level of probable guilt for the factual basis inquiry. The matter is left largely to the discretion of the judge, as the circumstances of the case will dictate both the degree and kind of inquiry that is necessary. This approach is consistent with the Federal Rules of Criminal Procedure and most other authorities, except for the Model Code of Pre-Arrestment Procedure, which states that there must be "reasonable cause" to believe the defendant is guilty.⁹ The purpose of this language, according to the commentary to that provision, is to assure at the taking of a guilty plea that there is at least a factual showing sufficient to hold a defendant after a preliminary hearing.¹⁰

Standard 14-1.6(b)

Standard 14-1.6(b) addresses the situation in which the defendant (for psychological or other reasons) refuses to admit guilt but nonetheless wishes to plead guilty (a so-called *Alford* plea). In *North Carolina v. Alford*,¹¹ the defendant denied that he had killed anyone but sought to plead guilty to second-degree murder, thereby avoiding the possibility of the death penalty if convicted of first-degree murder by a jury. The Supreme Court held that such guilty pleas may be accepted by courts, even if accompanied by protestations of innocence, as long as the plea is voluntarily and intelligently entered.¹²

There was a strong factual basis adduced for the guilty plea in *Alford*,¹³ and courts have generally held that a plea in which the defendant simultaneously denies culpability may not be accepted unless fac-

9. MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 350.4(3) (1975).

10. *Id.*, Commentary at 249.

11. 400 U.S. 25, 28 (1970).

12. 400 U.S. at 28. This is not the case in all state jurisdictions. See *Trueblood v. State*, 587 N.E.2d 105 (Ind. 1992) (as a matter of law, a judge may not accept a guilty plea when defendant pleads guilty and maintains his innocence at the same time).

13. See *Alford*, 400 U.S. at 38 ("In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.").

tual proof of guilt also is shown.¹⁴ But regardless of constitutional considerations, sound policy dictates that in such cases a factual basis be demonstrated, and “special care” be taken to make certain the evidence to support conviction is clear. This applies with equal force to the *nolo contendere* plea as well as the guilty plea where the defendant denies culpability. In neither situation does the defendant acknowledge having violated the law. Unless “special care” is taken (e.g., insisting on witnesses to testify about the offense or requiring a comprehensive written report from the prosecutor), the risk of convicting an innocent person is greater than in the average guilty plea case.

Moreover, special dangers are posed by *Alford* and *nolo* pleas because, while the consequences of these pleas are identical in most respects to every other guilty plea, the defendant may believe, wrongly, that there will be no consequences from entering such a plea, and may seek to do so to avoid the cost and trauma of facing trial even if he or she is not guilty of the charges. This is particularly likely if the defendant has not had the benefit of the advice of counsel. The courts should be particularly cautious, therefore, in accepting *Alford* or *nolo* pleas from uncounselled defendants. Such pleas should not be routinely negotiated or accepted.

Some courts will accept *Alford* pleas, while others will not (and within some systems, individual judges may differ in their practice). The *Alford* case did not find the availability of such pleas to be constitutionally necessary, simply constitutionally permissible.¹⁵ Standard 14-1.6(b) takes the position that such pleas should not be rejected “solely because the defendant refuses to admit culpability.” If, therefore, a court is to reject an *Alford* plea, specific reasons should be stated on the record for doing so.

In contrast to this standard, the National Advisory Commission has recommended that no plea should be accepted from a defendant who is

14. *Owens v. State*, 426 N.E.2d 372, 374 (Ind. 1981); *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995).

15. See *Alford*, 400 U.S. at 38 n.11 (“Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . , although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to ‘refuse to accept a plea of guilty’ We need not now delineate the scope of that discretion.”).

either unable or unwilling to recount facts establishing guilt,¹⁶ in order to avoid public disparagement of the criminal justice system and the risk that innocent defendants will be convicted. The Model Code of Pre-Arraignment Procedure, by contrast, permits pleas where the defendant refuses to admit guilt “if the court finds that it is reasonable for someone in the defendant’s position to plead guilty.”¹⁷ The court must advise the defendant, however, that “if he pleads guilty he will be treated as guilty whether he is guilty or not.”¹⁸

Standard 14-1.7. Record of proceedings

A verbatim record of the proceedings at which the defendant enters a plea of guilty or *nolo contendere* should be made and preserved. The record should include the court’s advice to the defendant (as required in standard 14-1.4), the inquiry into the voluntariness of the plea (as required in standard 14-1.5), and the inquiry into the factual basis of the plea (as required in standard 14-1.6). Such proceedings should be held in open court unless good cause is present for the proceedings to be held in chambers. For good cause, the judge may order the record of such proceedings to be sealed.

History of Standard

A new sentence has been included at the end of this standard, providing that proceedings in which a defendant enters a plea of guilty “should be held in open court unless good cause is present for the proceedings to be held in chambers.” The amendment provides further that for “good cause,” the judge may order the record of such proceedings to be sealed.

Related Standards

FED. R. CRIM. P. 11(g)

16. NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.7 (1973).

17. MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.4(4) (1975).

18. *Id.*

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.8
UNIF. R. CRIM. P. 754(a)(7)

Commentary

Standard 14-1.7 requires that a “verbatim record” of proceedings at which a defendant enters a guilty or nolo contendere plea be “made and preserved.” This record must contain the court’s advice to the defendant under Standard 14-1.4, as well as its inquiries into the voluntariness of the plea under Standard 14-1.5 and the factual basis of the plea under Standard 14-1.6. This standard is consistent with the Federal Rules of Criminal Procedure¹ and with the provisions of statutes in many states.²

It is important that a verbatim record be made of a defendant’s guilty plea or plea of nolo contendere, because in its absence a judgment of conviction may later be reversed. In *Boykin v. Alabama*,³ for example, the record did not reveal that the judge asked any questions of the defendant or addressed the defendant personally. The Supreme Court reversed, stating that the voluntariness of a guilty plea and the waiver of constitutional rights cannot be presumed from a silent record. The Court emphasized that for an accused “facing death or imprisonment” the judge must leave “a record adequate for any review that may be later sought.”⁴

It is also important that the verbatim record of the proceedings be satisfactorily preserved. This is not always accomplished if the practice is merely to file the reporter’s shorthand or stenotype notes. If the plea is

1. FED. R. CRIM. P. 11(g) (“A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court’s advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea”).

2. See, e.g., N.C. GEN. STAT. § 15A-1026 (1997) (“A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest . . . must be made and preserved. This record must include the judge’s advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses.”); see also OHIO R. CRIM. P. 5(B)(7); ILL. SUP. CT. R. 401(b). But see *State v. Van Egdorn*, 292 N.W.2d 586 (S.D. 1980) (absence of verbatim record not automatically fatal to conviction based on guilty plea).

3. 395 U.S. 238 (1969).

4. *Id.* at 243-244.

challenged some years later, the reporter may be unavailable and another reporter may be unable to prepare a transcript. One means of avoiding this difficulty is to have the court reporter promptly transcribe the plea proceeding. Another alternative is to file the reporter's untranscribed notes with an electronic sound recording of the proceedings.

Increasing Need for Records of Pleas

Verbatim records of plea proceedings have become ever more important because of the rise of "determinate sentencing" and repeat offender statutes. The Federal Sentencing Guidelines, for example, exclude from a defendant's prior record for purposes of his or her sentencing calculation only a handful of minor offenses.⁵ This highlights the importance of preserving a verbatim record of proceedings on guilty pleas.⁶

In *Parke v. Raley*, for example, the lower court had imposed an enhanced sentence under a state recidivist statute based on the defendant's prior guilty plea in another case. In that decision, the Supreme Court held that it is permissible to place the burden on the defendant to provide evidence that the prior guilty plea was not entered knowingly or voluntarily.⁷ Where the state has kept no record of those proceedings, however, the defendant will be unable even to present evidence concerning proceedings on the prior plea. This result undermines the fairness of the criminal justice system.

States may encounter budgetary and administrative problems in satisfying this requirement in all cases. The increasing availability of electronic recording may help address this problem. But even under present constraints, verbatim recording should always be made in felony and serious misdemeanor proceedings. Where budgetary or administrative constraints make verbatim recording of other plea proceedings impracticable, a written record should be created for any such other guilty or nolo pleas. Such a written record should include, at a minimum, the terms of the plea agreement, whether counsel was present and if not, whether an inquiry was conducted to ensure that the defendant knowingly waived counsel.

5. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(2) (1998).

6. See also U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1998) (permitting consideration of otherwise uncounted prior convictions where the guidelines calculation does not adequately represent the seriousness of a defendant's criminal history).

7. 506 U.S. 20 (1992).

Use of Guilty Plea Forms

In some jurisdictions, courts will require a defendant who pleads guilty or nolo contendere to execute a “guilty plea” form or “transcript of plea” form, which recites the advice given to the defendant and disclaims any promises, except as part of a plea agreement. The form may also contain questions relevant to establishing a factual basis for the plea. Such documents are useful as a checklist and serve to emphasize for a defendant his or her constitutional rights. Their use, however, should not be regarded as a substitute for a verbatim transcript of the plea proceedings. In *Blackledge v. Allison*,⁸ the Supreme Court ruled that a defendant’s execution of a standard printed guilty plea form did not foreclose collateral attack against a conviction, where the defendant alleged that promises of a lesser sentence had been broken. The Court stressed that the absence of a transcript made it exceedingly difficult to dispose of the defendant’s claim, and the case was remanded for a full evidentiary hearing.⁹

Sealing Plea Proceedings

In the third edition, Standard 14-1.7 has been revised to include a provision recognizing the courts’ authority to seal plea proceedings and records of those proceedings where “good cause is present.” In all other cases, the Standard makes clear that such proceedings should be held in open court. Where proceedings are sealed, they should be unsealed as soon as the need for confidentiality passes.

It is necessary to have provisions that allow certain plea agreements to be recorded but kept under seal for a period of time. For example, such an agreement might include a defendant’s promise to cooperate with the Government in an ongoing investigation or case. Of course, any such sealing of materials from public view would be subject to whatever rights the defense may have to discovery of that material for purposes of a case.¹⁰

Standard 14-1.8. Consideration of plea in final disposition

(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mit-

8. 431 U.S. 63, 71 (1977).

9. *Id.* at 76-80.

10. See *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (“the right of confrontation is paramount” to the state’s interest in sealing records of juvenile offenders).

igating factor in imposing sentence. It is proper for the court to approve or grant charge and sentence concessions to a defendant who enters a plea of guilty or nolo contendere when consistent with governing law and when there is substantial evidence to establish, for example, that:

(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iii) the defendant, by making public trial unnecessary, has demonstrated genuine remorse or consideration for the victims of his or her criminal activity; or

(iv) the defendant has given or agreed to give cooperation.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.

History of Standard

The standard has been amended, in subsections (a)(iii) and (a)(iv), to give the judge greater discretion, where a guilty plea has been entered, in the types of considerations that may justify the court in reducing or mitigating the charges or the sentence to be imposed. It has also been amended to clarify that the considerations that are spelled out are simply intended as an "example" of the types of circumstances the court legitimately may consider in imposing sentence in such cases.

Related Standards

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standards 3.1, 3.8

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.7

Commentary

Standard 14-1.8 concerns the court's power to consider the defendant's guilty plea in connection with sentencing. As this standard

makes clear, the mere fact that the defendant has pleaded guilty should not, by itself, be a mitigating factor in imposing a sentence. Otherwise, it may be perceived that the court is penalizing those defendants who exercise their constitutional right to go to trial—which is forbidden by Standard 14-1.8(b). On the other hand, courts typically do, for justifiable reasons, agree to significant concessions in sentencing where the defendant has pleaded guilty and demonstrated certain additional factors. This standard addresses the types of considerations that may justify such concessions.

The National Advisory Commission's standards are similar to Standard 14-1.8 in recommending that a defendant's guilty plea "should not be considered by the court in determining the sentence to be imposed."¹ Sentencing concessions to defendants are deemed appropriate when there is "substantial evidence" of "contrition," "cooperation with authorities," or "consideration for the victims of [their] criminal activity." The mere fact that the defendant has pleaded guilty, however, "should be considered in no way probative of any of these elements."²

Standard 14-1.8(a) (Propriety of sentencing concessions)

Standard 14-1.8(a) concerns the judge's power to "approve or grant" charge and sentencing concessions. With respect to the court's power to permit such concessions, it is clear that the Constitution does not prohibit the granting of leniency to defendants who plead guilty. This issue was resolved by the Supreme Court in *Brady v. United States*³, where the Court rejected the argument that a defendant's guilty plea was involuntary because induced by his desire to avoid the death penalty. The Court emphasized that the mere fact that the plea is motivated by the defendant's desire to accept a certain penalty rather than face a potentially higher sentence after trial does not make guilty plea agreements involuntary or coerced. Rather, such agreements provide benefits to both sides. For the defendant, "his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated." For the government, promptly imposed punishment "may more effectively attain the objectives of punishment," while avoiding trial allows "scarce judicial and prosecutorial resources [to be]

1. NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.1 (1973).

2. *Id.*

3. 397 U.S. 742 (1970).

conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." The Court was unwilling to find such mutually beneficial agreements unconstitutionally coercive.⁴

Standard 14-1.8(a) thus recognizes the propriety of allowing such concessions, and identifies certain criteria that may be appropriate for the court to consider in deciding whether to agree to concessions negotiated as part of a guilty plea. The criteria listed in this standard, however, are intended only as an "example," and do not limit the court's discretion in this area.

The considerations contained in Standard 14-1.8(a) are typical of those applied by the courts in indeterminate sentencing systems. In recent years, however, in the states as well as the federal system, there has been a discernible trend toward the adoption of sentencing guidelines and fixed or presumptive sentences.⁵ These provisions generally contain detailed standards that determine the sentence to be imposed, and may not permit consideration of all of the circumstances outlined in Standard 14-1.8(a). In such circumstances, the court should be guided by what is "consistent with governing law."

Standard 14-1.8(a)(i) (Defendant's assumption of responsibility)

Standard 14-1.8(a)(i) recognizes that a defendant's contrition and willingness to assume responsibility for his or her conduct is a valid consideration in sentencing the defendant who pleads guilty. (It may sometimes also be relevant when a defendant enters a plea of *nolo contendere*, but such a plea is less likely to indicate remorse.) This is consistent with federal sentencing law,⁶ as well as with other accepted sentencing standards, which emphasize the relevance of the attitudes of the defendant and the defendant's willingness to assume responsibility for his or her actions.⁷

4. *Id.* at 750-753; see also *United States v. Cruz*, 156 F.3d 366, 374 (2d Cir. 1998); *United States v. Parker*, 903 F.2d 91, 105 (2d Cir.), *cert. denied*, 498 U.S. 872 (1990); *State v. Taylor*, 975 P.2d 1196 (Kan. 1999).

5. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *National Assessment of Structured Sentencing*, (1996).

6. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1998) (authorizing 2-level decrease in offense level for full acceptance of responsibility, and 3-level decrease where the defendant "timely [notifies] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.").

7. See, e.g., MODEL PENAL CODE § 7.01 (1962); see also GA. SUPER. CT. R. 33.6; cf. MINN. R. CRIM. P. 15.01 (such factors to be considered in deciding whether to accept plea).

Consistent with Standard 14-1.8(a), the entry of a guilty plea alone should not be deemed evidence that the defendant has accepted responsibility for his or her conduct. Rather, the court must be convinced, through the defendant's words or conduct, that defendant is "genuinely contrite."

Standard 14-1.8(a)(ii) (Alternative correctional measures)

Standard 14-1.8(a)(ii) concerns the court's authority to approve concessions which will make possible "alternative correctional measures." Prosecutors are sometimes receptive to defense offers to plead to a lesser offense when the reduced charge will provide the trial judge with additional sentencing alternatives. For example, where the offense originally charged carries a high mandatory minimum sentence or may not be subject to probation, allowing a plea to a different offense may make probation or other sentencing terms available. This standard allows courts to approve charge reductions and dismissals as a means by which justice for a defendant may be individualized.

Similar considerations can apply to sentencing concessions. In a sentencing guidelines system, for example, approving a sentencing calculation agreed upon by the parties may allow sentencing alternatives, such as halfway houses or home detention, that would not be available if the court did not accept the facts as stipulated by the parties.

In addition, by allowing a defendant to plead guilty to a misdemeanor in exchange for dropping felony charges, the court allows the defendant to avoid the stigma—and some or all of the collateral consequences—of a felony conviction. Conviction on certain offenses may tend to imply that the defendant is a sexual psychopath or sexual deviant, or is an alcoholic, an addict, or a dangerous person. Standard 14-1.8(a)(ii) allows the court to consider whether allowing a plea to lesser charges will "avoid undue harm to the defendant in the form of conviction."

Standard 14-1.8(a)(iii) (Consideration for victims)

Standard 14-1.8(a)(iii) recognizes that charge or sentence concessions also are appropriate where the defendant demonstrates genuine consideration for the victims of the crime, either by agreeing to make restitution or by sparing the victims the ordeal of a public trial. This standard is most relevant to cases such as rape or sexual assault, where the victim would have to appear in court and repeat the details of what transpired. Testifying in public in these kinds of cases may not only be

humiliating but may be a severely traumatic experience for the victim. However, where the defendant evidences little or no regard for the victim and pleads guilty solely to take advantage of an attractive plea offer, this standard should not apply simply because the defendant has pleaded guilty.

Standard 14-1.8(a)(iv) (Defendant's cooperation)

Standard 14-1.8(a)(iv) recognizes that the court may appropriately consider, in imposing a criminal sentence, the defendant's cooperation in investigating or prosecuting others who are involved in criminal conduct. Such cooperation agreements are common in both the federal and state systems. In circumstances where the prosecutor may not wish to grant immunity from prosecution⁸ in exchange for testimony because of the seriousness of an individual's conduct or prior criminal record, he or she may instead offer sentence and charge concessions in exchange for the defendant's plea and cooperation in securing the conviction of others. Standard 14-1.8(a)(iv) takes the view that such concessions may be appropriate.⁹

The federal sentencing guidelines are similar to this standard in recognizing that sentencing concessions may be appropriate where the defendant has provided "substantial assistance" to authorities in the investigation or prosecution of criminals.¹⁰ Most federal courts, interpreting the relevant federal statutes and sentencing guidelines,¹¹ have held that absent extraordinary circumstances, the discretion to determine whether a defendant has provided "substantial assistance" is the government's.¹² Thus, in the federal system, while the sentencing court

8. See, e.g., 18 U.S.C. § 6003 (1994 & Supp. 1999); 725 ILL. COMP. STAT. § 5/106-1 (West 1993).

9. Conversely, the Supreme Court has upheld a court's decision to consider, as a factor in imposing consecutive sentences, the defendant's refusal to be of assistance, where a convicted defendant failed to cooperate with government officials investigating a related criminal conspiracy. *Roberts v. United States*, 445 U.S. 552 (1980).

10. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (authorizing the government to move for a downward departure where the defendant has provided "substantial assistance" in the investigation or prosecution of others); see also 18 U.S.C. § 3553(e) (1999) (authorizing court to impose sentence below mandatory minimum where defendant has provided such "substantial assistance").

11. See 18 U.S.C. § 3553(e) (1994); U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K2.0 (1998).

12. See *United States v. Wade*, 504 U.S. 181, 185 (1992) (prosecutors have the power, not the duty, to file a motion when a defendant has provided substantial assistance but

may give a defendant limited credit for substantial assistance by sentencing at the lower end of the applicable guidelines sentencing range, it generally may not depart downward from that range absent a motion from the government affirming the defendant's substantial assistance. The issue whether courts should have greater power to recognize a defendant's substantial assistance is the source of continuing controversy in federal sentencing. By recognizing that the court may both "grant" and "approve" sentencing concessions based on the defendant's cooperation, this Standard takes the position that the power to grant such concessions should be shared by the prosecutor and the court.

