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July 1993
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During the preparation of the third edition Prosecution Function Standards, the following persons also served as members of the Criminal Justice Standards Committee: Albert J. Datz (Chair), private practitioner, Jacksonville, Florida; Charles L. Becton, private practitioner, Raleigh, North Carolina; Paul D. Borman, Chief Defender, Detroit, Michigan; William P. Curran, County Attorney, Clark County, Las Vegas, Nevada; Arthur C. "Cappy" Eads, District Attorney, Belton, Texas; Steven H. Goldberg, Dean, Pace University School of Law, White Plains, New York; Albert J. Krieger, private practitioner, Miami, Florida; Norman K. Maleng, District Attorney, Seattle, Washington; and Alexander H. Williams III, Judge, Superior Court, Los Angeles, California. The following persons also served for a substantial period of time as liaisons to the Criminal Justice Standards Committee: Thomas Foley, Ramsey County Attorney, St. Paul, Minnesota, from the National District Attorneys Association; David A. Horowitz, Judge, Superior Court, Los Angeles, California, from the ABA Judicial Administration Division; Dennis Saylor, now a private practitioner, Boston, Massachusetts, from the U.S. Department of Justice; and Irwin H. Schwartz, private practitioner, Seattle, Washington, from the National Association of Criminal Defense Lawyers.
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INTRODUCTION

Background: The Process of Adoption of the Third Edition

This third edition of the Defense Function Standards and the Prosecution Function Standards is the product of a drafting effort that began more than five years ago, in the spring of 1988. The blue-ribbon Updating Task Force on the Prosecution Function and the Defense Function/Providing Defense Services Standards was appointed by the Criminal Justice Standards Committee, a standing committee of the Criminal Justice Section, in the winter of 1988. The Task Force first met in Minneapolis in May 1988 to assess the substantive areas in which rethinking and redrafting of these standards should begin and should focus. A preliminary draft of revised standards was initially considered at great length by the Task Force in November 1988. A second draft was considered and prepared for review by the Criminal Justice Standards Committee in January 1989. After an initial review by the Standards Committee, a third and then a fourth working draft were prepared and reviewed sequentially by the Task Force and the Standards Committee, respectively, during the remainder of 1989.

A complete draft revision of both the Prosecution Function Standards and the Defense Function Standards was then prepared by the Standards Committee and referred to the Criminal Justice Section Council for its preliminary review at its fall meeting in 1989. The Council made numerous comments and suggestions. In the light of this input, the Standards Committee then reviewed and approved a final working draft of both of these sets of standards in January 1990.

The final working draft of the Defense Function Standards was then submitted to the Criminal Justice Section Council once again in August 1990 and was approved overwhelmingly. Subsequently, on February 11, 1991, the third edition of the Defense Function Standards was approved by the ABA House of Delegates.

The final working draft of the Prosecution Function Standards was also submitted to the Criminal Justice Section Council in August 1990, but it was not discussed substantively. Instead, at that meeting of the Council in Chicago, various prosecutors’ groups and the U.S. Department of Justice asked for additional time to comment on the proposed revised standards. Accordingly, final consideration of the revised Prosecution Function Standards was deferred. In May 1991, the Standards
Committee once again reviewed and revised the Prosecution Function Standards in the light of additional comments and suggestions made in the intervening months by a number of interested sources, including active liaisons from the U.S. Department of Justice, the ABA Judicial Administration Division, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, and the National Legal Aid and Defender Association. The resulting revised final working draft of the Prosecution Function Standards was then considered and approved by the Criminal Justice Section Council at its November 1991 meeting in Annapolis. Subsequently, on February 3, 1992, the third edition of the Prosecution Function Standards was approved by the ABA House of Delegates.

The final product, this third edition of both the Defense Function Standards and the Prosecution Function Standards, is the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

Major Changes in the Third Edition

These Standards were revised in large part to reflect the dramatic developments in the field of legal ethics that have taken place since the second edition of these Standards was published in 1980. Literally thousands of new judicial decisions relating to prosecutorial and criminal defense ethics have been handed down in the last decade. Hundreds of new books and articles touching upon these subjects have been published. Indeed, the proper role and function of criminal defense counsel and prosecutors have become a particularly topical focus of discussion, debate, and, frankly, of controversy in the legal community and in the larger society.