Notably, in developing the third edition, this standard was amended to delete a requirement that the defendant's cooperation led to the "successful prosecution" of other offenders engaged in "equally serious or more serious criminal conduct." As federal law recognizes, it is also appropriate, for example, to permit concessions where the defendant has provided substantial assistance in the "investigation" of another person who has committed an offense.¹³ Moreover, the court's consideration of a defendant's cooperation should be based upon the extent and nature of that cooperation, rather than upon the ultimate success or failure of related prosecutions.

prosecutor's "discretion when exercising that power is subject to constitutional limitations that district courts can enforce"); *In re Sealed Case No. 97-3112* (*Sentencing Guidelines' "Substantial Assistance"*), 1999 WL 462422 (D.C. Cir. July 7, 1999) (district court may depart downward from guidelines for substantial assistance only upon motion by government); *United States v. Huang*, 1999 WL 330419 (3d Cir. May 26, 1999) (even where cooperation agreement does not expressly reserve discretion to the government to decide whether defendant rendered "substantial assistance," district court may review government's failure to make motion for substantial assistance departure pursuant to plea agreement only for bad faith or unconstitutional motive); *United States v. Solis*, 169 F.3d 224 (5th Cir. 1999) (district court may not depart downward for substantial assistance absent government motion unless refusal to make motion is based on unconstitutional motive or government bargains away its discretion in plea agreement), *petition for cert. filed*, No. 98-9623 (U.S. June 3, 1999); *United States v. Isaac*, 141 F.3d 477 (3d Cir. 1998) (district court may review government's failure to make motion for substantial assistance departure pursuant to plea agreement only for bad faith or unconstitutional motive), *cert. denied*, 119 S.Ct. 1479 (1999).

13. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998); *see also* 18 U.S.C. § 3553(e) (1994) (federal prosecutors may move for a sentence below the mandatory minimum to reflect the defendant's substantial assistance in the "investigation or prosecution of another person").

Standard 14-1.8(b) (Defendant who goes to trial)

Standard 14-1.8(b) reflects the other side of the rule that defendants should not be given sentencing concessions merely because they plead guilty. It provides that courts should not "impose upon a defendant any sentence in excess of that which would be justified" simply because the defendant has forced the prosecution to go to trial. The defendant who goes to trial should not be punished for putting the state to its proof. Rather, he or she should receive only that sentence which properly serves the deterrent, protective, and other objectives of the criminal justice system.¹⁴

14. The Model Code of Pre-Arrest Procedure, similarly, bars prosecutors from "threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty." MODEL CODE OF PRE-ARREST PROC. § 350.3(3)(c) (1975).

PART II.

WITHDRAWAL OF THE PLEA

Standard 14-2.1. Plea withdrawal and specific performance

(a) After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant's plea.

(b) After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. A timely motion for withdrawal is one made with due diligence, considering the nature of the allegations therein.

(i) Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that:

(A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;

(B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's behalf;

(C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;

(D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or

(E) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement, which was either tentatively or fully concurred in by the court, and the defendant did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea; or

(F) the guilty plea was entered upon the express condition, approved by the judge, that the plea could be withdrawn if the

charge or sentence concessions were subsequently rejected by the court.

(ii) The defendant may move for withdrawal of the plea without alleging that he or she is innocent of the charge to which the plea has been entered.

(c) As an alternative to allowing the withdrawal of a plea of guilty or nolo contendere, the court may order the specific performance by the government of promises or conditions of a plea agreement where it is within the power of the court and the court finds, in its discretion, that specific performance is the appropriate remedy for a breach of the agreement.

History of Standard

Subsection (a) has been amended to clarify that “any prejudice to the prosecution caused by reliance on the defendant’s plea” is simply one factor to be weighed as a part of the determination whether a “fair and just reason exists” to allow withdrawal of a guilty plea, rather than providing a reason, by itself, to reject such a request. A new subsection (c) has been included to recognize that the court may “order the specific performance” by the government of promises or conditions of a plea agreement in appropriate cases in lieu of permitting withdrawal of the plea.

Related Standards

FED. R. CRIM. P. 11(e)(4), 32(e)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.5(4), 350.6

NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS
§§ 69.3, 70.4

UNIF. R. CRIM. P. 444(g)

Commentary

Standard 14-2.1 concerns requests for the withdrawal of a guilty plea and the standards that the court should apply in deciding upon such requests. Statutes and rules of procedure generally provide trial judges little guidance on the question of when a defendant must be allowed to withdraw a plea of guilty or nolo contendere. Although most jurisdictions require a judge to permit a defendant to withdraw a guilty plea

if the judge rejects the plea agreement pursuant to which it was entered,¹ the states vary considerably in their determination of the appropriate time limitations and standards for judgment applicable to a defendant's request to withdraw a plea in other circumstances. The standards most often applied—that the court may permit withdrawal of the plea in its discretion,² where such withdrawal “serves the interest of justice,”³ where the defendant demonstrates a “fair and just” reason for withdrawal,⁴ or where withdrawal is necessary to prevent “manifest injustice”⁵—are of relatively little assistance to courts in determining how to decide specific cases, and frequently provide no test for setting aside a guilty plea before sentencing.

To provide more concrete guidance in this area, Standard 14-2.1 establishes standards for both pre-sentence and post-sentence withdrawal motions, and in the latter situation, provides specific examples

1. See, e.g., FED. R. CRIM. P. 11(e)(2), (4); ALA. R. CRIM. P. 14.3(c)(2)(iv); ALASKA R. CRIM. P. 11(e)(3); ARIZ. R. CRIM. P. 17.4(e); DEL. SUPER. CT. CRIM. R. 11(e) (4); GA. SUPER. CT. R. 33.10(4); IOWA R. CRIM. P. 9(4).

2. See, e.g., N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 1993) (“At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment . . . to withdraw such plea.”); PA. R. CRIM. P. 320 (“At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.”); see also FLA. R. CRIM. P. 3.170(f) (before sentence, court may permit withdrawal “in its discretion,” and “shall on good cause”); KY. R. CRIM. P. 8.10 (“At any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted.”)

3. See, e.g., MD. R. CRIM. P. 4-242(f) (at any time before sentencing, the court may permit the defendant to withdraw a guilty plea when withdrawal “serves the interest of justice”; after sentence, withdrawal is permitted if the defendant establishes that the rule was violated in the course of the plea); N.J. R. CRIM. P. 3:9-3(e) (at sentencing, the court may permit withdrawal of the guilty plea if it determines that the “interests of justice” would not be served).

4. See, e.g., ARK. R. CRIM. P. 26.1(a) (before sentence, judge may allow defendant to withdraw plea if it is “fair and just to do so”); DEL. SUPER. CT. CRIM. R. 32(d) (“If a motion for withdrawal of a plea of guilty . . . is made before imposition or suspension of sentence . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.”); COLO. R. CRIM. P. 32(d).

5. See, e.g., ALA. R. CRIM. P. 14.4(e) (“The court shall allow withdrawal of a plea of guilty when necessary to correct a manifest injustice.”); GA. SUPER. CT. R. 33.12(A) (after sentence pronounced, guilty plea may be withdrawn to correct a manifest injustice); IOWA R. CRIM. P. 9(4) (After guilty plea is accepted by the court, the defendant “shall not have the right subsequently to withdraw the plea except upon a showing that withdrawal is necessary to correct a manifest injustice.”); WASH. SUP. CT. CRIM. R. 4.2(f) (at all times, court may permit defendant to withdraw plea to correct a manifest injustice).

of the most prominent situations that would make out a "manifest injustice" sufficient to withdraw a plea. It is intended to set up a more liberal test for allowing withdrawal of a plea before sentencing has occurred than after sentence and conviction.

It should be noted that the types of errors which may be pursued through withdrawal of a plea, through direct appeal, or through collateral attack may differ or overlap; these rules may also diverge from one jurisdiction to another. In the federal system, for example, a guilty plea may be withdrawn before sentencing for any "fair and just reason," but may be set aside after sentencing only on appeal or on collateral attack.⁶ It is therefore important, where the defendant seeks to challenge a plea, that defense counsel conduct research to determine the appropriate avenue to pursue, any evidence that must be added to the record, and the standard of review that will apply.

It should be noted that, where the governing law has changed and the defendant would no longer be guilty of the offense of conviction under the governing law, the defendant should be able to withdraw the plea. This is true both before and after the entry of the sentence.⁷

The omission of any standard authorizing requests by the prosecutor to withdraw from a plea is deliberate. While there are some circumstances in which prosecutors may wish to invalidate a plea agreement, this issue does not generally arise through a motion for withdrawal or specific performance. In most cases, the defendant's performance of commitments under the plea will be complete by the time of entry of a guilty plea and/or sentencing on the plea, and the prosecutor will usually have an opportunity to raise objections to the defendant's performance before final resolution of the case. In those rare cases in which the prosecutor seeks to void the plea agreement after the defendant has already entered a guilty plea and been sentenced, prosecutors will usually reinstate the charges previously dismissed under the agree-

6. As noted, the same language is used in the comparable federal rule. FED. R. CRIM. P. 32(e); see also *United States v. Farley*, 72 F.3d 158, 244 (D.C. Cir. 1995); *Davis v. United States*, 924 F.2d 182, 184 (4th Cir. 1992).

7. See, e.g., *Bousley v. United States*, 118 S.Ct. 1604, 1609-10 (1998); *Davis v. United States*, 417 U.S. 333, 346 (1974); *United States v. Benboe*, 157 F.3d 1181, 1184-85 (9th Cir. 1998); *Woodruff v. United States*, 131 F.3d 1238, 1241-43 (7th Cir. 1997), cert. denied, 118 S.Ct. 2376 (1998).

ment. The parties then litigate the issues on the defendant's motion to dismiss or quash.⁸

Standard 14-2.1(a) (Withdrawal of plea before sentence)

Standard 14-2.1(a) allows the withdrawal of a guilty plea before sentencing for any "fair and just reason."⁹ There are sound reasons for allowing a fairly generous standard for withdrawal of pleas before sentencing. The conviction is not yet final, the court has not taken the time to weigh an appropriate sentence, and no appeal from the judgment is possible. Moreover, if the defendant has second thoughts before sentencing about having pleaded guilty, this fact may suggest that the plea was entered without sufficient understanding and contemplation. At the same time, given the considerable care pursuant to which pleas are required to be taken, it is difficult to justify allowing a defendant to withdraw a plea without any reason at all.

Standard 14-2.1 accommodates these competing values by allowing presentence withdrawal of pleas "for any fair and just reason" but providing that the court should also "weigh any prejudice to the prosecution caused by reliance on defendant's plea." The burden is on the defendant to establish a "fair and just" reason for the plea to be withdrawn.¹⁰ This test frequently has been applied to presentence plea withdrawal motions in the federal courts¹¹ and in many state

8. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1 (1987).

9. See FED. R. CRIM. P. 32(e); *United States v. Hyde*, 520 U.S. 670, 671 (1997) (after a defendant pleads guilty but before the trial court decides whether to accept the plea agreement pursuant to which the plea was entered, defendant must show a "fair and just reason" for withdrawing the plea).

10. The burden is clearly the defendant's under the comparable federal rule. See *United States v. Marrero-Rivera*, 124 F.3d 342, 347 (1st Cir. 1997); *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996), cert. denied, 522 U.S. 806 (1997); *United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996); *United States v. Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995); *United States v. Ludwig*, 972 F.2d 948, 950 (8th Cir. 1992); *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992); *United States v. Burger*, 964 F.2d 1065, 1070-71 (10th Cir. 1992), cert. denied, 513 U.S. 848 (1994); *United States v. Alexander*, 948 F.2d 1002, 1003 (6th Cir. 1991), cert. denied, 502 U.S. 1117 (1992).

11. See, e.g., *United States v. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998); *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997); *United States v. McCarty*, 99 F.3d 383, 385-86 & n.2 (11th Cir. 1996); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996); *United States v. Laliberte*, 25 F.3d 10, 14 (5th Cir. 1994); *United States v. Isom*, 85 F.3d 831, 834-35 (1st Cir. 1996); *United States v. Alexander*, 948 F.2d 1002, 1003-04 (6th Cir. 1991), cert. denied, 502 U.S. 1117 (1992).

courts.¹² The federal cases have recognized a greater liberality in allowing withdrawal of pleas prior to sentencing,¹³ but have rejected an absolute right to withdraw such pleas.¹⁴ This standard takes the same position, as do the Uniform Rules of Criminal Procedure.¹⁵

In general, this standard is intended to allow for withdrawal in circumstances including those permitted under the comparable federal rule. Under federal law, courts look to a variety of factors to determine whether a plea withdrawal is "fair and just." Foremost is whether the plea sought to be withdrawn was taken in compliance with the procedures required by law.¹⁶ A plea will be considered tainted if the plea is found not to be knowing, intelligent, or voluntary.¹⁷ Folded within this

12. *People v. Chippewa*, 751 P.2d 607 (Colo. 1988); *Malone v. State*, 742 S.W.2d 945 (Ark. 1988); *Patterson v. State*, 684 A.2d 1234 (Del. 1996).

13. See, e.g., *United States v. Laliberte*, 25 F.3d 10, 13 (5th Cir. 1994) (before sentencing, plea withdrawal motion "is reviewed under a more liberal standard than a motion filed after sentencing"); *United States v. Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994) ("a motion to withdraw a guilty plea before sentencing is determined under a less stringent standard than a motion made after sentencing").

14. See *United States v. Hyde*, 520 U.S. 670, 675-76 (1997) (rejecting reading of Federal Rules which would allow a defendant to withdraw his plea prior to acceptance of plea agreement "for any reason or for no reason"); *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996), cert. denied, 522 U.S. 806 (1997) (although Rule 32 is to be construed and applied liberally, the defendant has no right to withdraw a guilty plea); *United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996) ("While Rule 32(e) as applied to pre-sentence motions to withdraw should be liberally construed, a defendant enjoys no absolute right to withdraw a guilty plea before sentencing."); but cf. *United States v. Abdul*, 75 F.3d 327, 329 (7th Cir. 1996), cert. denied, 518 U.S. 1027 (1996) (defendant bears a "heavy burden of persuasion" and an "uphill battle" in persuading a judge that there exist fair and just reasons to withdraw a plea where the plea was freely and knowingly given).

15. See UNIF. R. CRIM. P. 444(g) (1987) (court shall allow withdrawal of guilty plea "before sentencing for any fair and just reason unless the prosecution shows it has been substantially prejudiced by reliance upon the plea").

16. See *United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("If we determine that there was no error in the taking of the defendant's plea, we will be extremely reluctant to reverse the district court[']s denial of withdrawal], even if the defendant makes out a legally cognizable defense to the charges against him."); *United States v. Wilson*, 81 F.3d 1300, 1306-07 (4th Cir. 1996) ("the fairness of the rule 11 proceeding is the key factor in the review of the denial of a motion to withdraw a guilty plea"); *United States v. Laliberte*, 25 F.3d 10, 14 (1st Cir. 1994) ("most important[']" factor is "whether, when viewed in light of emergent circumstances, the defendant's plea appropriately may be characterized as involuntary, in derogation of the requirements imposed by Fed. R. Crim. P. 11, or otherwise legally suspect").

17. See, e.g., *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997) (one factor is whether the plea was "knowing and voluntary"); *United States v. McCarty*, 99 F.3d 383, 385

criterion or considered separately is “whether adequate assistance of counsel was available.”¹⁸ The court may also inquire whether a defendant is asserting “a legally cognizable defense to the charge against him;”¹⁹ in particular, courts weigh whether the defendant is making a “viable” claim of innocence (although they do not require such a claim).²⁰ Another frequently noted consideration is “the timing of the defendant’s motion.”²¹ In evaluating timing, courts chiefly seem concerned with whether the timing of the request undermines or corroborates the defendant’s asserted motive in seeking withdrawal.²² It is not a “fair and just” reason for withdrawal that the defendant is unhappy with the presentence report or has a change of heart about the terms of

(11th Cir. 1996) (same); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996) (one factor is “whether the defendant has offered credible evidence that his plea was not knowing or not voluntary”).

18. See, e.g., *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997); *United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996); *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990).

19. See *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995).

20. See *United States v. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998) (one factor of three); see also *United States v. Grant*, 117 F.3d 788, 789 (1997) (one factor is “whether the defendant asserted his innocence”); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996) (one factor is “whether defendant has credibly asserted his legal innocence”); *United States v. Laliberte*, 25 F.3d 10, (1st Cir. 1994) (one factor is “the existence or nonexistence of an assertion of innocence”); *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (same), cert. denied, 502 U.S. 1117 (1992). However, a “claim of innocence, standing alone, does not justify withdrawal.” *Grant*, 117 F.3d at 790; *United States v. Redig*, 27 F.3d 277, 281 (7th Cir. 1994).

21. *United States v. Laliberte*, 25 F.3d 10, 14 (1st Cir. 1994); see also *United States v. Grant*, 117 F.3d 788, 789 (1997) (one factor is “whether the defendant delayed in filing the withdrawal motion”); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996) (one factor is “whether there has been a delay between the entering of the plea and the filing of the motion”); *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (same), cert. denied, 502 U.S. 1117 (1992).

22. For example, courts view with suspicion withdrawal motions made after a defendant receives bad news regarding his sentence expectations. See, e.g., *United States v. Parrilla-Tirado*, 22 F.3d 368 (1st Cir. 1994) (the fact that defendant’s “belated change of heart followed not long after the PSI Report . . . arrived at the court’s doorstep . . . serves to cast a long shadow over the legitimacy of [defendant’s] professed reasons for seeking a change of course”); *United States v. Gonzalez*, 970 F.2d 1095 (2d Cir. 1992) (defendant’s assertion of innocence undercut by the timing of his motion, which came seven months after plea but shortly after defendant learned that the Government would not move for a downward departure).

the plea.²³ Other factors which have been employed are “the plausibility [and the force] of the reasons prompting the requested change of plea;”²⁴ “whether withdrawal would inconvenience the court;”²⁵ “whether the parties had reached a plea agreement;”²⁶ and “whether withdrawal would waste judicial resources.”²⁷

Prejudice to the government is also weighed in deciding whether to permit withdrawal under this standard. Under this standard, even where a satisfactory reason for withdrawal is established by the defendant, another factor the court must consider in assessing whether to permit a plea withdrawal is whether the withdrawal will prejudice the government.²⁸ The burden is on the prosecution to establish the prejudice, if any, that would be caused by withdrawal due to its reliance on the plea.²⁹ However, “prejudice to the government need not be established or considered unless and until the defendant has established a

23. See *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (“Courts have noted that the aim of the rule is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant ‘to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.’ For these reasons, courts have denied motions to vacate entered after any substantial time has passed after entry of the plea.”) (citation omitted), *cert. denied*, 502 U.S. 1117 (1992); *United States v. Laliberte*, 25 F.3d 10, 15 (1st Cir. 1994) (“Generally, the longer a defendant waits before bringing his motion to withdraw his guilty plea, the more forceful his reasons in support of withdrawal must be. . . . This principle obtains because, ‘[w]hile an immediate change of heart may well lend considerable force to a plea withdrawal request, a long interval between the plea and the request often weakens any claim that the plea was entered in confusion or under false pretenses.’”) (citations omitted).

24. *United States v. Laliberte*, 25 F.3d 10, 14 (1st Cir. 1994); see also *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (one factor is whether defendant has a “valid reason for the failure to present the grounds for withdrawal at an earlier point in the proceedings”), *cert. denied*, 502 U.S. 1117 (1992).

25. *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996).

26. *United States v. Isom*, 85 F.3d 831, 834 (1st Cir. 1996).

27. *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997); *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996); *United States v. McCarty*, 99 F.3d 383, 385 n.2 (11th Cir. 1996).

28. See *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995); *United States v. McCarty*, 99 F.3d 383, 385 n.2 (11th Cir. 1996).