Moreover, since the second edition of these Standards was published, the ABA, after many years of intensive study, discussion, and vigorous debate, adopted a new code of professional ethics, the Model Rules of Professional Conduct (the Model Rules). The Model Rules replaced the
Criminal Justice Prosecution Function and Defense Function Standards

preexisting Model Code of Professional Responsibility. These new ethical rules, the Model Rules of Professional Conduct, are the primary (but not the only) source of changes in these revised Standards. The second edition of the Prosecution Function Standards and of the Defense Function Standards—revised in 1979, more than four years before the Model Rules were adopted by the ABA House of Delegates in August of 1983—contained a number of Standards that conflicted in significant ways with Model Rules provisions. Adoption of this third edition of these Standards conformed them with the Model Rules and eliminated these conflicts.

In addition, there are numerous other amendments contained in these revised standards dealing with areas not directly or explicitly covered by the Model Rules. For example, criminal defense counsel’s obligations as “hybrid” or “standby” counsel are addressed in new Standard 4-3.9 of the Defense Function Standards. There was, prior to adoption of this standard, no existing ABA ethics policy on this subject. Similarly, a prosecutor’s obligations to victims is addressed in some detail in portions of Standard 3-3.2. Prior to adoption of this Standard, there was no existing ABA ethics policy on this subject as well.

In all, of the forty-three standards that were previously contained in the second edition of the Defense Function Standards, two were deleted (although their content was moved to other standards) and two new standards were added. Twenty-nine of the forty-three standards were amended to reflect new substantive additions and/or deletions and twelve standards were amended to reflect changes essentially of a stylistic nature. Only two of the forty-three standards contained in the second edition of the Defense Function Standards remain unchanged in the third edition.

In the Prosecution Function Standards, of the forty standards contained in the second edition, one was deleted (although its content was moved to another standard) and two new standards were added. Twenty-three of the forty standards were amended to reflect substantive additions and/or deletions and seven standards were amended to reflect changes essentially of a stylistic nature. Only ten of the forty standards contained in the second edition of the Prosecution Function Standards remain unchanged in the third edition.

Finally, lawyers and judges consulting the revised standards contained in this third edition of the Prosecution Function Standards and the Defense Function Standards should not confuse these standards either with applicable ethics codes or crimes codes, which vary in significant
ways jurisdiction by jurisdiction. The Prosecution Function Standards and the Defense Function Standards have been drafted and adopted by the ABA in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be. Hence, these are extremely useful standards for consultation by lawyers and judges who want to do "the right thing" or, as important, to avoid doing "the wrong thing." However, whether a particular rule or policy set forth in these standards might appear to be fairer or more sensible than prevailing law or ethics provisions in force in a given jurisdiction, defense counsel and prosecutors should nonetheless not fail to consult and to follow the laws and ethics codes applicable in their own jurisdictions.
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PART I.

GENERAL STANDARDS

Standard 3-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

History of Standard

This Standard is new, but the language is not. Most of the language is taken from Standard 3-1.1(f) in the second edition. The concept of "unprofessional conduct" used in Standard 3-1.1(f) was used throughout these Standards in the second edition and has been deleted. The word "honorable" before the phrase "professional conduct" has also been deleted. The remainder of Standard 3-1.1 in the second edition is now Standard 3-1.2, as revised, in this edition.

Related Standards

ABA Model Rules of Professional Conduct Scope (1983)
ABA Standard for Criminal Justice 4-1.1 (3d ed. 1993)
NDAA National Prosecution Standards Introduction (2d ed. 1991)

Commentary

These Standards are intended to provide prosecutors with reasoned and appropriate professional advice. They are also intended to serve as
a guide to what is deemed to be proper conduct. These Standards are not intended, however, to serve as rules to be used as the basis for the imposition of professional discipline; applicable codes of ethics adopted in each jurisdiction serve that function. Moreover, these Standards are not intended to create substantive or procedural rights that might accrue either to accused or convicted persons.

The commentary occasionally refers to judicial decisions that involve issues of competency or effectiveness of counsel, insofar as such decisions cast light on standards that courts have concluded are applicable to the conduct of counsel. Nonetheless, it is beyond the scope of these Standards to attempt to determine the conditions under which deviation from the recommendations made herein warrants reversal or vacation of a conviction.

**Standard 3-1.2 The Function of the Prosecutor**

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

**History of Standard**

Standard 3-1.2 was Standard 3-1.1 in the second edition. Section (b) has been revised stylistically to add the "and an officer of the court" language. Section (d) was Standard 3-1.4 in the second edition of these
Standards. Section (e) contains a stylistic revision. The final section in this Standard in the second edition—former Section (f)—has been deleted, but some of the language has been moved to Standard 3-1.1.

**Related Standards**

ABA Model Code of Professional Responsibility Preliminary Statement; DR 1-102(A)(4), (5); EC 6-1; EC 7-13; EC 7-14; EC 9-6 (1969)
ABA Model Rules of Professional Conduct Preamble; Scope; 1.1; 3.8; 8.4(c), (d), (e) (1983)
ABA Standards for Criminal Justice 3-2.8; 3-3.4; 3-3.8; 3-3.9; 4-1.2; 4-1.5 (3d ed. 1993)
NDAA National Prosecution Standards 1.1; 1.3; 1.5; 1.6; 6.1; 6.2; 6.3; 25.1; 25.3; 25.5; 86.1; 92.1 (2d ed. 1991)

**Commentary**

The prosecutor plays a critical role in the criminal justice system. All serious criminal cases require the participation of three entities: a judge (and jury), counsel for the prosecution, and counsel for the accused. Absent any one of these entities (and barring a valid waiver of counsel), the court is incomplete. In short, a "court" must be viewed as a structure with three legs, requiring the support of all three.

Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a "minister of justice" or as occupying a quasi-judicial position.

The prosecutor may also be characterized as an administrator of justice, since the prosecutor acts as a decision maker on a broad policy level and presides over a wide range of cases as director of public prosecutions. The prosecutor also has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Since the prosecutor bears a large share of the responsibility for determining which cases are taken into the courts, the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.
3-1.2 Criminal Justice Prosecution Function and Defense Function Standards

The legal profession must continue to develop an awareness of the importance of a vigorous, fair, and efficient prosecutorial system and give high priority to the sponsorship and support of those measures necessary to implement this objective. The court and defense counsel will treat the prosecutor with the respect that facilitates furthering this objective, however, only if the prosecutor maintains proper professional detachment and acts in accordance with applicable professional standards. Such professional integrity and detachment is furthered by the prosecutor's efforts, independent of the prosecutorial role, to engage in appropriate law reform activities and to remedy injustices that the prosecutor sees in the administration of criminal justice generally in his or her jurisdiction.

As the public official in constant contact with the day-to-day administration of criminal justice, the prosecutor occupies a unique position to influence the improvement of the law. As one national study has noted, the prosecutor "affects the development of legal rules by his arguments in court. He can help bring about needed reform by pressing for changes in bail practices, for example, or in procedures for the appointment of counsel."1 Although the legal profession does not bear sole responsibility for law reform, it has a clear duty in this respect.2 In recent years, moreover, increasing numbers of lawyers have recognized their responsibility in the administration of criminal justice. Prosecutors should take advantage of this climate of professional concern by assuming leadership to improve the quality and efficiency of criminal justice. It is in the public interest for the prosecutor to foster good working relationships with the defense bar, including defender agencies, and to participate in such activities as criminal law sections of the organized bar and joint seminars on criminal law and procedure. Reforms and improvements in the criminal law will more readily gain the approval of legislative bodies and the public if they are the joint work product of both prosecutors and defense lawyers.

It is also the duty of the prosecutor to become intimately familiar with and adhere to the legal and ethical standards governing the performance of his or her official duties. Like other lawyers, the prosecutor is subject to disciplinary sanctions for conduct prohibited by applicable

2. ABA Model Rule of Professional Conduct 6.1; ABA Model Code of Professional Responsibility EC 8-2.
Criminal Justice Prosecution Function and Defense Function Standards

3-1.3 codes of professional conduct in his or her jurisdiction. The Prosecution Function Standards are intended to advise and assist the prosecutor in the honorable and professional performance of prosecutorial duties. To this end, in situations of doubt as to the proper course of action and where available, the prosecutor should make use of the guidance of the advisory council on professional conduct that these Standards recommend be established in each jurisdiction.

Standard 3-1.3 Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties.

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(c) A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or nongovernmental employment unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor's stead in the matter.