29. See, e.g., *United States v. Muriel*, 111 F.3d 975, 978 (1st Cir. 1997); *United States v. Pitino*, 887 F.2d 42, 46 (4th Cir. 1989) (per curiam); *United States v. Triplett*, 828 F.2d 1195, 1198 (6th Cir. 1987).

fair and just reason for vacating his plea.”³⁰ Substantial prejudice is established if the prosecution shows, for example, that vital physical evidence has been discarded,³¹ that a chief government witness has died,³² or that numerous witnesses from all over the United States and from overseas have been dismissed.³³ Under this standard, such prejudice must be weighed against the strength of the defendant’s showing to determine whether the plea should be permitted to be withdrawn in a particular case.

Standard 14-2.1(b) (Withdrawal of plea after sentence)

Standard 14-2.1(b) sets the standard for the withdrawal of a guilty plea after sentencing. By allowing such withdrawal under certain circumstances, this standard rejects the position adopted in a number of jurisdictions—including the federal courts³⁴—that withdrawal of a plea

30. *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991), cert. denied, 502 U.S. 1117 (1992); see also *United States v. Payton*, 168 F.3d 1103, 1105 (8th Cir. 1999), cert. pending, No. 98-9630 (U.S. 1999); *Sparks*, 67 F.3d at 1154; *United States v. Parrillo-Tirado*, 22 F.3d 368, 373 n.5 (1st Cir. 1994); *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992) (“[t]he Government is not required to show prejudice when opposing a defendant’s motion to withdraw a guilty plea where the defendant has shown no sufficient grounds for permitting withdrawal; however, the presence or absence of such prejudice may be considered by the district court in exercising its discretion”); *United States v. Hickok*, 907 F.2d 983, 986 (10th Cir. 1990).

31. *United States v. Jerry*, 487 F.2d 600 (3d Cir. 1973).

32. *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973), cert. denied, 411 U.S. 970 (1973).

33. *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940).

34. See FED. R. CRIM. P. 32(e). This rule provides that, after sentence is imposed, the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255 (1994 & Supp. II 1996) (federal habeas). Although withdrawal no longer is permitted after sentencing, essentially the same relief is available on direct appeal or by motion on federal habeas for serious defects in guilty pleas. Federal courts differ in articulating the standard that is applied post-sentence, but it is a more demanding one than the “fair and just” standard applied prior to sentence. Compare *United States v. Christopher*, 923 F.2d 1545, 1557 (11th Cir. 1991) (“A defendant who seeks to withdraw a guilty plea after sentence bears a heavy burden of ‘proving the necessity of such action to correct manifest injustice.’”) (quoting *United States v. Teller*, 762 F.2d 569, 574 (7th Cir. 1985)); *United States v. Ramos*, 923 F.2d 1346, 1358 (9th Cir. 1991), with *United States v. Isom*, 85 F.3d 831, 834 (1st Cir. 1996) (defendant will only be relieved of his plea after sentence only if he demonstrates that a “miscarriage of justice” would otherwise result); *United States v. Farley*, 72 F.3d 158, 162 (D.C. Cir. 1995) (holding the defendant to a manifest injustice standard if his plea withdrawal claim is heard on direct appeal but employing a miscarriage of justice claim where the claim is heard on § 2255 review).

should only be permitted before sentence,³⁵ or judgment.³⁶ Other jurisdictions, like Standard 14-2.1(a), recognize the possibility of withdrawal after judgment and sentence.³⁷ As these rules reflect, sentence or judgment should not eliminate the opportunity for plea withdrawal.

It does not follow, however, that the timing of the defendant's motion is totally irrelevant. Standard 14-2.1 requires that such a motion be "timely," that is, made with "due diligence, considering the nature of the allegations therein." The fact that a motion to withdraw comes considerably after sentencing and judgment may have a bearing upon whether the motion is well-founded, considering the nature of the allegations in the motion. For example, if the allegation is that the prosecuting attorney did not seek the sentence concessions promised in a plea agreement, it is reasonable to expect that the plea withdrawal motion be made promptly upon learning of the prosecutor's inaction.

This standard takes no position on the burden of proof that must be met in establishing a "manifest injustice." To the extent that jurisdictions have adopted such rules, most appear to apply a preponderance

35. See, e.g., DEL. SUPER. CT. CRIM. R. 32(d) (At any time after sentence, a plea may be set aside only by motion under DEL. SUPER. CT. CRIM. R. 61 (post-conviction remedy)); PA. R. CRIM. P. 320 ("At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted."); N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 1993) ("At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty . . . to withdraw such plea"); see also FLA. R. CRIM. P. 3.170(l)(motion to withdraw guilty plea may be filed within 30 days after rendition of sentence but only upon grounds specified in FLA. R. APPELL. P 9.140(b)(2)(B)(i)-(v) (lack of subject-matter jurisdiction, breach of plea agreement, involuntary plea or sentencing error)).

36. See, e.g., KY. R. CRIM. P. 8.10 ("At any time before judgment the court may permit the plea of guilty . . . to be withdrawn. . . .").

37. See, e.g., ALASKA R. CRIM. P. 91(h) (for post-sentence withdrawal, a defendant "must prove that withdrawal is necessary to correct a manifest injustice"); GA. SUPER. CT. R. 33.12(A) ("After sentence is pronounced, the judge should allow the defendant to withdraw his plea of guilty . . . whenever the defendant . . . proves that withdrawal is necessary to correct a manifest injustice"); MD. R. CRIM. P. 4-242(f) (before sentence, a plea may be withdrawn where withdrawal serves the interests of justice; after sentence, plea may be withdrawn if defendant establishes that certain plea rules were not complied with or if there was a violation of the plea agreement); WASH. SUPER. CT. CRIM. R. 4.2(f) ("The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears . . . necessary to correct a manifest injustice.").

of the evidence test; a minority require "clear and convincing evidence;" and most do not specify any particular test.³⁸

Standard 14-2.1(b)(i)

Standard 14-2.1(b)(i) identifies six different factual situations, each of which could establish manifest injustice when proven by the defendant: ineffective assistance of counsel; lack of ratification by the defendant; involuntariness or lack of knowledge of the potential sentence; breach of the plea agreement by the prosecutor; the defendant's nonacquiescence after disapproval of the plea agreement by the court; and withdrawal of right after rejection of the agreement's terms by the court. The burden of proof to show such "manifest injustice" rests with the defendant.³⁹ This burden is greater in a case in which all the safeguards have been followed, but even in a case in which some procedural requirement has not been met, the defendant may be required to put in proof to establish an injustice. For example, a defendant who alleges he or she was unaware of the charge pleaded to would find it extremely difficult to show grounds for withdrawal if the record established that the judge advised the defendant of the charge.⁴⁰ On the other hand, if the record indicated that the judge did not so advise the defendant, the defendant may still have to present evidence tending to show that he or she was not otherwise aware of the charge.⁴¹

38. It appears that only Nebraska and Wisconsin have actually adopted a "clear and convincing" burden of proof, although one Delaware court and the U.S. Court of Appeals for the Sixth Circuit have also made supportive statements. See *State v. Bentley*, 548 N.W.2d 50, 54 (Wis. 1996); *State v. Nearhood*, 393 N.W.2d 530, 532 (Neb. 1986); cf. *State v. Fredsall*, 1992 WL 390702 (Del. Super. 1992) (suggesting that standard applies in Delaware). States that have expressly endorsed a preponderance of the evidence rule include Indiana, Minnesota, Missouri, and New Jersey. See IND. CODE ANN. § 35-35-1-4(e) (Michie 1998); MINN. STAT. ANN. § 590.04(3) (West 1988); *State v. Pendleton*, 910 S.W.2d 268, 270 (Mo. Ct. App. 1995); *State v. Nichols*, 345 A.2d 357, 360 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 365 A.2d 467 (N.J. 1976). Most other jurisdictions apparently have no rule imposing a special burden of proof for withdrawal of a guilty plea.

39. See Annotation, *Withdrawal of Plea of Guilty or Nolo Contendere, After Sentence, Under Rule 32(d) of Federal Rules of Criminal Procedure*, 9 A.L.R. FED. 309, § 7 (1971 & Supp. 1998).

40. E.g., *Jones v. United States*, 437 F.2d 93 (4th Cir. 1971) (defendant's denial that his guilty plea was knowingly and voluntarily made was insufficient to establish "manifest injustice" where the record indicated that the trial court made proper inquiries before accepting the plea).

41. E.g., *United States v. Lau*, 287 F. Supp. 653 (S.D.N.Y. 1968) (defendant required to prove not only that his attorney failed to advise him of an essential element of the offense

Standard 14-2.1(b)(i)(A) lists denial of the “effective assistance of counsel” as a ground for withdrawal. This, of course, includes the case in which a defendant is permitted to enter a plea without first properly waiving a right to counsel. It also covers those cases in which the court interferes significantly with retained or appointed counsel’s ability to represent the client’s interest effectively prior to entry of a plea, for example, by refusing defense counsel’s request to delay taking of the plea (as required by Standard 14-1.3(a)). Finally, this standard also covers those cases in which defendant’s counsel is so incompetent that the client is denied the effective assistance guaranteed by the Constitution.⁴²

Standard 14-2.1(b)(i)(B) allows withdrawal if the defendant’s plea was not entered by the defendant, nor subsequently ratified by the defendant or someone authorized to act on the defendant’s behalf.⁴³

Standard 14-2.1(b)(i)(C) allows withdrawal of an involuntary plea or one entered without knowledge of the charge or without knowledge that the sentence actually given could be imposed. Such circumstances should be unlikely if the trial judge acts in accordance with these standards in receiving the plea. If the judge properly advises the defendant (Standard 14-1.4), gives a defendant without counsel additional time to weigh the plea after receiving the court’s advice (Standard 14-1.3(b)), makes additional inquiry as to any threats or promises (Standard 14-1.5), and establishes the factual basis for the plea (Standard 14-1.6), the defendant is unlikely to be in a position to show that the plea was involuntary or entered without the required knowledge.

Less than full compliance with these standards, moreover, is not *per se* grounds for allowing withdrawal of a plea after sentencing. For example, if the judge misstates the maximum penalty as lower than that provided by law but the defendant’s sentence does not exceed that stated by the judge, there is no manifest injustice.⁴⁴

Standard 14-2.1(b)(i) (D) recognizes that unkept plea agreements are a basis for withdrawal.⁴⁵ Assuming the court follows Standards 14-1.5

charged, but also that he was actually ignorant of such an element at the time the plea was entered).

42. See, e.g., *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (dicta); *State v. Bentley*, 548 N.W.2d 50, 54 (Wis. 1996); *DeJesus v. State*, 897 P.2d 608, 617 n.9 (Alaska Ct. App. 1995).

43. See *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (dicta); *Holton v. Parratt*, 683 F.2d 1163, 1168-69 (8th Cir. 1982); *State v. Evans*, 234 N.W.2d 199, 201 (Neb. 1975).

44. See, e.g., *United States v. Timmreck*, 441 U.S. 780 (1979).

45. Most courts will permit withdrawal of a guilty plea where the prosecutor has failed to seek or has opposed promised charge or sentence concessions. See, e.g., *Santobello*

and 14-3.3(a), which require that all plea agreements be disclosed on the record, it should not be difficult to determine whether an agreement has been kept. Mere breach of an agreement by a prosecutor is not grounds for withdrawal, however, if the breach has no effect on the outcome of the case or on the sentence that is imposed (for example, if the court grants sentencing concessions contemplated in the plea agreement, even though the prosecutor has breached his or her agreement to advocate for those concessions).

Standards 14-2.1(b)(i)(E) and (F) correspond to the two circumstances recognized in Standard 3.3(e) under which the court must allow the defendant to withdraw a plea: That is, where the defendant does not receive charge or sentencing concessions contemplated by a plea agreement and either (1) "the judge had previously concurred, whether tentatively or fully" in the proposed concessions, or (2) the guilty plea was "entered on the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court."

Standard 14-2.1(b)(ii)

Standard 14-2.1(b)(ii) makes clear that a defendant need not allege "that he or she is innocent of the charge to which the plea has been entered" in order to move for withdrawal of the plea. Most courts in ruling on plea withdrawal applications generally do not require an assertion of innocence as an absolute precondition, but rather assess as one of a number of factors whether innocence is asserted. This standard takes the position that, even assuming the defendant's guilt, fairness requires that withdrawal of the plea be allowed if the effective assistance of counsel was denied; if the plea was not entered, authorized, or ratified; if the plea was not voluntary or was entered without knowledge of the charge or possible sentence to be imposed; if the plea was obtained by an unfulfilled plea agreement; if the charge or sentence concessions, tentatively or fully concurred in by the court, were not

v. New York, 404 U.S. 257, 263 (1971); *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (in dicta, one of criteria for determining "manifest injustice" warranting plea withdrawal is whether "plea agreement was not kept by the prosecution"); *Kolkman v. State*, 857 P.2d 1202, 1207 (Alaska Ct. App. 1993) ("manifest injustice" demonstrated where defendant shows prosecutor failed to seek or oppose concession promised) (quoting ALASKA R. CRIM. P. 11(h)(1)(ii)(dd)); see also Annotation, *Enforceability of Plea Agreement, or Plea Entered Pursuant Thereto, with Prosecuting Attorney Involving Immunity From Prosecution for Other Crimes*, 43 A.L.R. 3d 281 § 5 (1972).

obtained; or if the plea was entered with the understanding that it could be withdrawn if agreed-upon charge or sentence concessions were rejected by the court.

Standard 14-2.1(c) (Specific performance)

Standard 14-2.1(c) is a new standard recognizing that the defendant may seek the remedy of specific performance as an alternative to seeking withdrawal of the plea. There is a growing body of case law and commentary that treats plea agreements under general principles of contract law.⁴⁶ One of the principles that follows, as reflected in this standard, is that specific performance may be a remedy for breach of a plea agreement.⁴⁷ In *Santobello v. New York*, the Supreme Court recognized that courts should and do have discretion to remedy violations of broken plea agreements by specific performance as well as by permitting withdrawal of the plea.⁴⁸

46. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 9 n. 5 (1987); *Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977); *Mabry v. Johnson*, 467 U.S. 504, 508-509 (1984); *United States v. Isaac*, 141 F.3d 477, 481 (3d Cir. 1998); *United States v. Moulder*, 141 F.3d 568, 571 (5th Cir. 1998); *United States v. Mitchell*, 136 F.3d 1192, 1194 (8th Cir. 1998); *United States v. Bunner*, 134 F.3d 1000, 1003 (10th Cir.), cert. denied, 119 S. Ct. 81 (1998); *United States v. Ramunno*, 133 F.3d 476, 484 (7th Cir. 1998); *United States v. Gottesman*, 122 F.3d 150, 152 (2d Cir. 1997); *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *United States v. Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994); *United States v. Robinson*, 924 F.2d 612, 613-14 (6th Cir. 1991); *State v. Morales*, 804 S.W.2d 331, 332 (Tex. Crim. App. 1991); *Wright v. McAdory*, 536 So.2d 897, 901 (Miss. 1988); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). At the same time, because plea agreements also implicate public interests in the fair and final adjudication of criminal cases, some courts have emphasized that they should not be treated purely under private contract law rules. See, e.g., *United States v. Pielago*, 135 F.3d 703, 709 (11th Cir. 1998); *United States v. Rourke*, 74 F.3d 802, 805 (7th Cir.), cert. denied 517 U.S. 1215 (1996); *Peavy v. United States*, 31 F.3d 1341, 1346 (6th Cir. 1994); *United States v. Asset*, 990 F.2d 208, 216 (5th Cir. 1993).

47. See *Santobello v. New York*, 404 U.S. 257, 263 (1971); see also *Lane v. Williams*, 455 U.S. 624, 630 (1982) (where defendants' plea colloquy was deficient, they could seek to have convictions set aside and to plea anew or they could seek specific performance of the plea agreement). This right to specific performance, however, only extends to plea offers that are accepted by the defendant before being withdrawn by the prosecutor. See *Mabry v. Johnson*, 467 U.S. 504 (1984).

48. It is clear, however, that this relief is discretionary, not mandatory. See *Santobello*, 404 U.S. at 263 ("The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether, in the view of the state court, the circumstances require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the relief sought by the petitioner, i.e., the oppor-

The remedy of specific performance is likely to be appropriate in circumstances where a party has changed its position as a result of a guilty plea and conviction, so that withdrawal would not be a just or an effective remedy. This may occur where the defendant has already satisfied his or her obligations under a plea agreement, so that withdrawal of the plea would not restore the parties to their previous positions. For example, a defendant who has agreed to cooperate by testifying in exchange for concessions by the prosecution and who has already done so cannot ordinarily be made whole by withdrawal of a plea.⁴⁹ Such a remedy may also be proper where the violation of the plea agreement concerns the sentence only, and a specific performance remedy, in these circumstances, will promote the finality of criminal judgments arrived at by way of pleas of guilty or nolo contendere.⁵⁰

Standard 14-2.1(c) limits availability of the specific performance remedy to those circumstances in which the remedy is "within the power of the court." This is intended to address those limited circumstances in which the court has no authority to enter the order requested. For example, it would not be within the power of a federal court to order specific performance of a promise in a plea agreement that no state charges will be brought; in such a case, specific performance would not be an available alternative to withdrawal of the plea because a federal court has no jurisdiction to order state prosecutors not to bring charges. At the same time, this limitation is not intended to suggest that the court's authority to order specific performance is otherwise limited, nor to discourage the use of this remedy where appropriate.

tunity to withdraw his plea of guilty."); see also *Mabry*, 467 U.S. at 510 n.11 (*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea; the Court made it clear that permitting *Santobello* to replead was within the range of constitutionally appropriate remedies."). See generally Annotation, *Choice of Remedies Where Federal Prosecutor Has Breached Plea Bargain - Post-Santobello v. New York* (1971), 120 A.L.R. FED. 501 (1994).

49. See, e.g., *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990) ("When a prosecutor makes a promise and obtains in return cooperation from the defendant, the promise must be kept.").

50. See *Ex parte Johnson*, 669 So.2d 205 (Ala. 1995); *Citti v. State*, 807 P.2d 724 (Nev. 1991).

Standard 14-2.2. Withdrawn plea and discussions not admissible

(a) A plea of guilty or nolo contendere that has been withdrawn should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(b) Any statement made in the course of any proceedings concerning a plea of guilty or nolo contendere that has been withdrawn, or in plea discussions with the prosecuting attorney that result in a plea of guilty or nolo contendere that is later withdrawn, should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings, except that such a statement may be admitted:

(i) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel; or

(ii) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

History of Standard

This standard has been amended so that it addresses only the admissibility of pleas that are withdrawn, and of statements made in plea discussions or proceedings leading to a plea that is withdrawn. The question of the admissibility of pleas that are not accepted by the court, and statements made in plea discussions that do not lead to a guilty plea, are addressed elsewhere, in Standard 14-3.4. The standard has also been rewritten more accurately to reflect the legal rules concerning the circumstances in which such facts may be admitted in evidence.

Related Standards

FED. R. CRIM. P. 11(e)(6)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.7

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.7

UNIF. R. CRIM. P. 441(e)

Commentary

As revised in the third edition, Standard 14-2.2 addresses only the admissibility questions related to withdrawn pleas. This is consistent with its placement in Part II of these standards, which is limited to questions concerning “Withdrawal of the Plea.” General admissibility questions concerning other aspects of plea proceedings and plea negotiations are addressed in Standard 14-3.4, which is intended to be read in conjunction with this standard.

Standard 14-2.2(a)

Standard 14-2.2(a) prohibits the introduction as “evidence against the defendant in any criminal or civil action or administrative proceedings” the fact that the defendant entered a plea of guilty or nolo contendere that was later withdrawn. In the federal courts, the withdrawal of a plea of guilty has been inadmissible as substantive evidence since 1927, when the Supreme Court decided *Kercheval v. United States*.¹ State courts have ruled similarly.²

This contrasts with certain older rulings, which allowed such withdrawn pleas to be admitted, but afforded the accused an opportunity to explain the plea.³ Such an opportunity, however, may mean little, given the jury’s tendency to give extreme weight to such evidence. Therefore, the absolute prohibition contained in Standard 14-2.2(a) is the more appropriate rule.

Although the nature of the nolo contendere plea is such that it is unlikely that it would be offered in evidence, even if not withdrawn, the standard makes it clear that a withdrawn nolo plea is similarly not admissible.

Standard 14-2.2(b)

Standard 14-2.2(b) concerns the separate issue of a “statement made in the course of any proceedings” concerning a guilty or nolo plea that is withdrawn, or in “plea discussions with the prosecuting attorney”

1. 274 U.S. 220 (1927).

2. See, e.g., *People v. Oliver*, 314 N.W.2d 740 (Mich. Ct. App. 1981); *Shoemaker v. State*, 445 S.E.2d 558 (Ga. Ct. App. 1994); *State v. Simonson*, 732 P.2d 689 (Idaho Ct. App. 1987).

3. See, e.g., *Rascon v. State*, 57 P.2d 304 (Ariz. 1936); *State v. Downs*, 341 P.2d 957 (Kan. 1959) (dictum); *Commonwealth ex rel. Ashmon v. Banmiller*, 137 A.2d 236 (Pa. 1958), cert. denied, 356 U.S. 945 (1958); see Annotation: *Propriety and Prejudicial Effect of Showing, in Criminal Case, Withdrawn Guilty Plea*, 86 A.L.R.2d 326, § 3 (1962).

resulting in a plea that is later withdrawn. While such statements are generally inadmissible, there are two exceptions to this rule: where the statements were perjurious and were made “under oath, on the record, and in the presence of counsel;” and where another statement in the same course of discussions has been introduced and the defendant’s statement “ought in fairness to be considered contemporaneously with it.” This standard is substantively identical to provisions in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.⁴ Neither Standard 14-2.2 nor the federal rules go as far as to authorize the later use for impeachment purposes of statements made while entering a plea that is withdrawn.

It should be noted, however, that while this standard is consistent with the defendant’s general rights under federal law, the Supreme Court has held that the prohibition against the impeachment use of statements made during plea negotiations can be waived by the defendant. In *United States v. Mezzanato*,⁵ the defendant wished to discuss cooperating with the Government. The prosecutor, as a condition to holding such discussions, indicated that the defendant would have to agree that any statements he made during their meeting could be used, in the event the case went to trial, to impeach any contradictory testimony the defendant might give at trial. After conferring with counsel, the defendant agreed to these terms for the plea discussions, but was not able to reach a cooperation agreement. At trial, the defendant took the stand. Over the defense’s objection, he was cross-examined with inconsistent statements he had made to the prosecutor during the cooperation discussion. The Supreme Court upheld the impeachment use of his statements, holding that “absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.”⁶

The Court’s decision is, in major part, founded upon interpretation of the applicable federal rules.⁷ However, the Court also rejected arguments founded upon the “public policy” arguments that permitting

4. See FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410. But see *State v. Hansen*, 633 P.2d 1202 (Mont. 1981) (contrary to the federal rule, Montana allows statements in connection with guilty pleas that are later withdrawn to be used for impeachment as long as voluntary, reliable, and made on the record).

5. 513 U.S. 196 (1995).

6. *Id.* at 210.

7. See *id.* at 200-06.

waiver would be fundamentally inconsistent with the federal rules' goal of encouraging voluntary settlement and that waiver agreements invite prosecutorial overreaching and abuse.⁸ In particular, the Court expressed its judgment that "there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining. The court below focused entirely on the defendant's incentives and completely ignored the other essential party to the transaction: the prosecutor. Thus, although the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it."⁹

These standards would not preclude a prosecutor from requesting a defendant to waive rights that would otherwise be applicable under Standard 14-2.2 in order to engage in plea negotiations. It should be recognized, however, that while the *Mezzanato* decision is binding in its interpretation of the federal rules, its policy judgment regarding the likely effect of its ruling on defendants' incentives to enter into plea negotiations is subject to debate. Indeed, some would argue that any use of statements made during plea negotiations, particularly if the waiver rule is extended to possible use as direct evidence as well as impeachment, will have an unfortunate chilling effect upon negotiated pleas. Accordingly, the standards do not take any position on whether requesting such waivers is desirable as a matter of criminal justice policy.

8. *Id.* at 206-07, 209-210.

9. *Id.* at 207.

PART III.

PLEA DISCUSSIONS AND PLEA AGREEMENTS

Standard 14-3.1. Responsibilities of the prosecuting attorney

(a) The prosecuting attorney may engage in plea discussions with counsel for the defendant for the purpose of reaching a plea agreement. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant. Where feasible, a record should be made and preserved for all such discussions with the defendant.

(b) The prosecuting attorney should make known any policies he or she may have concerning disposition of charges by plea or diversion.

(c) The prosecuting attorney, in considering a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations or to remain silent as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere, including such terms of the sentence as criminal forfeiture, restitution, fines and alternative sanctions;

(ii) to dismiss, to seek to dismiss, or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct;

(iii) to dismiss, to seek to dismiss, or not to oppose dismissal of other charges or potential charges if the defendant enters a plea of guilty or nolo contendere;

(iv) where appropriate, to enter an agreement with the defendant regarding the disposition of related civil matters to which the government is or would be a party, including civil penalties and/or civil forfeiture; or

(v) in lieu of a plea agreement, to enter an agreement permitting the diversion of the case from the criminal process where appropriate and permissible to do so.

(d) Similarly situated defendants should be afforded equal plea agreement opportunities.

(e) The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials before reaching a plea agreement.

(f) The prosecuting attorney should not knowingly make false statements or representations as to law or fact in the course of plea discussions with defense counsel or the defendant.

(g) The prosecuting attorney should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.

(h) In connection with plea negotiations, the prosecuting attorney should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges or the prosecuting attorney has no good faith intention of pursuing those charges.

History of Standard

This standard, retitled "Responsibilities of the prosecuting attorney," has been expanded in a number of respects. A new subsection (b) has been included, calling upon the prosecutor to "make known any policies he or she may have concerning disposition of charges by plea or diversion."

Subsection (c)(i) has been amended to clarify that a prosecutor may promise, as part of a plea agreement, "to remain silent" as to the sentence to be imposed. The same section has been amended to make clear that a plea agreement may properly address "such terms of sentence as criminal forfeiture, restitution, fines and alternative sanctions." Subsection (c)(iii) has been amended to reflect that a plea agreement may include a prosecutor's promise to dismiss charges against parties other than the defendant. Section (c) also contains two new subsections. New subsection (c)(iv) authorizes the prosecutor, where appropriate, to enter into an agreement with the defendant regarding the "disposition of related civil matters," including "civil penalties and/or civil forfeiture." New subsection (c)(v) authorizes the prosecutor, in lieu of entering a plea agreement, to enter "an agreement permitting the diversion of the case from the criminal process" in appropriate cases.

New subsection (f) has been included, concerning the prosecutor's ethical duties in making representations during plea discussions. It pro-

vides that a prosecuting attorney “should not knowingly make false statements or representations as to law or fact in the course of plea discussions with defense counsel or the defendant.”

New subsection (g) has been included, addressing the prosecutor’s discovery obligations. It provides that a prosecuting attorney “should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.”

Finally, a new subsection (h) has been included, setting out the prosecutor’s duty not to bring or threaten charges which “admissible evidence does not exist to support” or which the prosecutor “has no good faith intention of pursuing.”

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standards 3-4.1, 3-4.2

FED. R. CRIM. P. 11(e)(1)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3

NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standards 3.1, 3.3, 3.6

UNIF. R. CRIM. P. 443(a)

NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS §§ 1.1, 25.1, 25.4 52.2, 66.1 through 66.3, 67.1, 68.1

Commentary

Standard 14-3.1 governs the basic role of the prosecutor in the plea bargaining process. It addresses the types of terms which the prosecutor may agree to, as well as the type of improper conduct the prosecutor should avoid during plea negotiations.

Standard 14-3.1(a) (Propriety of plea negotiations)

Standard 14-3.1(a) authorizes the prosecutor to engage in plea discussions with the defense. For at least thirty years, it has been clear, as a constitutional matter, that the process of negotiating a guilty plea between the prosecution and defense is not invalid.¹ The Supreme Court has emphasized, as well, that plea negotiations are “an essential

1. See, e.g., *Brady v. United States*, 397 U.S. 742, 749-55 (1970).

component of the administration of justice.”² Standard 14-3.1(a) reflects this philosophy by expressly recognizing the propriety of plea discussions. It states that the prosecuting attorney “may engage in plea discussions with counsel for the defense for the purpose of reaching a plea agreement,” and makes clear as well that the prosecutor may engage in discussions directly with a defendant who has “properly waived counsel.”

Negotiations with Unrepresented Defendant

Standard 14-3.1(a) requires that, where discussions are held with an uncounselled defendant, the prosecutor must “where feasible” make and preserve a record of all such discussions. An identical provision is contained in the Prosecution Function Standards.³ The concept of “feasibility” incorporates the idea that different types of records are appropriate for different types of cases. In serious cases, it would ordinarily be appropriate—for the protection of the prosecutor as well as the defendant—to keep a verbatim record of any prosecution discussions with an uncounselled defendant.

The standard rejects the notion, however, contained in Standard 3-4.1(b) of the Prosecution Function Standards, that a prosecutor could negotiate directly with a represented defendant so long as it is done “with defense counsel’s approval.” There are no circumstances in which direct plea discussions should be conducted with a represented defendant without defense counsel present. Such a policy invites malpractice and can only lead to subsequent challenges to any resulting conviction.

Refusal to Plea Bargain

While this standard is phrased in permissive terms (indicating what prosecutors “may” do), prosecutors should follow an affirmative policy of openness to plea discussions. In certain jurisdictions prosecutors have experimented with blanket refusals to enter into plea agreements.⁴

2. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260-61 (1971).

3. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.1(b) (3d ed. 1993). The requirement, in the second edition of this standard, that a verbatim record “ordinarily” be created for such discussions was amended in the third edition to conform to this part of the Prosecution Function Standards, which require such a record to be created “where feasible.”

4. See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 U.C.L.A. L. REV. 265 (1987); Roland Acevedo, Note, *Is a Ban on Plea Bar-*

Such prosecutorial policies have reportedly not been successful. Moreover, a refusal to negotiate with defendants is inconsistent with the ABA's Prosecution Function Standards⁵ and with efficient judicial administration. Local jurisdictions may, of course, establish reasonable deadlines to require that any plea negotiations in a case be concluded by a specified date in advance of trial.

Pre-Indictment Negotiations

Prosecutors should also be available to discuss the possibility of a plea agreement before a formal indictment is filed. There is a growing practice, at least in the federal system, of conducting plea negotiations before an indictment is issued. Ordinarily, the plea is then entered at the same time that the indictment is filed, or indictment is waived and the plea is entered on an information. Because this procedure conserves judicial resources, it should be encouraged, at least where the defendant is represented by counsel.

Standard 14-3.1(b) (Publicizing plea policies)

Standard 14-3.1(b) calls upon the prosecutor to "make known any policies he or she may have concerning disposition of charges by plea or diversion." This is consistent with the provision from Prosecution Function Standard 3-4.1(a) that the prosecutor should "make known" his or her policy concerning plea negotiations. This standard emphasizes the principle that all defense counsel should be placed on an equal footing insofar as possible, and should all be entitled to learn the special policies or practices that a particular prosecuting attorney's office may have concerning charge and sentence concessions generally, or in particular types of cases.

While the standard does not specify any particular policies that the prosecutor should adopt, whatever policies are adopted should encourage the drafting of clear and unambiguous plea agreements. There has been increasing litigation over the meaning and enforcement of terms included in plea agreements, such as cooperation clauses, agreements

gaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study, 64 FORDHAM L. REV. 987, 998 (1995); *Espinoza v. Martin*, 894 P.2d 688 (Ariz. 1995).

5. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.1(a) (3d. ed. 1993) ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea."); see also NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 67.1 (2d ed. 1991) (to same effect).

that the prosecutor “stand silent” at sentencing or make no recommendation, and other terms.⁶ Disputes about the terms of plea agreements are particularly problematic because they may turn the prosecutor and defense counsel from advocates to witnesses to resolve questions of interpretation.⁷ To avoid such disputes, it is important to encourage the careful drafting of plea agreements. Because the prosecutor is ordinarily the author of the plea agreement, prosecutors’ offices should develop standard language which clearly explains to the defendant what the government is and is not agreeing to.⁸

Standard 14-3.1(c) (Terms of plea)

Under Standard 14-3.1(c), the prosecutor has the authority to agree to a wide range of terms as part of the resolution of a case by a guilty plea. Plea agreements commonly include sentence recommendations and agreements to dismiss or limit charges. Such agreements may also, however, cover such matters as forfeiture, restitution, civil penalties, agreements not to prosecute other defendants, and other related terms “as dictated by the circumstances of the individual case.” This standard reviews the basic categories of plea terms.

Standard 14-3.1(c)(i) (Sentencing recommendations)

Standard 14-3.1(c)(i) recognizes the prosecutor’s authority to “make or not oppose favorable recommendations,” or “to remain silent,” as to the sentence to be imposed on the defendant following the entry of a guilty plea. As part of this presentation, the prosecutor may agree to make recommendations that sentences be served concurrently, and may also agree to weigh in on the recommended length of any term of probation or supervised release. While some have debated whether prose-

6. See, e.g., *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990) (promise to tell other courts of defendant’s cooperation); *United States v. Ramos*, 810 F.2d 308, 313-14 (1st Cir. 1987) (promise to recommend light sentence); *United States v. Miller*, 993 F.2d 16, 19 (2d Cir. 1993) (promise not to oppose motion for downward departure); *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991) (promise not to recommend particular sentence).

7. See *United States v. DeMichael*, 692 F.2d 1059, 1062-63 (7th Cir. 1983) (“It is most distasteful to be confronted with conflicting testimony by lawyers with respect to the terms of an agreement which ought to be clear and indisputable in its terms”), *cert. denied*, 461 U.S. 907 (1983). Cf. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.2(c) (3d ed. 1993) (prosecutor should not fail to comply with a plea agreement).

8. Cf., e.g., *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) (ambiguities in plea agreement construed against government as drafter).

cutors should have a significant role in determining the defendant's sentence—a role traditionally reserved for the court—there are important reasons to allow such concessions as part of plea negotiations. Agreeing upon a recommended sentence increases the certainty for the defendant, and thereby enhances the voluntary and knowing nature of the plea. The court may also be assisted by receiving the prosecutor's recommendation of sentence, based on his or her knowledge of other comparable cases resolved by plea.

The prosecutor's sentencing recommendations may extend not only to whether the defendant should be incarcerated, and for how long, but also to "such terms of the sentence as criminal forfeiture, restitution, fines and alternative sanctions." Under both federal and state law, the government may require the forfeiture of assets used in criminal activity and/or restitution to the victim.⁹ Terms to this effect are routinely negotiated as a part of guilty plea agreements. This language expressly recognizes the prosecutor's power to seek such terms during plea negotiations.

Standard 14-3.1(c)(ii) (Dismissal of charges)

Under Standard 14-3.1(c)(ii), the prosecutor may agree to "dismiss, to seek to dismiss, or not to oppose dismissal" of the offense charged if the defendant agrees to enter a plea to "another offense reasonably related to the defendant's conduct." Such a "reasonably related" offense may include an offense of a lesser degree than the offense charged, or a lesser included offense.¹⁰ However, this standard is not intended to be limited to such offenses. In some cases, for example, charge concessions may be appropriate but there may be no lesser included offense that is available. This standard would allow the defendant to plead to any offense which is supportable based on the facts of the defendant's original conduct.

9. See, e.g., 18 U.S.C. §§ 981, 982 (1994 & Supp. II 1996) (civil and criminal forfeiture); 18 U.S.C.A. § 3663A (1996) (mandatory restitution).

10. See, e.g., N.Y. CRIM. PROC. LAW § 220.10(3) (McKinney 1993) ("where the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense"); FLA. R. CRIM. P. 3.170(h) ("The defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged that is included in the offense charged in the indictment or information or to any lesser degree of the offense charged") (emphasis added); MINN. R. CRIM. P. 15.07 ("With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea of guilty to a lesser included offense or to an offense of a lesser degree.").

Standard 14-3.1(c)(iii)

While the preceding standard addresses the “offense charged against the defendant,” Standard 14-3.1(c)(iii) addresses negotiations concerning “other charges or potential charges.” This includes not only other charges that could be filed against the defendant himself or herself, but also charges that may be pending or threatened against other co-defendants. The prosecutor has the authority to agree “to dismiss, seek to dismiss, or not to oppose dismissal of” such charges (as well, of course, as the authority to agree not to bring such charges).

This standard is consciously drafted to recognize the power that a prosecutor has, in certain circumstances, to negotiate a plea agreement in exchange for charge concessions against third parties (e.g., other family members). At the same time, given the dangers for undue pressures posed by such plea offers (which are recognized elsewhere in the standards), this standard is not intended to broadly endorse this tactic or suggest that it is proper in all cases.

Standard 14-3.1(c)(iv) (Negotiation of civil settlement)

Standard 14-3.1(c)(iv), which is new in the third edition, recognizes the prosecuting attorney’s authority, in appropriate cases, to negotiate the resolution of “related civil matters to which the government is or would be a party” (for example, claims for civil penalties or civil forfeiture). This standard is intended to refer to those civil matters which the prosecutor has the power to resolve. It does not authorize, or encourage, prosecutors to negotiate civil settlements that are properly decided by other agencies (for example, civil tax matters), without the concurrence of those agencies.

Standard 14-3.1(c)(v) (Pretrial diversion)

Standard 14-3.1(c)(v), which is also new, expressly recognizes the prosecutor’s power to enter into pretrial diversion agreements. This provision corresponds to new Standard 14-4.1, which authorizes pretrial diversion programs, and to new Standard 14-3.2(e), which concerns defense counsel’s duty to explore a possible resolution through diversion. A similar principle is reflected in Prosecution Function Standard 3-3.8, which encourages prosecutors to consider “in appropriate cases the availability of noncriminal disposition, formal or informal” as an alternative to pressing criminal charges.

Standard 14-3.1(d) (Similarly situated defendants)

Standard 14-3.1(d) makes clear that “similarly situated defendants should be afforded equal plea agreement opportunities.” This goal is important as a matter of fairness, and also for sound correctional policy, since it can create significant disciplinary problems if incarcerated defendants have received vastly disparate sentences for comparable conduct. Such equality of opportunity is also important on equal protection grounds.¹¹ This does not mean that all defendants must be offered concessions or identical concessions. It does mean, however, that the same standards relevant to the granting of concessions should be applied to all cases. This objective can perhaps be best served if prosecution offices establish formal procedures for plea discussions and plea agreements, as provided in the standards on the Prosecution Function.¹²

Standard 14-3.1(e) (Victim and law enforcement sentiments)

Standard 14-3.1(e) calls upon the prosecuting attorney to make “every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials” before reaching a plea agreement with the defendant. In some jurisdictions, the victim may not even be informed of the disposition of the case which was based upon the violation of his or her rights as a citizen. Victims who are shut out of the disposition process in this manner may develop a cynical attitude toward the criminal justice system and may become reluctant to cooperate with law enforcement officers in the future. To prevent these consequences, it is important that the prosecutor make every effort to contact the victim, to listen to the victim’s views, and to explain the plea negotiation process to the victim.¹³

Law enforcement officers also should be apprised of the plea negotiation process and their views concerning the disposition of cases should be sought. This is important because the officers working on the case will often have relevant information that properly should be considered as part of the plea process.

11. See *Oyler v. Boles*, 368 U.S. 448 (1962).

12. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-2.5 (3d ed. 1993).

13. See, e.g., CAL. PENAL CODE § 679.02(a)(12) (West 1999); S.C. CONST. Art. I, § 24(A)(1), (C)(2) (1998); S.C. CODE ANN. §§ 16-3.1535(D), 1540(A), 1545(H) (Law Co-op. 1998).