(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

(e) A prosecutor should not, except as law may otherwise expressly permit, negotiate for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(g) A prosecutor who is related to another lawyer as parent, child, sibling, or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. Nor should a prosecutor who has a significant personal or financial relationship with another lawyer participate in the prosecution of a person who the prosecutor knows is represented by
the other lawyer, unless the prosecutor's supervisor, if any, is informed and approves or unless there is no other prosecutor authorized to act in the prosecutor's stead.

(h) A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. Nor should a prosecutor comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel's services unless requested by such person.

History of Standard

The former conflicts of interest standard, Standard 3-1.2 in the second edition, consisted only of two sentences, part of which now comprise current section (a). Former Standard 3-1.2 provided in its entirety: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in codes of professional responsibility, failure to do so will constitute unprofessional conduct." The first sentence of section (a) as revised reflects the ABA Model Rules of Professional Conduct's rejection of appearance-based conflict-of-interest standards. The last sentence of the former Standard 3-1.2 was deleted because the remainder of the sections in this Standard define such instances of what was previously deemed "unprofessional conduct."

As noted, therefore, sections (b) through (h) are new to this edition. Section (c), however, reflects the language and approach taken in ABA Model Rule of Professional Conduct 1.11(c)(1). Section (d), similarly, reflects the approach taken in ABA Model Rule 1.9(b). Section (e) is similar to ABA Model Rule 1.11(c)(2). And section (g) is taken in large part from ABA Model Rule 1.8(i).

Related Standards

ABA Model Code of Professional Responsibility DR 5-101(A); DR 5-105; DR 5-107; Canon 9 (1969)
ABA Model Rules of Professional Conduct 1.7; 1.8(a), (i); 1.9; 1.10; 1.11; 5.4(a), (c), (d) (1983)
ABA Standards for Criminal Justice 3-2.11; 3-3.9(d); 4-1.2; 4-1.6; 4-3.1; 4-3.5; 4-3.8; 4-6.2(d), (e) (3d ed. 1993)
NDAA National Prosecution Standards 7.1; 7.2; 7.3; 7.4 (2d ed. 1991)

Commentary

Outside Interests and Influences

A prosecutor's client is the people who live in the prosecutor's jurisdiction. Since all lawyers have a fiduciary duty to their clients, the professional judgment of the prosecutor must be exercised, within the bounds of the law, solely for the benefit of the client—the people—free of any compromising influences or loyalties. A prosecutor's own interests, of whatever nature, should never be permitted to have an adverse effect on the professional performance of the prosecutor's official duties and obligations. For example, a prosecutor's past, present, or anticipated future personal, business, or employment relationship with an accused person, a potential witness, or another lawyer must not be permitted to affect the prosecutor's charging decisions or the prosecutor's handling of prosecutions or appeals.¹

Furthermore, a prosecutor should not allow personal, ideological, or political beliefs to interfere with the professional performance of official duties. The natural desire for personal achievement, or for personal or political success, or simply to be in the forefront in developing new legal concepts or theories also never justifies the compromise of judgment or statutory or other obligations in deciding how to carry out official duties.

Similarly, a prosecutor should never proceed with an unnecessary investigation or prosecution in order simply to make "new law" or headlines.² Nor should a prosecutor be deterred from investigation or prosecution merely because of the possibility of unfavorable media attention or an unfavorable result.³ The correct role of the prosecutor is to strive not for "courtroom victories" or media or public attention, but for results that best serve the overall interests of justice and that satisfy the prosecutor's fiduciary and statutory duties to the people in a lawful and professional manner. The decision on how to proceed must be made strictly on this basis, uninfluenced by the prosecutor's self-interest in being identified with a "landmark case." Nonetheless, noth-

¹. See also Standards 3-2.11; 3-3.9(d).
². See Standard 3-3.9(a), (f).
³. See Standard 3-3.9(a), (e).
ing contained in this Standard is intended to cast doubt upon an elected prosecutor's political accountability to the public.

Prosecutors as Defense Counsel

It is inappropriate to permit a lawyer who regularly serves as a prosecutor to also appear as defense counsel in the same jurisdiction, opposing someone who ordinarily is an associate in the prosecutor's office. There are, to be sure, some advantages to the operation of an adversary system where lawyers can avoid being stereotyped in their roles. In our system of institutionalized prosecution offices, it is difficult if not impossible, however, for prosecutors to simultaneously appear in a defense role. Nonetheless, the long-range benefits of such interchange are such that lawyers who have been trained in prosecution offices should be encouraged to devote some period of their professional careers to defense work, whether privately or as public defenders, after they have left prosecution offices. Correspondingly, public defender staff members should be encouraged to move into prosecution offices.