Of course, the prosecutor is not bound to act in accordance with the suggestions or feelings either of the victims or the law enforcement officers. The duty of the prosecutor is to act in the best interests of society at large, and numerous factors normally must be considered in addition to the views of victims and police.¹⁴ However, both victims and police should be afforded the opportunity to confer with the prosecutor and should come away from their discussions feeling that they have been afforded an opportunity to be heard and that they understand the process whereby dispositions are made.

Standard 14-3.1(f) (Misrepresentations)

Standard 14-3.1(f) is a new standard which bars the prosecuting attorney from “knowingly mak[ing] false statements or representations as to law or fact in the court of plea discussions.” It is mirrored by new Standard 14-3.2(d), which imposes an identical requirement on defense counsel. These standards are based on similar standards included in the Prosecution Function and Defense Function Standards, as well as a comparable provision in the Model Rules of Professional Responsibility.¹⁵ While the obligation is also set out elsewhere in the criminal justice standards, this ethical obligation is important enough that it has been added here as well.

A prosecutor should be particularly careful not to make any misrepresentations concerning his or her ability to bind other governmental agencies or entities.¹⁶ In the federal system, for example, prosecutors should be careful when making commitments concerning the actions of

14. For a listing of factors appropriate for consideration of prosecutors in the charging decision, see ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.9 (3d ed. 1993).

15. See MODEL RULE OF PROFESSIONAL CONDUCT Rule 4.1(a) (prohibiting a lawyer from “knowingly . . . mak[ing] a false statement of material fact or law to a third person”) (1996); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standards 3-4.1(c) (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-6.2(e) (3d ed. 1993).

16. See, e.g., *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994) (state prosecutors cannot promise that federal prosecution will not be brought); *United States v. Fitzhugh*, 801 F.2d 1432, 1434-35 (D.C. Cir. 1986) (federal prosecutors cannot bind DEA); *State v. Parker*, 640 A.2d 1104 (Md. 1994) (promise that defendant would serve his concurrent sentences in federal prison beyond state court’s jurisdiction and therefore unenforceable). But see, e.g., *United States v. Harvey*, 791 F.2d 294, 303 (4th Cir. 1986) (promise by federal prosecutor not to bring any further charges is binding on other U.S. Attorneys’ offices).

other agencies such as the IRS or INS.¹⁷ The prosecutor should also be careful not to “imply a greater power to influence the disposition of a case than is actually possessed.”¹⁸

Standard 14-3.1(g) (Discovery)

Standard 14-3.1(g) specifies that the prosecutor shall not, “because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.” This new standard addresses the trend in both the state and federal systems toward requiring increased exchanges of discovery before a criminal trial.

Because plea negotiations often take place early in the process, plea discussions may occur before important evidence is required to be disclosed. Thus, there has been a debate over what information, if any, the prosecution should be required to provide the defense about the case during plea negotiations.¹⁹ A significant category of information, in this regard, is exculpatory evidence as defined in *Brady v. Maryland* and subsequent cases, which the defendant is entitled to receive as a matter of constitutional due process.²⁰ Some courts hold that *Brady* obligations apply during plea negotiations, and that a prosecutor’s failure to disclose *Brady* material during such negotiations can invalidate a guilty plea under certain circumstances.²¹ As this reflects, courts should be

17. Compare *San Pedro v. United States*, 79 F.3d 1065, 1069-70 (11th Cir. 1996) (prosecutor cannot promise non-deportation because authority over deportation is vested in Attorney General), cert. denied, 519 U.S. 980 (1996); with *Margalli-Olvera v. I.N.S.*, 43 F.3d 345, 351 (8th Cir. 1994) (holding that Assistant United States Attorney has actual authority to bind the I.N.S.).

18. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.2(b) (3d ed. 1993).

19. See generally Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989); Eleanor Ostrow, *The Case For Preplea Disclosure*, 90 YALE L.J. 1581 (1981).

20. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also, e.g., *Giglio v. United States*, 405 U.S. 150, 154 (1972) (exculpatory evidence includes evidence that serves to impeach credibility of government witnesses).

21. See, e.g., *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988), cert. denied, 489 U.S. 1029 (1989); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir.), cert. denied, 488 U.S. 890 (1988); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985), cert. denied, 475 U.S. 1048 (1986); *Banks v. United States*, 920 F. Supp. 688, 691 (E.D. Va. 1996); *United States v. Millan-Colon*, 829 F. Supp. 620, 635 (S.D.N.Y.), aff’d, 17 F.3d 14 (2d Cir. 1993).

particularly concerned when the prosecution has withheld from the defense, during plea negotiations, important evidence known to the prosecutor that goes to the defendant's guilt, innocence, or punishment. The failure to provide such information before a guilty plea is entered undermines the fairness of the plea and invites subsequent challenges.

Discovery obligations under state or local law may also affect plea negotiations. Increasingly, state statutes and rules require pretrial disclosures by the prosecutor of the identity of witnesses, search and seizure evidence, eyewitness identification evidence, and other trial-related information. Some specify that such disclosures must be made early in the case.²² The prosecuting attorney should, of course, make all discovery disclosures that may be required by local law in a timely fashion.²³ Indeed, some jurisdictions have reportedly found that the early disclosure of discovery information may have a salutary effect in leading to early plea negotiations in appropriate cases.

The ABA's Criminal Justice Standards on Discovery state that discovery procedures should "provide the defendant with sufficient information to make an informed plea,"²⁴ recognizing that "[t]he informed plea is crucial to the integrity of the criminal justice system."²⁵ Similarly, the ABA's Standards on the Prosecution Function provide that a prosecutor should make disclosure of exculpatory evidence to the defense "at the earliest feasible opportunity."²⁶

This Standard thus is not intended to impose new or additional discovery obligations. Instead, it simply recognizes that plea discussions do not permit the prosecutor to dispense with discovery disclosures that are otherwise required to be made under governing law. The prosecutor is not relieved of the obligation to make required discovery dis-

22. See MD. R. CRIM. P. 4-263(a) (requiring prosecution disclosures without defense request, including exculpatory evidence, statements related to any search and seizure, statements made by the defendant and pretrial identification evidence).

23. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11 (3d ed. 1993).

24. ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY, Standard 11-1.1(a)(ii) (3d ed. 1996).

25. *Id.*, Commentary at 3; see also *id.*, Standard 11-1.1(a), Commentary at 2-3 ("By emphasizing that all types of dispositions—whether by diversion, plea or trial—should be fair and expeditious, the standard recognizes that most criminal cases are disposed of without trial, and that discovery procedures should promote the fairness of those dispositions.").

26. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (3d ed. 1993).

closures simply because plea negotiations are ongoing. Such obligations may differ, however, depending on the stage of the case. For example, disclosure obligations that apply in an early stage of the case are often less extensive than those that apply closer to trial, when there may be affirmative obligations on the prosecutor to search for specific types of evidence. The obligations in connection with plea negotiations should, similarly, vary according to the timing of the discussions. Leaving aside any affirmative disclosure obligations under federal or state law, a prosecutor should never knowingly seek to exploit a misunderstanding by the defendant or defense counsel concerning the strength or existence of evidence in order to obtain a more favorable plea agreement.²⁷

This is not to say, of course, that the prosecutor should be required to provide every piece of information about a case before accepting a guilty plea from the defendant. There is a balance between ensuring that the defendant is given all the information to which he or she is entitled at that point in time under applicable law, and avoiding placing on the prosecution such a burden to provide discovery in connection with plea negotiations that it eliminates incentives to engage in such discussions.

Nor should the prosecutor's failure to disclose discovery, no matter how limited in significance, automatically provide grounds for withdrawal from or invalidation of the plea. The circumstances under which defendants will be entitled to invalidate guilty pleas because of a breach of the discovery rules are quite narrow, because the requirement for "materiality" of the withheld information tends to be quite strictly construed by the courts. Ultimately, the primary responsibility to ensure that the defendant has all of the relevant information falls upon defense counsel, who is required to make an appropriate investigation of the case before the defendant enters a guilty plea.²⁸

Standard 14-3.1(h) (Good faith negotiations)

Standard 14-3.1(h) is a new standard that expressly recognizes the prosecutor's obligation, in connection with plea negotiations, to refrain from bringing or threatening charges against the defendant or another person, or refusing to dismiss such charges, where "admissible evidence does

27. Cf. *id.*, Standard 3-4.1(c) ("A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.").

28. See Standard 14-3.2.

not exist to support the charges” or the prosecutor has “no good faith intention of pursuing those charges.” This reflects that while pressure is inherent in all plea discussions, certain prosecutorial pressures may range into the improper. It is important to have a standard that addresses these issues because improper and deliberately coercive prosecutorial conduct in plea negotiations undermines the fairness of guilty pleas and invites subsequent legal challenges. It is also inconsistent with the prosecutor’s role as a public representative charged to see that “justice shall be done.”²⁹

This standard is based on a similar standard in the Model Code of Pre-Arrestment Conduct.³⁰ It reflects the case law that has developed recognizing that certain types of prosecutorial threats in the plea bargaining process are improper and may invalidate the plea. The ABA’s Prosecution Function Standards similarly reference certain conduct in which prosecutors may not engage during plea negotiations.³¹

There is, of course, a range of prosecutorial conduct during plea negotiations that places pressure on the defendant, but that is entirely proper nevertheless. The Supreme Court has long held, however, that a guilty plea that is “induced by promises or threats which deprive it of the character of a voluntary act” is void.³² The courts have recognized, in this regard, that certain inducements to plead guilty inherently create a risk of prosecutorial overreaching. A prosecutor’s pressure upon a defendant to plead will be found to rise to the level of improper conduct when it threatens the integrity of the defendant’s plea.³³

29. *Berger v. United States*, 295 U.S. 78, 88 (1935).

30. The ALI’s Model Code of Pre-Arrestment Procedure bars a prosecutor from “charging or threatening to charge the defendant with a crime not supported by facts believed by the prosecutor to be provable” (§ 350.3(3)(a)). Similarly, it bars the prosecutor from “charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him” (§ 350.3(3)(b)) (1975).

31. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.2(a) (3d ed. 1993) (prosecutor may not “make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence”); *id.*, Standard 3-4.2(b) (prosecutor may not “imply a greater power to influence the disposition of a case than is actually possessed”).

32. *Machibroda v. United States*, 368 U.S. 487, 493 (1962); see also, e.g., *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea may be rendered involuntary by, *inter alia*, “inducements, [or] subtle or blatant threats”); *Brady v. United States*, 397 U.S. 742, 755 (1970) (plea void if induced by “threats (or promises to discontinue improper harassment)” or by “promises that are by their nature improper”).

33. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 n.8 (1978) (expressing concern that certain prosecutorial promises “might pose a . . . danger of inducing a false guilty plea by

Certain types of prosecutorial tactics pose particular danger of undermining the voluntariness of the resulting plea. One concerns the situation in which a prosecutor promises leniency to another person in return for the defendant's plea.³⁴ Courts recognize, for example, that a prosecutor should not threaten the prosecution of other family members or the forfeiture of their property where there is either no adequate basis for such action, or no genuine intention to proceed.³⁵ Similarly, it would be improper for a prosecutor to seek to induce a plea of guilty by charging or threatening to charge the defendant with a crime not supported by facts the prosecutor believes to be provable at trial. Standard 14-3.1(h) implements these principles by barring the prosecutor from bringing or threatening charges "where admissible evidence does not exist to support" those charges or where he or she "has no good faith intention of pursuing" them.

Another type of prosecutorial strategy that has received heightened scrutiny are threats to bring additional charges if the defendant does not plead guilty, where the prosecutor does not in fact intend to bring charges or has no good faith basis for doing so. The standard's condemnation of such tactics is consistent with the United States Department of Justice's policies. For example, the Justice Department's death penalty protocol expressly states that "[t]he death penalty may not be

skewing the assessment of the risks a defendant must consider"); *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992) ("To say that a practice is 'coercive' or renders a plea 'involuntary' means only that it creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty.").

34. See *Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1982) ("Plea bargains, which include adverse or lenient treatment for some person other than the accused, are not per se invalid, but these situations demand that prosecutors exercise a high standard of good faith in negotiating such pleas"); *United States v. Diaz*, 733 F.2d 371, 374-375 (5th Cir. 1984) (when discussing prosecution of third party family members with defendant, prosecutors must be "held to a high standard of good faith"). See generally Annotation, *Effect Under Rule 11(e) of Federal Rules of Criminal Procedure, of Plea Bargain Based on Offer of Leniency to Person Other Than Accused*, 50 A.L.R. FED. 829 (1980).

35. See, e.g., *Sanchez v. United States*, 50 F.3d 1448, 1455 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 497-500 (10th Cir. 1994); *Weisberg v. Minnesota*, 29 F.3d 1271, 1278-79 (8th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); *United States v. Bellazerius*, 24 F.3d 698, 704 (5th Cir.), cert. denied, 513 U.S. 954 (1994); *United States v. Marquez*, 909 F.2d 738, 741-742 (2d Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *Politte v. United States*, 852 F.2d 924 (7th Cir. 1988); *Harman v. Mohn*, 683 F.2d 834 (4th Cir. 1982); *In re Ibarra*, 666 P.2d 980 (Cal. 1983) (en banc).

sought, and no attorney for the Government may threaten to seek it, for the purpose of obtaining a more desirable negotiating position.”³⁶

Standard 14-3.2. Responsibilities of defense counsel

(a) Defense counsel should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

(c) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant.

(d) Defense counsel should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.

(e) At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

History of Standard

Like the comparable standard governing prosecutors, this standard has been expanded in an a number of respects and has been entitled

36. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.000(I) (1995-3 Supp.) ("Plea Agreements"); *see also id.* at § 9-110.200 (use of RICO will not be approved where purpose in seeking RICO charge is something other than attacking the activity sought to be addressed through RICO).

"Responsibilities of defense counsel." New subsection (a) has been included, spelling out defense counsel's duty to "keep the defendant advised of developments arising out of plea discussions" and to "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."

Subsection (b) has been amended to include language making clear that defense counsel "should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed."

New subsection (d) is included, addressing defense counsel's ethical duties concerning representations made during plea discussions. It provides that defense counsel "should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney."

New subsection (e) is included, addressing defense counsel's duty to explore the pretrial diversion programs for which the defendant may be eligible. It provides that at the "outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process."

New subsection (f) is included, concerning defense counsel's duty, to the extent possible, to advise the client in advance of the entry of any guilty plea concerning the "possible collateral consequences that might ensue from the entry of the contemplated guilty plea."

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standards 4-4.1, 4-5.1, 4-6.1, 4-6.2

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.1

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(5)

Commentary

Standard 14-3.2 addresses the responsibilities of defense counsel in connection with the process of negotiating and entering a plea of guilty or nolo contendere. This is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests.

Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received under Standard 14-1.4, this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel. A defendant also needs to know the probable sentencing outcome of a plea of guilty or nolo contendere, as opposed to conviction at trial. Defense counsel's duty to his or her client thus encompasses a number of separate elements, set forth in this standard.

This standard is not, of course, intended to be a comprehensive list of all of defense counsel's duties to the client, which are set out fully in the ABA Standards on the Defense Function and which should be read in conjunction with these standards. Rather, they are intended more narrowly, to address the particular duties that defense counsel has in connection with the negotiation and entry of guilty pleas, and advising the client in connection therewith.

Standard 14-3.2(a) (Communication with defendant)

Standard 14-3.2(a) is a new standard that explicitly recognizes the defense counsel's duty to "keep the defendant advised" of plea offers and negotiations. Similar provisions are contained in the ABA's Defense Function Standards.¹ As is made clear by Standard 14-3.2(c), addressed below, while counsel has a duty to inform and advise the client, the decision whether to enter a guilty plea is always the client's determination to make. The obligations reflected in this Standard are also encompassed in Standard 14-3.2(b), below, which concerns defense

1. See ABA CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION, Standard 4-6.2(a) (3d ed. 1993) ("Defense counsel should keep the accused advised of developments arising out of plea discussions"); see also *id.*, Standard 4-5.1(a) ("After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.").

counsel's duty to provide effective assistance of counsel to the defendant.

Plea negotiations are normally conducted between the prosecutor and defense counsel, outside the presence of the defendant. The defense may make the decision that the defendant should not be present for a variety of strategic reasons. For example, in some jurisdictions, statements the defendant makes during plea negotiations may be admissible against him as admissions. Further, both sides often conclude that the frank exchange necessary to conduct meaningful negotiations may be hampered by the presence of the defendant.² Finally, a defendant's presence may be problematic as a practical matter if the defendant has been detained. This general rule does not apply, of course, when the prosecution requires that, before the negotiation of a plea agreement, the defendant make a proffer in person of the testimony he or she would offer. In such circumstances, defense counsel has an obligation to fully prepare the client for meeting with the prosecutor and to protect the client's interests in connection with the proffer, to the extent possible to do so.

Because plea discussions are usually held, however, outside the presence of the defendant, it is critical that the lawyer communicate fully with his or her client the substance of these discussions. Such information is essential to the defendant's ability to participate intelligently in the decision whether to accept or reject a plea. This comports with the requirement of Model Rule of Professional Conduct 1.4, which provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."³

The standard also requires that defense counsel "explain to the defendant" the import of all plea offers made by the prosecutor. In this respect, the standard is also consistent with the requirement of the Model Rules that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁴ The requirement that defense counsel

2. See *id.*, Standard 4-6.2, Commentary at 207 ("The discussions are best conducted on a level of mutual professional respect that may be undermined by the presence of the accused, and indeed misunderstood by the accused. Both sides may be hampered by an unwillingness to be as candid as necessary in the presence of the accused, or by the added burden of explaining to the accused the significance of what is taking place.").

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (1996).

4. *Id.*, Rule 1.4(b).

explain to the defendant the significance of all plea offers made by the prosecutor is critical to the operation of the plea process. By necessity, defense counsel is charged with the primary responsibility to ensure that the defendant fully understands the plea that is being offered, including all terms of the sentence that could be imposed and other ramifications of that plea.

Given the importance of this decision for the defendant and the defendant's family, and the serious and lasting collateral consequences that may flow from the conviction, defense counsel is, in effect, acting as a fiduciary for the client. The obligation to communicate with a criminal client in this situation is not simply a formal one that may be satisfied in each particular case by giving a client a rote checklist of factors worth considering in deciding whether to plead guilty. In evaluating the information necessary to provide meaningful advice prior to a plea, individualized consideration should be given to such factors as the particular circumstances of the defendant, the particular offense(s) at issue, the level and quality of the defendant's education and cognition, the client's familiarity with the legal system, and the like. This presupposes that counsel has a duty to conduct a sufficient investigation to understand the unique issues that confront each client and the client's particular concerns. Such inquiries may be difficult when the defendant's English language skills are poor, and counsel may require the assistance of a translator both to ask the necessary questions and to convey the requisite information for a fully informed guilty plea.

Standard 14-3.2(b) (Advice and investigation)

Standard 14-3.2(b) concerns defense counsel's duty adequately to "advise" the defendant concerning the plea decision. As part of the third edition, this provision has been expanded explicitly to include the duty of defense counsel to conduct "appropriate investigation and study" of the case before recommending acceptance of a plea offer. This advice should, of course, include discussion of any affirmative defenses that may be available to the defendant.