It is also important to note that lawyers who are associated in the practice of law should not appear on both sides of the same case, i.e., as prosecutor and defense counsel. The principal rationale for this prohibition, of course, is the avoidance of any possibility of division or dilution of loyalties. Relationships between lawyers who are associated in practice are so close and the potential for conflict is so great that, given the lack of any strong reason for permitting such potentially conflictive representation, a flat prohibition is warranted against lawyers from the same firm or office appearing as prosecutor and defense counsel in the same case.4

Former Defense Practice

A lawyer's duty of confidentiality to his or her client continues after the termination of the attorney-client relationship.5 Accordingly, it is improper for a prosecutor who has formerly engaged in private practice to use confidential information obtained during a former attorney-client relationship to the disadvantage of the former client when that information retains its privileged character.

4. See also Standard 4-3.5(f).
5. See Standard 4-3.5 Commentary; Standard 4-3.7(d); ABA Model Rules of Professional Conduct 1.6; 1.9; ABA Model Code of Professional Responsibility EC 4-6.
For similar reasons, in other than extraordinary circumstances a prosecutor should not participate in any fashion in the same or a substantially related matter in which the prosecutor previously participated personally or substantially on behalf of an accused while in private practice. This prohibition, set out in section (c), should not, however, be construed vicariously to disqualify other prosecutors in the prosecutor’s office from such participation in the absence of some additional conflictive factor or the possession of confidential information by the other prosecutors.

*Negotiating for Employment*

Because of the improper appearance such negotiations might create, prosecutors should not seek employment from any person who is significantly involved in a matter in which the prosecutor is presently participating both personally and substantially. This prohibition is inapplicable, however, to other individuals in a prosecution office without significant substantive involvement in the matter, e.g., clerical personnel.

*Prosecutor Who Is Related to Defense Counsel*

A prosecutor’s familial interests can be the source of a conflict of interest just as much as any other competing interest. Section (g) prohibits prosecutors from participating in a criminal matter in which an accused is represented by the prosecutor’s parent, child, sibling, or spouse. Given the importance of assuring public confidence in the administration of criminal justice, this prohibition should be imposed without the possibility of exception based upon a supervisor’s consent. However, such a conflict should not be imposed vicariously upon other prosecutors in the prosecution office. Nor is this prohibition intended to apply when the prosecutor’s familial relationship is with defense counsel who is not directly involved in the particular prosecution in question.

Where a prosecutor has a significant, albeit nonfamilial, personal or financial relationship with defense counsel on the other side of a matter, a conflict of interest may also exist. The prosecutor should either decline

6. See ABA Model Rule of Professional Conduct 1.9(a).
7. See ABA Model Rules of Professional Conduct 1.10(a); 1.11(c), Comment.
8. See also Standard 4-3.5(k).
9. See ABA Model Rules of Professional Conduct 1.8(i); 1.10(a).
or withdraw from participation in such an instance or should obtain his or her supervisor’s consent before proceeding.

**Improper Referrals and Comments**

A prosecutor may possess a natural and understandable interest both in who is representing an accused person or a material witness and in how vigorously that individual is being represented. Further, the prosecutor’s interest may be different from, indeed often is directly adverse to, the accused’s or witness’s personal interest in private representation leading to complete personal exculpation. As a result, prosecutors should avoid a potential source of conflict of interest by generally refraining from making referrals of such individuals to particular defense counsel.

Nonetheless, it is also true that prosecutors are often uniquely well situated to assess the quality of the defense bar and defense representation in their jurisdictions. Furthermore, a prosecutor may have a preexisting relationship with the individual needing a referral that would predispose the prosecutor to want to assist the individual in obtaining first-rate representation, whatever the impact on the prosecutor’s professional interests, e.g., the individual could be a family member. In balancing these interests, section (h) provides that it is not improper for a prosecutor who has not initiated the subject to make a specific recommendation of defense counsel in response to a direct request from such an individual. A referral in these circumstances is not improper, assuming that it does not otherwise raise some other specific question of actual conflict of interest, e.g., it is a referral to the prosecutor’s spouse or law partner.