As a matter of constitutional law, a plea is not deemed voluntary and intelligent "if the advice given by defense counsel on which the defendant relied in entering the plea falls below the level of reasonable competence such that the defendant does not receive effective assistance of

counsel.”⁵ The minimum counsel can do without rendering constitutionally ineffective assistance is laid out in the Supreme Court’s decision in *Hill v. Lockhart*, which addresses the legal test for Sixth Amendment effective assistance of counsel in the context of a guilty plea.⁶ In *Hill*, the Court held that where the defendant pleads guilty upon counsel’s advice, and later attacks the voluntariness of the plea based on counsel’s alleged deficient performance, the standard to be applied is the same as the general test for assessing the constitutional effectiveness of counsel set forth in *Strickland v. Washington*.⁷

Thus, a defendant attacking a guilty plea as involuntary based on the alleged ineffective assistance of counsel must show: (1) that “counsel’s representation fell below an objective standard of reasonableness;”⁸ (2) and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁹ In the guilty plea context, to satisfy this second, “prejudice,” requirement, the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”¹⁰

The particular issue, in the *Hill* case, was whether the defendant’s plea should be set aside on habeas where defense counsel allegedly advised the defendant that he would become eligible for parole after serving one-third of his prison sentence, when in fact he was not eligible for parole until serving one-half of his sentence, due to his status as a repeat offender.¹¹ Applying the test set forth in *Hill*, the Supreme Court held that, assuming misadvice concerning parole would be sufficient to establish an unreasonable error by counsel, not only did the defendant fail to allege that he would have gone to trial had defense

5. *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (allowing post-sentence plea withdrawal of guilty plea based upon ineffective assistance of counsel).

6. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); see also *Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991) (en banc), cert. denied, 502 U.S. 835 (1991); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990). See generally *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1097, 1456-57 (1999); Annotation, *Adequacy of Defense Counsel’s Representation of Criminal Client Regarding Guilty Pleas*, 10 A.L.R.4TH 8, § 3 (1981).

7. 466 U.S. 688 (1984).

8. *Id.* at 57 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

9. *Hill*, 474 U.S. at 57 (quoting *Strickland*, 466 U.S. at 694).

10. *Hill*, 474 U.S. at 59.

11. *Hill*, 474 U.S. at 52-55.

counsel given the proper advice, but the error he alleged would have affected the parole calculation in the same manner whether the defendant pleaded guilty or was convicted after trial. It would not, therefore, have been a reason to change his mind concerning the benefit of a plea offer.¹² Thus, the court rejected the ineffective assistance claim in that case.

It should be emphasized that this Standard requires counsel to do more than the constitutional minimum; it mandates that a defendant should be informed fully by defense counsel and provided with a realistic appraisal of the value of any concessions offered by the prosecutor. Consistent with *Hill*, however, the Standard contemplates that any plea offer will be assessed not only based on the maximum possible punishment in the event of a guilty plea, but also by comparison to the probable sentence the judge would impose after trial. Obviously, this requires some prediction of the judge's likelihood of acting on the prosecutor's recommendations.

Defense counsel cannot predict many of these matters with certainty, but the defendant is nonetheless entitled to counsel's best professional judgment. Although counsel must avoid overconfident assurances to clients, "[t]here is nothing wrong . . . with a lawyer's giving his client the benefit of his judgment as to what the court is likely to do, always making it clear that he is giving advice, not making a promise."¹³ Although it is inevitable that not all of defense counsel's predictions will come to pass, defendants generally are aided by such advice. Pleas entered upon opinions and not promises are not subject to attack.¹⁴

In this regard, it is important to note that plea withdrawal motions and ineffective assistance of counsel claims are often, at bottom, predicated upon the defendant's belief that the "deal" he took was represented to him by counsel as entailing certain definite sentencing concessions or consequences that did not materialize. In offering counsel's informed judgment on probable sentencing and other consequences of a plea, then, it is crucial that counsel make clear to the accused that the action of the judge—either with respect to accepting a plea or, where a definite sentence bargain is not at issue, with respect to sentence—cannot be definitely predicted. Counsel should take care in

12. *Hill*, 474 U.S. at 60.

13. *Cortez v. United States*, 337 F.2d 699, 701 (9th Cir. 1964), cert. denied, 381 U.S. 953 (1965).

14. See, e.g., *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984).

distinguishing between “what a particular judge may do or usually does from what the judge is authorized by law to do.”¹⁵

Equally important, Standard 14-3.2(b) recognizes defense counsel’s duty to investigate the case before recommending acceptance of a guilty plea. It provides that defense counsel “should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.” In most cases, an “appropriate” investigation will include not only an analysis of controlling law and the evidence likely to be introduced at trial, but also consideration of any applicable discovery rules, and a determination whether it would be preferable to seek particular items of discovery before negotiating a plea.

Increasingly, in many jurisdictions, the defense may be entitled to receive in advance of trial not only constitutionally exculpatory information, but also such basic information as the witnesses in the case, search and seizure information, evidence relating to eyewitness identification, expert reports, and other important evidence. Defense counsel’s duty to conduct an “appropriate investigation” thus includes the duty to be familiar with, and enforce the defendant’s rights under, any discovery rules that may apply in the jurisdiction. Defense counsel should use these avenues, among others, to conduct an appropriate investigation of the case before advising the defendant concerning a possible guilty plea. In conducting such an investigation, it is defense counsel’s responsibility to investigate not only the facts concerning the offense, but also facts that go to the defendant’s potential sentence, including his or her prior record.

While defense counsel generally has a duty to seek crucial items of discovery before plea negotiations are completed, there may be some cases in which defense counsel legitimately determines that a better plea agreement may be available if the defendant enters a plea at a point in time before all of his or her discovery rights may apply. Thus, an “appropriate” investigation may be quite limited in certain cases—for example, where a highly favorable pre-indictment plea is offered, and the pleas offered after indictment are likely to carry significantly more severe sentences.

Standard 14-3.2(c) (Defendant’s decision)

Standard 14-3.2(c) makes clear that defense counsel has a duty to ensure that “the decision whether to enter a plea of guilty or nolo con-

tendere is ultimately made by the defendant.”¹⁶ Defense counsel will sometimes engage in preliminary plea discussions with the prosecutor without prior consultation with the client as to whether the client is amenable to reaching a plea agreement.¹⁷ As this standard makes clear, however, no plea agreement should ever be concluded except with the “consent of the defendant,” who ultimately must decide upon the course of action.¹⁸ This decision by the defendant should be an informed decision, based on the advice of counsel.

If, after full investigation, a lawyer has determined that a proposed plea is in the best interests of the defendant, the lawyer “should use reasonable persuasion to guide the client to a sound decision.”¹⁹ Counsel must make clear, however, that the accused has the right to go to trial and that the decision is ultimately the client’s. It is, of course, “unprofessional conduct for the lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused’s decision as to his or her plea.”²⁰

Standard 14-3.2(d) (Misrepresentations)

Standard 14-3.2(d) is a new standard that bars defense counsel from “knowingly mak[ing] false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.” This language is closely comparable to the ABA’s Model Rules of Professional Conduct, which prohibit a lawyer from “knowingly . . . mak[ing] a false statement of material fact or law to a third person.”²¹

The standard also parallels Defense Function Standard 4-6.2(b), which contains a similar obligation.²² As noted above, such an obliga-

15. ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-6.2, Commentary at 208 (3d ed. 1993).

16. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1996) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

17. See ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-6.1 (3d ed. 1993) (defense counsel’s duty to explore disposition without trial).

18. See *id.*, Standard 4-5.2 (control and direction of case).

19. *Id.*, Standard 4-5.1, Commentary; see also *id.*, Standard 4-4.1 (Duty to investigate).

20. *Id.*, Standard 4-5.1(b).

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (Discussion Draft 1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(5).

22. See ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-6.2(c) (3d ed. 1993) (knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.”)

tion was deemed important enough to be added both to the Guilty Plea Standards governing the prosecution's responsibilities (Standard 14-3.1(f)) and governing the defense counsel's responsibilities (the instant standard).

Although it is difficult to generalize about the application of this standard to particular facts, it should be noted that good faith arguments, opinions, or predictions about the applicable state of the law do not constitute making a "false statement[]" or representation[]" as to law" within the meaning of this Standard. The Standard proscribes the knowing and intentional misstatement of existing law to, for example, take advantage of an inexperienced prosecutor. The Standard also requires affirmative misstatements; it does not impose upon defense counsel an obligation to correct opposing counsel's expressed or apparent misunderstanding of applicable law where that misunderstanding did not originate with defense counsel and where defense counsel does not affirmatively endorse the incorrect position as accurate.

Standard 14-3.2(e) (Pretrial diversion)

Standard 14-3.2(e) is a new standard which requires that "at the outset of a case, and whenever the law, nature and circumstances of the case permit," defense counsel must "explore the possibility of a diversion of the case from the criminal process." Given the addition of a new section of these standards acknowledging the rise of pretrial diversion programs, it is important expressly to recognize in this Standard defense counsel's duty to consider pretrial diversion in appropriate cases. Comparable language is included in the Defense Function Standards.²³

Standard 14-3.2(f) (Collateral consequences)

Standard 14-3.2(f) is another new provision. It requires defense counsel, "sufficiently in advance of the entry of any plea," to determine and advise the defendant as to "the possible collateral consequences that might ensue from entry of the contemplated plea." While the standards always required defense counsel to advise his or her client concerning other considerations "deemed important by defense counsel or the defendant" (Standard 14-3.2(b)), the number and significance of poten-

23. See *id.*, Standard 4-6.1(a) ("Whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.").

tial collateral consequences has grown to such an extent that it is important to have a separate standard that addresses this obligation.

An increasing burden must fall to defense counsel by virtue of the growing number and range of consequences of conviction. As discussed at length in connection with Standard 14-1.4, these consequences may include civil or criminal forfeiture, mandatory restitution, court-martial or disqualification from the armed services, loss of or ineligibility for licenses granted by the state, loss of civil rights, loss of federal benefits, denial of certain types of employment, mandatory HIV testing, registration of sex offenders, use of the conviction in a subsequent civil or criminal case, and, for non-citizens, immigration consequences, to name a few.²⁴ Because such discussions may involve the disclosure of privileged or incriminatory information (such as the defendant's immigration status), only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.

Given the ever-increasing host of collateral consequences that may flow from a plea of guilty or *nolo contendere*, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances. Courts do not require such an expansive debriefing in order to validate a guilty plea.²⁵ This Standard, however, strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be

24. See Standard 14-1.4(c).

25. See FED. R. CRIM. P. 11, Commentary; *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1097, 1456-57 (1999). Courts generally distinguish between the "direct" and "collateral" consequences of a plea of guilty, holding that while the defendant must receive advice regarding the former, counsel's and the court's failure to consult with the defendant regarding the latter will not invalidate a plea. See, e.g., *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992) (stating that "[t]he circuits that have addressed the issue of failure of counsel to inform an accused of the likely deportation consequences arising out of a guilty plea have all held that deportation is a collateral consequence and therefore the failure to advise does not amount to ineffective assistance of counsel," and collecting cases), *cert. denied*, 507 U.S. 1039 (1993); *State v. McFadden*, 884 P.2d 1303, 1305-06 (Utah Ct. App. 1994) (collecting state cases and holding that "counsel's performance is not deficient by the mere failure to apprise a noncitizen defendant that entry of a guilty plea might subject defendant to deportation"); see generally Annotation, 90 A.L.R. FED 748 (1988) and Annotation, 65 A.L.R. 4th 719 (1988) (collecting federal and state cases discussing whether failure to advise a defendant of the immigration consequences of his or her plea constitutes ineffective assistance of counsel).

active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or *Alford* plea. Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client. Knowing the likely consequences of certain types of offense conduct will also be important. Defense counsel should routinely be aware of the collateral consequences that obtain in their jurisdiction with respect to certain categories of conduct. The most obvious such categories are controlled substance crimes and sex offenses because convictions for such offense conduct are, under existing statutory schemes, the most likely to carry with them serious and wide-ranging collateral consequences.

Standard 14-3.3. Responsibilities of the judge

(a) The judge should not accept a plea of guilty or nolo contendere without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms and conditions be disclosed.

(b) If a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea or presentence report is received.

(c) The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

(d) A judge should not ordinarily participate in plea negotiation discussions among the parties. Upon the request of the parties, a judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed. Discussions relating to plea negotiations at which the judge is present need not be recorded verbatim, so long as an appropriate record is made at the earliest opportunity. For good cause, the judge may order the record or transcript of any such discussions to be sealed.

(e) In cases where a defendant offers to plead guilty and the judge decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge shall so advise the defendant and permit withdrawal of the tender of the plea. In cases where a defendant pleads guilty pursuant to a plea agreement and the court, following entry of the plea, decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea shall be allowed if:

(i) the judge had previously concurred, whether tentatively or fully, in the proposed charge or sentence concessions; or

(ii) the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court.

In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted as set forth in standard 14-2.1.

History of Standard

The standard has been amended to delete subsections (c), (d), (e) and (f), which established a procedure for the judge's active participation in the parties' plea negotiations. Instead, the standard now includes new subsection (d), which provides that a judge "should not ordinarily participate in plea negotiation discussions among the parties," but upon the

request of the parties, “may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed.” It contains further provisions concerning the recording of discussions related to a plea agreement at which the judge is present. There are also stylistic changes made elsewhere in the standard.

Related Standards

FED. R. CRIM. P. 11(d), (e)(1)-(5), (g)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.3(5), 350.4(2), 350.5(1), (3), (4), 350.6, 350.8

NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard § 3.2, 3.7

NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS §§ 70.1 through 70.4

UNIF. R. CRIM. P. 443(b), 444(a), (c), (e), (g)

Commentary

Standard 14-3.3 addresses the general responsibilities of the court with respect to the negotiation and acceptance of plea agreements. It complements, and should be read in conjunction with, the court’s specific responsibilities set forth in Standards 14-1.1 through 14-1.8.

A fundamental question presented by these standards is that of the proper role of the judge with respect to plea agreements negotiated by the parties—and in particular, whether the court may reject some or all of the terms negotiated by the parties.

Historically, judges have declined to review prosecutors’ judgments whether to initiate or decline prosecutions.¹ Once a decision has been made to indict, prosecutors have long enjoyed the discretion to select

1. See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974) (the Executive has “exclusive authority and absolute discretion to decide whether to prosecute a case”); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2d Cir. 1973) (refusing to compel U.S. Attorney to prosecute specified persons); *Smith v. United States*, 375 F.2d 243, 247 (5th Cir.) (Tort Claims Act does not support a cause of action against the United States for failure to initiate a prosecution because the initiation of a prosecution is within the absolute discretion of the United States Attorney), *cert. denied*, 389 U.S. 841 (1967); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc) (holding that district court cannot force, through contempt sanction, a U.S. Attorney to sign an indictment), *cert. denied*, 381

the charges to levy—or not to levy—against a criminal defendant.² Similarly, judges have been reluctant to scrutinize prosecutors' good faith decisions unilaterally to revise their initial charging choices by moving to dismiss indictments or charges.³ Although charging is felt to be an executive function, sentencing has been "primarily a judicial function."⁴ These executive and judicial functions potentially collide when the issue is whether a plea agreed to by the parties should be approved by the sentencing court.

Generally, where courts are presented with a plea agreement that contemplates the bargained-for dismissal of charges or contains agreements regarding the proposed sentence, courts' traditional sentencing powers are implicated and the degree of deference accorded executive prerogatives is therefore reduced.⁵ Thus, for example, the Federal Rules of Criminal Procedure give judges greater discretion to reject plea agreements under Rule 11⁶ than they have in reviewing Rule 48(a) voluntary dismissals.⁷

Many courts, when called upon to exercise their power to accept or reject a plea agreement, draw a further distinction between the level of scrutiny accorded bargains regarding charges and that accorded bargains regarding sentence, apparently based upon the distinction between the charging powers historically vested in prosecutors and the sentencing power traditionally wielded by the judiciary.⁸ As one

U.S. 935 (1965); *Powell v. Katzenbach*, 359 F.2d 234, 234-35 (D.C. Cir. 1965) (upholding trial court's dismissal of a mandamus action seeking to require the Attorney General to initiate a criminal prosecution), *cert. denied*, 384 U.S. 906 (1966).

2. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *Wayte v. United States*, 470 U.S. 598, 607 (1985).

3. For example, FED. R. CRIM. P. 48(a) requires "leave" of the court prior to a prosecutor's voluntary dismissal of a criminal case or charges. However, federal courts generally hold that although "[t]he prosecutor's discretion to dismiss charges under Rule 48(a) is not unfettered, . . . it is only very narrowly circumscribed by the judiciary's power to prohibit a dismissal . . . [C]ourts are vested only with limited supervisory power over prosecutorial charging decisions specifically under Rule 48(a)." *United States v. Robertson*, 45 F.3d 1423, 1437 n.14 (10th Cir.), *cert. denied*, 516 U.S. 844 (1995); see also *Rinaldi v. United States*, 434 U.S. 22, 29-32 (1977) (*per curiam*); *United States v. Smith*, 55 F.3d 157, 158-59 (4th Cir. 1995); *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991).

4. *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (citation omitted).

5. See, e.g., U.S. SENTENCING GUIDELINES MANUAL, § 6B1.2, Commentary (1998).

6. See FED. R. CRIM. P. 11(e)(2), (4).

7. See, e.g., *Robertson*, 45 F.3d at 1437-38.

8. See, e.g., *id.*

federal court explained, “[w]ithin the statutorily prescribed range, imposition of sentence is a matter of discretion for the district court. Thus, the prosecutor’s role in sentencing bargains is strictly advisory ... [By contrast, c]harge bargains directly and primarily implicate prosecutorial discretion whereas judicial discretion is impacted only secondarily. Thus, while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices.”⁹ In some jurisdictions, however, this traditional allocation of discretion has been altered by the adoption of statutes or sentencing regimes that require courts to police prosecutors’ charging decisions more closely. For example, under the U.S. Sentencing Guidelines, judges are charged with rejecting proffered charge bargains calling for the dismissal of counts where the remaining charges would not “adequately reflect the seriousness of the actual offense behavior” or the agreement “undermine[s] the statutory purposes of sentencing or the sentencing guidelines.”¹⁰

Reflecting these rules, Standard 14-1.8 recognizes that courts may both “approve” and “grant” concessions. This standard provides, similarly, that while the court should give a plea agreement “due consideration,” it should also reach an “independent decision whether to grant charge or sentence concessions.”

Standard 14-3.3(a) (Disclosure of agreement)

Under Standard 14-3.3(a), the court may not accept a plea of guilty or nolo contendere “without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms and conditions be disclosed.” The purpose of this standard is to make certain that judges are told of and the record reflects all agreements between prosecution and defense. This consideration is relevant to the voluntariness of the plea, as addressed in Standard 14-1.5, which calls

9. *Id.*

10. U.S. SENTENCING GUIDELINES MANUAL, § 6B1.2(a) (1998); *see also id.* § 6B1.2(b), (c) (setting standards for acceptance of plea agreements involving sentence bargains); WASH. REV. CODE ANN. § 9.94A.090 (West 1998) (the parties are to disclose the “nature of the agreement and the reasons for the agreement” and the judge must then “determine if the agreement is consistent with the interests of justice and with the prosecuting standards”).

upon the court, similarly, to determine “whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what discussions were had and what agreement has been reached.” This standard is also similar to provisions contained in the Model Code of Pre-Arraignment Procedure,¹¹ the Federal Rules of Criminal Procedure,¹² and the Uniform Rules of Criminal Procedure.¹³

It is important to the integrity of the plea process to advise the judge of the terms of any plea agreements. If it should appear, for example, that the prosecutor has not honored a plea agreement, the judge must either permit withdrawal of the plea or require specific performance of the agreement, as the interests of justice may require.¹⁴ The terms of the agreement should be clearly stated on the record. Such a requirement also enhances the court’s ability to ensure that the defendant fully understands all of the terms that have been agreed to. Moreover, by enhancing the visibility of the plea negotiation process, placing plea agreements in the public record helps to establish a basis for public confidence in the criminal justice system.

In cases involving complex issues or a substantial period of incarceration, it is advisable for the court to encourage the parties to reduce any plea agreement to a writing, signed by both parties, if they have not done so already. Such a writing serves to facilitate the parties’ understanding of the agreement before it is signed, and ensures that the defendant has had an opportunity to review and agree to the full terms of the agreement before entering a plea. This, in turn, enhances the finality of resulting pleas. At the same time, formal written agreements may not be practicable in all cases, especially in minor state offenses that are routinely handled in a single court appearance. In such cases, the terms of the plea should be reflected in some written record, but the record may be substantially less formal, such as a form agreement, written memo of proceedings, taped transcript, or electronic record.

11. MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.5(1) (1975) (the parties shall “disclose [any plea agreement] to the court at the time the defendant is called upon to plead”).

12. FED. R. CRIM. P. 11(e)(2) (“If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.”).

13. UNIF. R. CRIM. P. 444(c)(2) (1987) (the court “shall determine whether the tendered plea is the result of plea discussions or of a plea agreement, and, if it is, what discussions were had and what agreement, if any, was reached”).

14. See Standard 14-2.1.

Standard 14-3.3(b) (Presentence report)

Standard 14-3.3(b) concerns the steps to be taken by the judge after being presented with a plea agreement negotiated by the parties. As Standard 14-3.3(b)(i) makes clear, the court should “order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition.” Preparation of a preplea report should not be undertaken without the defendant’s consent. Such consent is not likely to be withheld, however, because the defendant normally will be anxious for the court to accept the plea agreement.

In every case, under Standard 14-3.3(b)(iii), the judge must advise the defendant, at the time the plea is entered, whether the judge will accept “the contemplated charge or sentence concessions” or will defer decision on those matters “until after the plea is entered and/or after a preplea or presentence report is received.”¹⁵ For all of the reasons discussed earlier in these standards, it is important that the defendant understand, before entering a guilty plea, the degree of certainty that the court will accept any concessions contemplated by the parties’ plea agreement. If, as is true of most plea agreements negotiated in the federal system, the defendant will not be permitted to withdraw the plea even if the sentencing recommendations reflected in the plea agreement are not accepted by the court, it is important for the defendant to understand, before pleading guilty, that an adverse presentence report will not provide a later excuse for seeking to withdraw that plea.¹⁶

Standard 14-3.3(b)(ii) makes clear that in determining a sentence, the judge should “give the [plea] agreement due consideration” but should also “reach an independent decision on whether to grant charge or sentence concessions.” This is important because one of the most common criticisms of plea agreements is that they erode the sentencing discretion of the court. A judge who automatically accepts all plea agreements placed before him or her delegates to the prosecutor one of the most important judicial functions.

15. Cf. FED. R. CRIM. P. 11(e)(2) (if the agreement includes a motion for dismissal of charges or an agreement as to a specific sentence, “the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report”); MODEL CODE OF PRE-ARREST PROC. § 350.5(3) (1975) (same).

16. See FED. R. CRIM. P. 11(e)(2) (where plea agreement merely commits prosecutor to recommend a request a particular sentence, “the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.”)

Standards 14-3.3(c) and (d) (Judicial demeanor, participation in plea discussions)

Standard 14-3.3(c) provides that the judge “should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.” This standard is important because it protects the constitutional presumption of innocence, and avoids placing judicial pressure on the defendant to compromise his or her rights. A related rule is set forth in Standard 14-3.3(d), which provides that the judge “should not ordinarily participate in plea negotiation discussions among the parties.”

The approach taken by these standards differs from that in the second edition, which had allowed for a more active role for judges in plea negotiations. It returns to the approach taken in the first edition, which is more consistent with federal law and the rules in many states. A number of court decisions have condemned judicial participation in plea negotiations.¹⁷ Similarly, the Federal Rules of Criminal Procedure¹⁸ and numerous statutes and rules forbid the involvement of judges in plea discussions.¹⁹ While there is some evidence that judicial participation in plea negotiations is common in some state courts,²⁰ this is not a salutary

17. See, e.g., *State v. Buckalew*, 561 P.2d 289 (Alaska 1977) (trial judge’s offer to impose a specific sentence should defendant change his plea to guilty constituted improper participation in the plea bargaining process); *State ex. rel. Roark v. Casey*, 286 S.E.2d 702 (W. Va. 1982) (judge cannot dictate terms under which a prosecutor may enter into a plea agreement because to do so constitutes a type of prohibited judicial participation); *State v. Jordan*, 672 P.2d 169, 173-74 (Ariz. 1983) (court shall not participate in plea negotiations); *People v. Cobbs*, 469 N.W.2d 47 (Mich. Ct. App. 1991) (judge without discretion to advocate and negotiate plea agreement).

18. FED. R. CRIM. P. 11(e)(1) (“The court shall not participate in [the parties’ plea] discussions.”). See also Annotation, 56 A.L.R. FED. 529 (1982) (prohibition of federal trial judge’s participation in plea bargaining negotiations under Rule 11(e)(1) of the Federal Rules of Criminal Procedure); *United States v. Daigle*, 63 F.3d 346, 348 (5th Cir. 1995) (judge impermissibly participated in discussion by indicating his acceptance of a certain cap on sentence); *United States v. Crowell*, 60 F.3d 199, 203 (5th Cir. 1996); *United States v. Casallas*, 59 F.3d 1173 (11th Cir. 1995).

19. See, e.g., ARIZ. R. CRIM. P. 17.4(a); ARK. R. CRIM. P. 25.3(a); COLO. REV. STAT. ANN. § 16-7-302(1) (West 1998); N.M. DIST. CT. R. CRIM. P. 5-304(1); N.D. R. CRIM. P. 11(d); OR. REV. STAT. § 135.432 (1997); PA. R. CRIM. P. 319(b)(2); UTAH R. CRIM. P. 11(h)(1).

20. One national survey reports that judicial participation occurs to some degree in most jurisdictions. INSTITUTE OF CRIMINAL LAW AND PROCEDURE, GEORGETOWN UNIV. LAW CENTER, PLEA BARGAINING IN THE UNITED STATES: PHASE I REPORT 27, 35-40, 200-

development. These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.

Providing an active role for judges in the plea negotiation process, even at the parties' request, is ill-advised, particularly where that judge will preside at trial or at evidentiary hearings should the plea negotiations fail. Such a role is fundamentally in tension with the basic principle that the court "should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." Exposure to the facts and tactical considerations revealed during guilty plea negotiations may unduly color the judge's view of the evidence, and predispose the judge in his or her legal rulings.²¹

This is not to say that there is no role for the court in connection with plea negotiations. For example, where the parties have already reached agreement on the terms of a plea, and wish to know whether the court will accept that agreement, it may be desirable to have the court available for such limited consultation purposes. Thus, Standard 14-3.3(d) allows a court, upon request of both parties, to "be presented with a proposed plea agreement negotiated by the parties and . . . indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed." The Model Code of Pre-Arrestment Procedure contains a similar provision allowing for the court's "preliminary consideration" of a proposed plea agreement. Under this provision, the parties may advise the court of the terms of the agreement, and the court "may indicate to the parties whether it will concur in the proposed disposition."²²

Because the judge's permissible participation with respect to plea negotiations is very limited, Standard 14-3.3(d) does not require that all discussions related to plea agreements in which the judge participates be transcribed verbatim. It does, however, require that "an appropriate record" of such discussions be made "at the earliest opportunity." Thus, if the presentation occurs in open court, usually the proceeding

287, LEAA Grant No. 75 NI-99-0129 (April 1977); see also Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1090-91 (1976).

21. Some jurisdictions reportedly provide by rule or practice that judges other than the judge assigned to the criminal case may be used to assist the parties in plea negotiations, a practice which presents far less of a danger of undue coercion or influence.

22. MODEL CODE OF PRE-ARRESTMENT PROC. § 350.3(5) (1975).

will simply be transcribed in the ordinary course. If instead it occurs informally in chambers, upon returning to the courtroom, the judge should place on the record the fact that such discussions were held and the substance of those discussions. For good cause shown, the record or transcript of such discussions may be sealed for so long as is necessary.

Standard 14-3.3(e) (Disapproval of agreement)

Standard 14-3.3(e) concerns the circumstances in which the court rejects the plea terms agreed upon by the parties. Where a defendant offers to plead guilty in return for charge or sentence concessions, and the judge advises the defendant that the concessions will not be granted, the defendant obviously should be afforded the opportunity to withdraw his or her tender of a plea, as this standard provides. Since neither a plea nor judgment of conviction based upon the plea has been entered, the defendant should not be penalized in any way for making the offer.

Where the plea has already been entered, however, Standard 14-3.3(e) does not automatically permit its withdrawal simply because requested charge or sentence concessions are not received. If, for example, a plea is entered and the prosecutor recommends that the defendant receive a two-year sentence but the court rejects that recommendation, there is no justification for allowing withdrawal of the plea if no promise was made by the judge that this sentence would be received. In these circumstances, the plea agreement is fully discharged by the prosecutorial recommendation of a two-year sentence.

The situation is quite different, however, if the judge “previously concurred, whether tentatively or fully, in the proposed charge or sentence concessions” contemplated by the plea agreement. If the judge expressly agreed to the terms of the plea agreement, or implied his or her approval of those terms, it would be grossly unfair to the defendant not to allow withdrawal of the plea if those concessions are not in fact granted by the judge. In such a case, the defendant has relied to his or her detriment on the judge’s statements respecting the plea agreement.

In this circumstance, therefore, Standard 14-3.3(e)(i) provides that the defendant’s plea may be withdrawn. Similarly, withdrawal is obviously appropriate where the plea was entered “on the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court,” as recog-

nized in Standard 14-3.3(e)(ii).²³ In all other circumstances, a request to withdraw a plea should be governed by the principles set forth in Standard 14-2.1, the general standard that addresses withdrawal of a guilty plea.

Standard 14-3.4. Inadmissibility of nolo contendere pleas, pleas not accepted, and plea discussions

(a) A plea of nolo contendere should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(b) A plea of guilty or nolo contendere that is not accepted by the court should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings.

(c) Any statement made in the course of any proceedings concerning a plea of nolo contendere or a plea of guilty or nolo contendere that is not accepted by the court, or in the course of plea discussions with the prosecuting attorney that do not result in a plea of guilty or that result in a plea of nolo contendere or a plea of guilty or nolo contendere that is not accepted by the court, should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceedings, except that such a statement may be admitted:

(i) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel; or

(ii) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced

23. See, e.g., *Shorette v. State*, 402 A.2d 450 (Me. 1979) (judge may not impose less favorable sentence unless he first affords defendant the opportunity to withdraw the plea); *Scheuert v. State*, 569 S.W.2d 735 (Mo. 1978) (if court rejects plea, defendant should be afforded opportunity to withdraw plea and should be advised that disposition may be less favorable than that contemplated by plea agreement); *People v. Farrar*, 419 N.E.2d 864 (N.Y. 1981) (if court rejects sentence bargain and imposes lesser punishment, prosecution must be given option of withdrawing consent to guilty plea); *State v. Simpson*, 836 S.W.2d 75 (Mo. Ct. App. 1992) (court should inform defendant of intention to reject plea agreement); Annotation, *What Constitutes Rejection of Plea Agreement Under Rule 11(e)(4) of the Federal Rules of Criminal Procedure, Allowing Withdrawal of Plea if Court Rejects Agreement*, 60 A.L.R. FED. 621 (1982).

and the statement ought in fairness be considered contemporaneously with it.

History of Standard

This standard has been amended to delete any reference to the admissibility of pleas that are withdrawn, which is addressed in a separate standard, Standard 14-2.2. As amended, this standard is limited to addressing the admissibility of a nolo contendere plea, of any plea that is not accepted by the court, and of statements made in the course of plea discussions or proceedings that do not result in a plea or that result in a plea that is not accepted by the court.

Related Standards

AM. BAR ASS'N, Standards FOR CRIMINAL JUSTICE, Standard 14-2.2

FED. R. CRIM. P. 11(e)(6)

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.7

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.7

UNIF. R. CRIM. P. 441(e)

Commentary

Standard 14-3.4 concerns the admissibility of nolo contendere pleas, pleas that are not accepted by the court, and statements made in plea discussions with the prosecuting attorney. This standard is intended to be read in conjunction with Standard 14-2.2, which addresses the same issues with respect to pleas that are withdrawn.

Standard 14-3.4(a) (Nolo contendere pleas)

Consistent with governing law, Standard 14-3.4(a) provides that a nolo contendere plea "should not be admitted as evidence against the defendant in any criminal or civil action or administrative proceeding." As discussed earlier, this effect is the primary benefit of a nolo plea, which enables the defendant to avoid the preclusive effect of a criminal conviction for purposes of *establishing facts in* related civil litigation. A nolo plea does, however, constitute a criminal conviction.

Accordingly, it can be used as the basis for the invocation of repeat offender statutes.¹

Standard 14-3.4(b) (Plea not accepted)

Standard 14-3.4(b), similarly, provides that a plea of guilty or nolo contendere that is "not accepted by the court" is inadmissible. In these circumstances, there is no conviction and no sentence, and for reasons of public policy, the defendant's offer to plead guilty is not permitted to be given evidentiary significance.

Standard 14-3.4(c) (Statements in proceedings and plea negotiations)

Standard 14-3.3(c) addresses statements made by the defendant or defense counsel in the course of plea proceedings or plea negotiations with the prosecutor concerning a plea that is not accepted by the court, or that do not result in a plea agreement. It provides that such statements are admissible against the defendant in only two narrow circumstances: "in a criminal proceeding for perjury," if the statements were made "under oath, on the record, and in the presence of counsel;" and in any proceeding in which another statement made in the course of the same discussions has been introduced and the defendant's "statement ought in fairness to be considered contemporaneously with it." This standard is identical to that contained in the Federal Rules of Criminal Procedure.² The Model Code of Pre-Arrestment Procedure, by contrast, contains a flat ban on the use of statements made by a defendant in unsuccessful plea negotiations.³

This Standard reflects the modern trend to exclude offers to plead, plea agreements, and statements made during negotiations with the prosecutor.⁴ A contrary rule would discourage plea negotiations and

1. See FED. R. CRIM. P. 11, Commentary ("A judgment upon the plea [of nolo] is a conviction and may be used to apply multiple offender statutes."); *State v. Bancom*, 513 S.E.2d 112, 117 (S.C. Ct. App. 1999) (dictum); *State v. Jennings*, 778 S.W.2d 294, 295 (Mo. Ct. App. 1989), *rev'd on other grounds*, *State v. Redmond*, 937 S.W.2d 205, 209-10 (Mo. 1996).

2. FED. R. CRIM. P. 11(e)(6).

3. MODEL CODE OF PRE-ARRESTMENT PROC. § 350.7 (1975).

4. See, e.g., CAL. PENAL CODE § 1192.4 (West 1982) ("If the defendant's plea of guilty . . . is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn. . . . The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards and tribunals."); ILL. SUP. CT. R. 402 ("If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is with-

agreements, for defendants would have to be constantly concerned whether, in light of their plea negotiation activities, they could successfully defend on the merits if a plea ultimately was not entered.

The Standard is deliberately limited to plea discussions and agreements with "the prosecuting attorney." Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant.⁵ If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.⁶

The principal effect of Standard 14-4.3(c) is to bar the use of the defendant's statements for impeachment purposes (unless the defendant first opens the door). It should be noted, however, that this protection can be waived. In *United States v. Mezzanato*,⁷ which is discussed more extensively in connection with Standard 14-2.2, the Supreme Court specifically upheld the effectiveness of a term in a plea agreement waiving the defendant's protection against the impeachment use of the plea agreement.

drawn, . . . neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding."). Consistent with this Standard, statements made by defendants during plea negotiations are normally disallowed for impeachment as well as for direct evidence purposes. See, e.g., *State v. Vargas*, 618 P.2d 229 (Ariz. 1980) (en banc); *People v. Benniefeld*, 410 N.E.2d 455 (Ill. App. Ct. 1980) (the use of plea negotiation statements as evidence is prohibited in order to ensure that plea discussions may be conducted in an atmosphere of candor, free of the risk that statements made during negotiations will be used as evidence of guilt); *People v. Macias*, 941 P.2d 838 (Cal. 1997) (statements made by minors to probation officers in preparation for juvenile fitness hearings inadmissible as substantive evidence of guilt); *Russell v. State*, 614 So.2d 605 (Fla. Ct. App. 1993) (trial court erred in admitting letter written by defendant to prosecutor during plea negotiations).

5. See, e.g., *People v. Wanke*, 708 N.E.2d 833 (Ill. App. Ct. 1999); *State v. Annadale*, 383 S.E.2d 679 (N.C. Ct. App. 1989). Compare FED. R. CIV. P. 11(e)(6), Commentary at 24 (statements made to law enforcement personnel, other than the prosecuting attorney, "are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogation.").

6. See FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410; Annotation, When Is Statement of Accused Made In Connection With Plea Bargain Negotiations So As To Render Statement Inadmissible Under Rule 11(E)(6) Of The Federal Rules of Criminal Procedure, 60 A.L.R. FED. 854 (1982).

7. 513 U.S. 196 (1995).

PART IV.

DIVERSION AND OTHER ALTERNATIVE RESOLUTIONS

Standard 14-4.1 Diversion and other alternative resolutions

(a) Where the interests of justice will be served, the prosecuting attorney and the defense may agree that a prosecution be suspended for a specified period of time, after which time it will be dismissed if the offender has met specified conditions during the suspension period. Such a diversion may be appropriate, for example, where:

- (i) the offender is charged with an offense designated as appropriate for diversion;
- (ii) the offender does not have a prior criminal record that would make diversion inappropriate;
- (iii) the offender poses no threat to the community under the conditions specified in the diversion program; and
- (iv) the needs of the offender and the government can be better met outside the traditional criminal justice process.

(b) An agreement to diversion should be contained in a writing reflecting all of the conditions agreed upon. As a condition of diversion, an offender may be required, where permissible under law, to waive speedy trial rights and to toll a statute of limitations, and may also be required to fulfill other appropriate conditions, for example, to enter a treatment program, to provide community service, to make restitution, and/or to refrain from drug use and criminal activity.

(c) Diversion programs should be governed by written policies setting forth the Standards for eligibility and the procedures for participation, so that all eligible offenders have an equal opportunity to participate. An offender's eligibility to participate in diversion should not depend on his or her ability to pay restitution or other costs.

(d) The development of other, alternative forms of noncriminal resolution for appropriate cases should also be encouraged.

History of Standard

This is a new Standard.

Related Standards

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 320.5-320.9

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 2.2 (Procedure for Diversion Programs)

NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 3.1 (Procedure for Diversion Programs)

NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS §§ 44.1-44.8

UNIF. R. CRIM. P. 442

Commentary

Standard 14-4.1 is an entirely new Standard recognizing and approving the development of diversion or deferred prosecution programs. Such programs generally allow conduct that might constitute a criminal offense to be addressed through a variety of non-criminal means. The majority of states, and the federal system,¹ now provide for some type of diversion or deferred prosecution program. The Uniform Rules of Criminal Procedure also contain a model statute, designed to provide a detailed map for legislatures adopting a pretrial diversion program.² Diversion agreements offer the potential for speedy, just, and cost-effective resolution of criminal cases, particularly less serious cases that do not involve injury or violence or recurrent offenders. They therefore save prosecutive and judicial resources that may be trained on major, serious cases. Diversion programs may also facilitate prompt restitution to communities and victims of crime. Finally, diversion programs often lead to rehabilitative counseling or treatment for the defendant. Accordingly, they "prevent future criminal activity among certain offenders against whom prosecutable cases exist by diverting them from traditional processing into community supervision and services."³

1. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.000 (Supp. 1996-1) (Pre-Trial Diversion Program).

2. See UNIF. R. CRIM. P. 442 (1987) (Pretrial Diversion).

3. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.000 (1996-1 Supp.); see also NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 44.1 Commentary at 135 (2d ed. 1991) (the purposes of diversion programs include "[r]educing the incidence of offender recidivism by providing an alternative to incarceration—community-based rehabilitation—which would be more effective and less costly than incarceration" and "[b]enefiting society by the training and placement of previously unemployed or under-employed persons").