Similarly, in the interests of the overall integrity of the criminal justice system, prosecutors should exercise great restraint when otherwise tempted to comment upon the reputation or abilities of particular defense counsel to an individual seeking defense representation. As with referrals, such comments are inappropriate conflicts of interest under section (h) unless the issue has been directly raised in the first instance by the individual seeking defense assistance.

**Standard 3-1.4 Public Statements**

(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a
substantial likelihood of prejudicing a criminal proceeding.

(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

History of Standard

This Standard has been substantially revised. Section (a) of the former Standard prescribed that "[t]he prosecutor should not exploit the office by means of personal publicity connected with a case before trial, during trial, or thereafter." Current section (a) was taken in significant part from ABA Model Rule of Professional Conduct 3.6(a) and is identical (except for use of the word "prosecutor" instead of "lawyer") to ABA Standards for Criminal Justice, Fair Trial and Free Press Standard 8-1.1(a) (3d ed. 1992). Sections (b) and (c) in the second edition commanded compliance with the ABA Standards for Criminal Justice, Fair Trial and Free Press Standards (2d ed. 1980). Except for stylistic changes, new section (b) was taken directly from ABA Model Rule of Professional Conduct 3.8(e).

Related Standards

ABA Model Code of Professional Responsibility DR 7-107 (1969)
ABA Model Rule of Professional Conduct 3.6(a); 3.8(e) (1983)
ABA Standards for Criminal Justice 3-5.10; 4-1.4 (3d ed. 1993)
ABA Standards for Criminal Justice 5-5.3; 8-1.1 (3d ed. 1992)
NDAA National Prosecution Standards 33.1; 33.2; 34.1; 34.2; 34.3; 35.1 (2d ed. 1991)

Commentary

Fair Trial and Free Press Concerns

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. If there were no such limits, the result might be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital
social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. An accused may never be more in need of the First Amendment right of freedom of speech, for example, than when officially labeled a wrongdoer by indictment or information and, perhaps, by the media before family, friends, neighbors, and business associates. Moreover, the public has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. The subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

**Relationship to Other Standards**

Except for stylistic changes, the language in section (a) is identical to the language used in *ABA Standards for Criminal Justice, Fair Trial and Free Press Standard 8-1.1(a)* (3d ed. 1992) and in *ABA Standards for Criminal Justice, Defense Function Standard 4-1.4* (3d ed. 1993). In turn, both of these Standards are patterned after *ABA Model Rule of Professional Conduct 3.6(a)*.

The only substantive differences between Standard 3-1.4(a) (and Standards 4-1.4 and 8-1.1(a)) and Model Rule 3.6(a) are: (1) the addition of the phrase "or authorize the making of" in Standard 3-1.4(a), (2) the use of the phrase "a criminal" in Standard 3-1.4(a) rather than "an adjudicative" before the final word, "proceeding," and (3) the omission of the word "materially" before the word "prejudicing" in Standard 3-1.4(a). The first difference reflects the view that prosecutors may not avoid compliance with these rules by using another person to make statements that a prosecutor should not or could not make. The second difference reflects the view that application of this section is appropriate in *any* criminal proceedings, whether or not they can be formally labelled "adjudicative." The third difference reflects the view that it is inappropriate for a prosecutor to "prejudice" a criminal proceeding to any extent.¹

Both Model Rule 3.6 and the Fair Trial and Free Press Standards contain lists of the types of statements that can ordinarily be presumed to violate or not to violate the strictures of this section. Fair Trial and

¹. The Supreme Court has narrowly held constitutional under the First Amendment the standard of substantial likelihood of material prejudice (as opposed to a stricter standard, such as "clear and present danger"). *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2738, 2745 (opinion of Rehnquist, C.J.); *id.* at 2748 (opinion of O'Connor, J.).
Free Press Standards 8-1.1(b) and (c) provide as follows:

(b) Statements relating to the following matters are ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding:

1. the prior criminal record (including arrests, indictments, or other charges of crime) of a suspect or defendant;
2. the character or reputation of a suspect or defendant;
3. the opinion of the lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case;
4. the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;
5. the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
6. the identity, expected testimony, criminal record or credibility of prospective witnesses;
7. the possibility of a plea of guilty to the offense charged, or other disposition; and
8. information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) Notwithstanding paragraphs (a) and (b), statements relating to the following matters may be made:

1. the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty;
2. the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;
3. the name, age, residence, occupation and family status of the accused;
4. information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;
5. a request for assistance in obtaining evidence;
6. the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;
7. the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

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(8) the identity of the victim, where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;

(9) information contained within a public record, without further comment;

(10) the scheduling or result of any stage in the judicial process. Furthermore, Fair and Trial Free Press Standard 8-1.1(d) provides that:

Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her, or to preclude or inhibit any lawyer from making an otherwise permissible statement which serves to educate or inform the public concerning the operations of the criminal justice system.

In the absence of specifically applicable rules, this Standard is intended to apply to related criminal or “quasi-criminal” proceedings, e.g., juvenile or mental health proceedings.

*Reasonable Care with Respect to Actions of Others*

Section (b) was taken directly from ABA Model Rule of Professional Conduct 3.8(e), which imposes an express ethical duty upon prosecutors to exercise reasonable care to assure that nonlawyers employed by or associated with prosecutors’ offices also comply with the prohibitions contained in section (a).

It is not possible, of course, for a prosecutor who is nonetheless acting “reasonably” to always be in a position to prevent such unfortunate occurrences. Generally, it would appear that the “reasonable care” standard in section (b) would be satisfied by a prosecutor’s appropriate cautions to the proper law enforcement personnel and other relevant individuals to avoid violations of section (a). As prescribed by the National District Attorneys Association, National Prosecution Standard 35.1 (2d ed. 1991): “The prosecutor should inform local law enforcement agencies of the state, court, constitutional and case law provisions, as well as professional codes and standards, concerning fair trial and
free press issues, and should encourage them to adopt policies which will protect both the rights of the individual and the ability of the prosecution to proceed."

Standard 3-1.5 Duty to Respond to Misconduct

(a) Where a prosecutor knows that another person associated with the prosecutor's office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the prosecutor's office or a violation of law, the prosecutor should follow the policies of the prosecutor's office concerning such matters. If such policies are unavailing or do not exist, the prosecutor should ask the person to reconsider the action or inaction which is at issue if such a request is aptly timed to prevent such misconduct and is otherwise feasible. If such a request for reconsideration is unavailing, inapt or otherwise not feasible or if the seriousness of the matter so requires, the prosecutor should refer the matter to higher authority in the prosecutor's office, including, if warranted by the seriousness of the matter, referral to the chief prosecutor.

(b) If, despite the prosecutor's efforts in accordance with section (a), the chief prosecutor insists upon action, or a refusal to act, that is clearly a violation of law, the prosecutor may take further remedial action, including revealing the information necessary to remedy this violation to other appropriate governmental officials not in the prosecutor's office.

History of Standard

This Standard is a new addition to the Prosecution Function Standards. It reflects implementation of the ABA Model Rules of Professional Conduct in the prosecutorial setting. Section (a) was taken from Model Rules 1.13(b). Section (b) was adapted from Model Rule 1.13(c).

Related Standards

ABA Model Rule of Professional Conduct 1.13 (1983)
NDAA National Prosecution Standard 18.5 (2d ed. 1991)
Commentary

The governmental entity that employs the prosecutor acts through its authorized officials. Hence, when a prosecutor's supervisors in a prosecution office make decisions for the office, these decisions ordinarily must be accepted by the prosecutor even if their utility or prudence appears doubtful. Decisions made by a prosecutor's supervisors concerning overall office policy and operations may be questioned, of course, but should nonetheless ordinarily be followed by the prosecutor. In no event, however, should a prosecutor participate or assist in the commission of illegal activity whatever the direction he or she may have received from a supervisor.

Moreover, different considerations arise when the prosecutor knows that another prosecutor in the office or other office personnel is taking or planning actions that violate a legal obligation to the office or that are a violation of law. In such circumstances it may be necessary, as an initial course of action, for the prosecutor to ask the other person to reconsider the action that is at issue. If that step fails or otherwise is not a feasible course of action, e.g., illegal conduct has already taken place, the prosecutor should take steps to have the matter reviewed by a higher authority in the office, including, if necessary, the chief prosecutor. However, this step should not be undertaken lightly; clear justification should exist for seeking review over the head of the person whose actions are in question. The stated policy of the prosecution office may define circumstances and procedures for just such a review, and prosecutors should encourage the formulation of such a policy in advance of problems arising that might necessitate its use.