The components of existing diversion or deferred prosecution programs vary significantly. Some jurisdictions, for example, permit diversion prior to charging⁴ and most provide for diversion after arrest but prior to judgment.⁵ Some of these programs specifically provide that the defendant should not be required to admit guilt as a condition of pretrial diversion,⁶ or include a rule that statements made by the defendant as part of a pretrial diversion program are not admissible in a subsequent criminal trial.⁷ Such rules not only serve to encourage offenders to participate, but also facilitate the provision of the type of full information prosecutors and judges need in to evaluate offenders' eligibility. Other states, however, permit diversion in the form of suspended sentencing and specifically require a plea of guilty for eligibility.⁸ Such a rule safeguards the prosecution's interests should the defendant violate the diversion agreement.⁹ The Uniform rules provide a middle path, requiring a court's approval of the

4. See, e.g., U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.000(A) (1993-2 Supp.) (divertees may be selected at the pre-charge stage or at any point prior to trial).

5. See, e.g., ALA. CODE § 12-23-5 (1995); ARIZ. R. CRIM. P. 38.1(a).

6. See, e.g., MISS. CODE ANN. § 99-15-115 (c) (1994) (offenders who enter an intervention program "shall . . . [a]gree, in writing, to the conditions of the intervention program established by the district attorney which shall not require or include a guilty plea"); S.C. CODE ANN. § 17-22-90(5) (Law-Co-op. 1985 & Supp. 1998) ("In no case shall a written admission of guilt be required of a defendant prior to acceptance nor prior to completion of the pretrial intervention program.").

7. See, e.g., CAL. PENAL CODE § 1000.1(c) (West 1985 & Supp. 1999); S.C. CODE ANN. § 17-22-90(5) (Law-Co-op. 1985 & Supp. 1998); WIS. STAT. ANN. § 971.39(2) (West 1998). Compare also Standards 14-3.4 (inadmissibility of nolo contendere pleas, pleas not accepted, and plea discussions); 14-2.2 (inadmissibility of withdrawn pleas and discussions underlying same).

8. See, e.g., CAL. PENAL CODE §§ 1000.12(c)(1) (upon prosecution motion and defendant's guilty plea, court may defer entry of judgment); 1000.12(c)(3)(D) (defendant must plead guilty) (West 1985 & Supp. 1999); DEL. CODE ANN. tit. 10, § 1024(d) (first offenders domestic violence diversion program) (Supp. 1998), tit. 16, § 4764(b) (first offenders controlled substances diversion program) (1995); IOWA CODE § 907.3 (1997); see also HAW. REV. STAT. ANN. § 853-1 (Michie 1999) (must be plea offer; court defers acceptance of guilty or nolo plea); VA. CODE ANN. §§ 18.2-251 (controlled substance offenses; at plea, "if the facts found by the court would justify a finding of guilt, [court,] without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place [the defendant] on probation") (Michie 1996 & Supp. 1999); 19.2-303.2 (same with respect to misdemeanor property offenses) (Michie 1995).

9. NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 44.5(e) (2d ed. 1991) (diversion agreements should include "[a]ppropriate mechanisms to safeguard the prosecution of the case, such as admissions of guilt, stipulations of facts, and dispositions of witnesses").

diversion which is contingent, in part, on a finding that a conviction could be obtained.¹⁰ This requirement protects defendants' rights, helping courts to ensure that an innocent defendant is not persuaded by the inducement of diversion into accepting a diversion program which may involve significant restrictions upon his or her liberty.¹¹

There are also considerable disparities among jurisdictions regarding the roles of prosecutors and judges in the diversion process. Generally, in jurisdictions where diversion programs are available prior to the filing of an accusatory instrument,¹² prosecutors have sole control over the decision whether to permit a defendant to divert after arrest but prior to the filing of a complaint, indictment or information.¹³ After the filing of the accusatory instrument, most jurisdictions require judicial approval of the prosecutorial decision.¹⁴ However, some jurisdictions allocate to judges entire control of the decision whether to permit the defendant to participate in a diversion program at this stage,¹⁵ other jurisdictions seem to give judges the discretion to override prosecutors' decisions, and still others seem to require judges to approve prosecutors' decisions regarding a defendant's eligibility for a program.¹⁶

10. UNIF. R. CRIM. P. 442(a)(2) (1987); *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.400 (1993-2 Supp.) ("The offender must acknowledge responsibility for his or her behavior but is not asked to admit guilt."); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.200(C) (1993-2 Supp.) ("All information obtained in the course of making the decision to divert an offender is confidential, except that written statements may be used for impeachment purposes.").

11. *Id.*

12. *Compare* ARIZ. R. CRIM. P. 38.1(a) (diversion only available after filing of complaint, indictment, or information but prior to plea of guilty or trial); MISS. CODE ANN. § 99-15-109(1)(h) (1994) (must be indicted to be eligible for diversion program).

13. *See, e.g.,* ALA. CODE § 12-23-5 (1995).

14. *See, e.g.,* ALA. CODE § 12-23-5 (1995) or *id.*; ARIZ. R. CRIM. P. 38.3 (court "may" order suspension); FLA. STAT. ANN. § 948.08(2) (West 1996 & Supp. 1999); MISS. CODE ANN. § 99-15-117 (1994) (court "must" approve). *Compare also* NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 2.2, Commentary at 40 (1973) ("[i]n view of the potential limiting impact upon prosecutorial discretion, the danger of extensive litigation over decisions to reinstate prosecutions, and the burden of the formalities involved," standard requires a court-approved agreement for conditional suspension of prosecution only when the diversion program involves actual deprivation of liberty) with MODEL CODE OF PRE-ARRAIGNMENT PROC. § 320.7 (1975) (recommending court-approved agreements in certain diversion cases).

15. *See, e.g.,* HAW. REV. STAT. ANN. § 706.605 (Michie 1999); IOWA CODE § 907.3 (1997); *see also* MODEL CODE OF PRE-ARRAIGNMENT PROC. § 320.7 (1975).

16. *See, e.g.,* ARIZ. R. CRIM. P. 38.1(c).

Another critical question as to which there is no clear consensus is who—the judge or the prosecutor—determines whether the defendant has complied with the terms of the pretrial diversion program. Model statutes and state law provisions on this issue differ,¹⁷ perhaps in part because of the disparities among them as to the appropriate point in the criminal process at which diversion or deferred prosecution programs should be invoked.

Because the Standard seeks to provide general guidance for all programs, commenced at whatever point in the criminal process, no specific instruction on the allocation of control of diversion decisions between prosecutors and judges is provided in the Standard. In general, however, where no charges have been filed against the defendant, the prosecutor should be able to exercise his or her traditional authority to decide whether to pursue or decline prosecution, so long as the prosecutor is acting in good faith. If charges have been filed, and the permission of the court is needed for the defendant to enter a pretrial diversion program, it should be up to the court to determine whether the defendant has complied with the terms of that program and thus is entitled to dismissal of the charges.¹⁸

The language of this standard is based in part on the standards contained in the Uniform Rules of Criminal Procedure,¹⁹ and is also drawn from the types of terms often included in pretrial diversion programs under state law. It is designed to suggest the basic parameters for a pretrial diversion program while leaving room for individual jurisdictions to experiment with the details of such programs. In every instance, however, the parameters of such programs should be reduced to writing and made publicly available, as reflected in Standard 14-4.1(c).

Standard 14-4.1(a) (Parties' agreement to diversion)

The standard provides that "[w]here the interests of justice will be served," the parties may agree that a prosecution will be suspended

17. Compare, e.g., ARIZ. R. CRIM. P. 38.2 (prosecutor determines compliance); FLA. STAT. ANN. § 948.06(6) (West 1996); WIS. STAT. ANN. § 971.39(1)(e) (West 1998); NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 2.2(7), Commentary at 41 (1973) (discretionary right of prosecutor to declare the agreement violated and reinstate prosecution) with CAL. PENAL CODE § 1000.3 (court determines compliance) (West 1985 & Supp. 1999); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 320.9 (1975).

18. Cf. UNIF. R. CRIM. P. 442(j) (1987).

19. UNIF. R. CRIM. P. 442 (1987).

“for a specified period of time,” after which the prosecution will be dismissed if the offender has met “specified conditions” during the suspension period. This subsection lists four general criteria that may be considered in determining whether the “interests of justice will be served” in suspension of prosecution in a particular case. These four general criteria, discussed more specifically below, are not intended to be exclusive. For example, additional criteria that may be relevant in particular cases include: whether the offender has previously been admitted to a diversion program;²⁰ any special characteristics or difficulties of the offender;²¹ whether there is a probability that the offender will cooperate with and benefit from the diversion program;²² whether an available program is appropriate to the needs of the offender.²³

The Standard provides that the suspension period must be specified by the parties, but leaves jurisdictions to experiment regarding what limits, if any, should be imposed on the permissible periods of suspension.²⁴

Standard 14-4.1(a)(i)

Standard 14-4.1(a)(i) calls upon each jurisdiction to develop a list of those offenses that are “designated as appropriate for diversion.” Existing programs vary widely with respect to the types of cases in which diversion or deferred prosecutions are possible. Some jurisdictions have programs directed at particular types of charges — for example, drug

20. See, e.g., HAW. REV. STAT. ANN. § 853-4 (Michie 1999); IOWA CODE § 907.3 (1997); MISS. CODE ANN. § 99-15-107 (1994); S.C. CODE ANN. § 17-22-50 (Law Co-op. 1985 & Supp. 1998).

21. NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS § 44.4(b) (2d ed. 1991).

22. *Id.* § 44.4(d).

23. *Id.* § 44.4(e).

24. See, e.g., ARIZ. R. CRIM. P. 38.1(c) (criminal proceedings may be suspended for 2 years); CAL. PENAL CODE § 1000.2 (for diversions in controlled substance cases, suspension must be no less than six months and no more than two years); CAL. PENAL CODE § 1000.12 (for diversions in child neglect or abuses cases, suspension can be no more than the statutory maximum sentence) (West 1985 & Supp. 1999); HAW. REV. STAT. ANN. § 853-1(b) (Michie 1999) (not more than three years); MISS. CODE ANN. § 99-15-117 (1994); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-22.400 (period of supervision is not to exceed 18 months); NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 2.2, Commentary at 40 (1973) (one year limitation on suspension agreements); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 320.5(1) (1975) (same).

treatment programs designed to allow diversion of charges against offenders who purchased or possessed limited quantities of drugs.²⁵ In other areas, pretrial diversion may be available for a range of cases, typically excluding violent crimes.²⁶ The Standard does not articulate express restrictions in part because the policies of various jurisdictions will necessarily vary with the law enforcement needs of the vicinity. The Standard does contemplate, however, that those charged with writing the eligibility and participation rules for a particular jurisdiction under Standard 14-4.1(c) should designate and make publicly available the types of charges determined to be appropriate (or inappropriate) for diversion. Such instruction should, at the least, contribute to more uniform and evenhanded administration of these programs.

Standard 14-4.1(a)(ii)

Standard 14-4.1(a)(ii) recognizes that in certain circumstances, the defendant's "prior criminal record" may make diversion inappropriate. Most state programs do not permit defendants to participate if they have a significant criminal record, or have been admitted to a diversion program previously.²⁷ The apparent rationale of such rules is twofold: first, that there are certain offenders who, given the threat that their alleged conduct poses to the public, require prosecution; and second, that repeat offenders are not good candidates for the rehabilitation that these diversion programs offer. Again, should various jurisdictions determine that these types of restrictions are appropriate, they should be contained in the written policies discussed in Standard 14-4.1(c).

Standard 14-4.1(a)(iii)

Standard 14-4.1(a)(iii) contemplates that where an offender "poses no threat to the community under the conditions specified in the diversion program," diversion may be appropriate. The assessment of the

25. See, e.g., ALA. CODE § 12-23-5 (1995); CAL. PENAL CODE § 1000 *et seq.* (West 1985 & Supp. 1999).

26. See, e.g., DEL. CODE ANN. tit. 10, § 1024(c) (Supp. 1998), tit. 16, § 4764(a) (1995); FLA. STAT. ANN. § 948.08(2) (West 1996 & Supp. 1999); IOWA CODE § 907.3 (1997); MISS. CODE ANN. § 99-15-107 (1994); S.C. CODE ANN. § 17-22-50 (Law Co-op. 1985 & Supp. 1998).

27. See, e.g., ALA. CODE § 12-23-5(1) (1995); HAW. REV. STAT. ANN. § 853-4 (Michie 1999); IOWA CODE § 907.3 (1997); MISS. CODE ANN. § 99-15-107 (1994); S.C. CODE ANN. § 17-22-50 (Law Co-op. 1985 & Supp. 1998).

threat a defendant poses to the community will depend in part upon each jurisdiction's determination of the types of conduct it views as threatening to the public health, safety, and well-being. It will also depend in part upon forecasts of the likelihood that the defendant will offend again or otherwise threaten the community.

Standard 14-4.1(a)(iv)

Standard 14-4.1(a)(iv) suggests that, in assessing when a diversion would be in the interests of justice, it is appropriate to consider whether the "needs of the offender and the government can be better met outside the traditional criminal justice process." In assessing the needs of the offender, it is appropriate for the parties to contemplate what treatment or counseling alternatives are available and what conditions of diversion have the greatest chance of ensuring meaningful rehabilitation.

Some jurisdictions require that any victim of the alleged offense consent to the diversion.²⁸ Many others require that the victim (and in some cases, law enforcement personnel involved in the case) be consulted and their recommendations be considered by the prosecutor or judge.²⁹ Where possible, the views of the victims, if any, of the offense should be considered in assessing the government's interest, and ultimately, the interests of justice in a particular case, consistent with general Standard 14-1.1(b).

Standard 14-4.1(b) (Diversion agreement)

Standard 14-4.1(b) instructs, consistent with the requirements of many states and the Uniform Rules,³⁰ that a diversion agreement should be contained in a writing reflecting all of the conditions agreed upon. Diversion agreements should be drafted in a manner that clearly explains to the defendant both the grounds and the procedure for

28. See, e.g., ARIZ. R. CRIM. P. 38.1(a); FLA. STAT. ANN. § 948.08(2) (West 1996 & Supp. 1999).

29. See, e.g., MISS. CODE ANN. § 99-15-113 (1994); S.C. CODE ANN. § 17-22-80 (Law Co-op. 1985 & Supp. 1998); see also NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 44.4(g), (i) (2d ed. 1991).

30. See, e.g., MISS. CODE ANN. § 99-15-117 (1994); S.C. CODE ANN. § 17-22-120 (Law Co-op. 1985 and Sup. 1998); WIS. STAT. ANN. § 971.39(1)(a) (West 1998); NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 44.5 (2d ed. 1991); MODEL CODE OF PRE-ARRAIGNMENT PROC. § 320.5(4) (1975); UNIF. R. CRIM. P. 442(a)(1) (1987).

terminating the defendant's participation in a pretrial diversion program.³¹ A clear and full explanation is not only important to ensure a defendant's knowing entrance into what may be a demanding program, but also guards against the types of misunderstandings that give rise to unnecessary, burdensome, and counterproductive disputes about the contours of the agreement. Although not expressly mandated by many jurisdictions, the better practice, recognized by the federal government and the National District Attorneys Association, is to require that offenders negotiating a diversion agreement have the assistance of counsel.³² The Standard contemplates that the advice of counsel will be necessary not only to safeguard the defendant's interests, but also to ensure the type of comprehensive, clear, and constructive agreement envisioned by this section.

Some of the conditions most frequently required to be present in diversion agreements are suggested by the Standard. Thus, most existing diversion programs require the defendant to waive speedy trial rights, which is proper where permissible under state law.³³ Many also provide that the defendant must toll the statute of limitations applicable to the underlying offense.³⁴ Because a number of existing programs are designed specifically for drug offenders, entrance into and satisfactory completion of a substance abuse treatment program is a very common condition of diversion. Similarly, offenders are commonly required to refrain from drug use or other criminal activity. The final condition that is mentioned in the standard is the performance of community service.³⁵ This list is not intended to be mandatory or exhaustive; the

31. *See, e.g.*, MISS. CODE ANN. § 99-15-117 (1994).

32. *See* NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 44.1 Commentary at 137 (2d ed. 1991); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.200(B)(2) (1993-2 Supp.) ("The divertee must have the advice of counsel, and if he/she cannot afford counsel, one will be appointed for him/her upon his/her application. . .").

33. *See, e.g.*, CAL. PENAL CODE § 1000.1(b) (West 1985 & Supp. 1999); FLA. STAT. ANN. § 948.08(2) (West 1996 & Supp. 1999); MISS. CODE ANN. § 99-15-115(a) (1994); S.C. CODE ANN. § 17-22-90 (Law Co-op. 1985); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.200(B)(1) (1993-2 Supp.).

34. *See, e.g.*, MISS. CODE ANN. § 99-15-115(b) (1994) S.C. CODE ANN. § 17-22-90 (Law Co-op. 1985 & Supp. 1998); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.000(B)(1) (1996-1 Supp.). Some also require that the defendant waive extradition. *See, e.g.*, MISS. CODE ANN. § 99-15-115(e)(1994).

35. *See, e.g.*, DEL. CODE ANN., tit. 16, § 4764(b)(2) (1995); WIS. STAT. ANN. § 971.38 (West 1998).

Standard contemplates that jurisdictions will experiment with the conditions that best suit their program needs.

A special note regarding restitution is required. Many jurisdictions view the prompt payment of restitution to the victim of the offense as one of the cardinal purposes behind diversion programs,³⁶ and thus require as a condition of successful completion of a diversion program the payment of restitution.³⁷ These Standards, while recognizing the appropriateness of conditioning successful completion of a diversion program on restitution in appropriate cases, also make clear in Standard 14-4.2(c) that not every case is an appropriate one for requiring restitution. Standard 14-4.2(c) cautions that an "offender's eligibility to participate in diversion should not depend on his or her ability to pay restitution or other costs." The Standard reflects the judgment that in most cases it would be unfair to condition access to a diversion program—and hopefully rehabilitation—on the size of a defendant's pocketbook. Further, although prompt restitution is one goal of diversion programs, it is not the only goal. In appropriate cases the other interests underlying this Standard, and ultimately the interests of justice, may well be served by permitting offenders who do not have the resources to make restitution to participate in diversion programs.

Standard 14-4.1(c) (Written policies for diversion programs and offender eligibility)

Standard 14-4.1(c) provides that diversion programs "should be governed by written policies setting forth the Standards for eligibility and the procedures for participation." The object is to give all eligible offenders an equal opportunity to take advantage of the diversion opportunity. The requirement that prosecutors be required to make public their policies regarding diversion programs serves other goals as well. The existence of such public policies provides interested persons—supervisory prosecutors, judges, defense counsel, or legislators—the means to determine whether the functioning and results of

36. See, e.g., U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.000 (1996-1 Supp.) (one of three "major objectives of pre-trial diversion" are "[t]o provide, where appropriate, a vehicle for restitution to communities and victims of crime").

37. See, e.g., ALA. CODE § 12-23-5(3)(d) (1995); MISS. CODE ANN. §§ 99-15-115(d), 99-15-121 (1994); S.C. CODE ANN. § 17-22-90 (Law Co-op. 1985 & Supp. 1998), § 17-22-140 (Law Co-op. 1985).

the program square with its articulated policies and goals.³⁸ Finally, the existence of written policies deters arbitrary and discriminatory exercises of discretion in the administration of diversion programs.³⁹

Standard 14-4.1(d) (Alternative forms of noncriminal resolution encouraged)

This Standard is not intended to limit jurisdictions' experimentation with alternative forms of noncriminal resolution or different forms of treatment in lieu of sentence. Accordingly, Standard 14-4.1(d) provides that "[t]he development of other, alternative forms of noncriminal resolution for appropriate cases should also be encouraged." The Standard is intended to promote experimentation with different types of non-incarceration sentences designed to rehabilitate and reform, as well as alternative forms of noncriminal disposition which are directed in part at achieving the same end.

38. See, e.g., NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 3.1, Commentary at 96 (1973) ("If diversion programs are to perform as they are intended, then the decisions of those referring to these programs must be subject to review").

39. See, e.g., NAT'L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 2.2, Commentary at 40 (1973) ("the discretion of decision making officials should be structured by written regulations to obviate whimsical and erratic decisions.").