Where a prosecutor has made every reasonable or feasible effort to remedy a problematic situation within the prosecution office itself and has failed, it is appropriate for the prosecutor to take further action. Such further action includes going outside of the prosecution office, e.g., reporting the misconduct to appropriate law enforcement officials.\(^1\) In some instances, the proper course of conduct may be spelled out in statutes or regulations. Where that is the case, the prosecutor should follow scrupulously such requirements.

\(^1\) See ABA Model Rule of Professional Conduct 1.13 Comment ("Government Agency"). See also NDAA National Prosecution Standards 18.5 (2d ed. 1991) ("When the prosecutor has knowledge of misconduct or incompetency in another entity of prosecution, he should report that information to the supervisory authority and take such other actions necessary to sanction the misconduct and remedy the incompetence.").
PART II.

ORGANIZATION OF THE
PROSECUTION FUNCTION

Standard 3-2.1 Prosecution Authority to be Vested in a Public Official

The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.

History of Standard

This Standard is unchanged from the second edition.

Related Standards

NDAA National Prosecution Standards 1.5; 3.2 (2d ed. 1991)

Commentary

The concept that the state has a special interest in the prosecution of criminal cases that requires the presence of a professionally trained advocate arose during the formative period of American law. Much earlier, in England, it had been assumed that prosecution was a matter for the victim, the victim’s family, or friends. The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected. Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice.

In a few jurisdictions, a private party may institute criminal proceedings without the authorization or approval of the prosecuting attorney. When a check is not provided by the participation of a public prosecutor, however, there is danger of the vindictive use of the criminal law process. Standard 3-2.1 is designed to discourage the practice of police or private prosecution by the adoption of appropriate legislation to require the participation of a prosecutor in all criminal cases except regulatory violations of a minor nature.

Private prosecution, as described above, should be distinguished from the process available in some jurisdictions whereby a private citizen may file a complaint if the prosecutor refuses to act. It is often argued that a private citizen should have this right if the prosecutor refuses to proceed. Against this view, it is said that efficient prosecution requires the participation of a trained prosecutor at the initial stage of decisions on prosecution. This Standard is not intended to discourage the adoption of a system under which a complainant may move for prosecution before a magistrate when a prosecutor has declined to proceed, provided this right is limited to significant criminal conduct and provided that the prosecution is conducted by a public prosecutor.

There has been increasing recognition of the desirability of transferring drunkenness offenses, minor traffic offenses, and similar matters out of the traditional criminal processes and into some form of administrative process. Thus, the ALI Model Penal Code recommends the creation of a category of "violations" below that of misdemeanors and not subject to either the consequences or the procedures of the criminal law. Even where this has not yet been done, such matters often can be prosecuted without the aid of a professional public prosecutor. Relieved of handling these categories of regulatory violations, a properly staffed prosecution office should be better able to ensure that all other prosecutions are initiated only after evaluation by a professionally trained prosecutor and that the prosecution is conducted by such a prosecutor.

Standard 3-2.2 Interrelationship of Prosecution Offices Within a State

(a) Local authority and responsibility for prosecution is properly vested in a district, county, or city attorney. Wherever possi-

2. ALI, MODEL PENAL CODE § 1.04(5) and Comment (Tent. Draft No. 2, 1954).
ble, a unit of prosecution should be designed on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution.

(b) In some states, conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are deputies.

(c) In all states, there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state association of prosecutors should be established in each state.

(d) To the extent needed, a central pool of supporting resources and personnel, including laboratories, investigators, accountants, special counsel, and other experts, should be maintained by the state government and should be available to assist all local prosecutors.

**History of Standard**

Sections (a) and (b) are unchanged. Section (c) and section (d) (which was formerly section (e)) contain stylistic changes only. Former section (d) ("In cases where questions of law of statewide interest or concern arise which may create important precedents, the prosecutor should consult and advise with the attorney general of the state.") was deleted as unnecessary or inappropriate in all cases.

**Related Standards**

NDAA National Prosecution Standards 1.4; 3.1; 8.1; 8.2; 8.3; 8.4; 8.5; 8.6; 8.7; 11.1; 16.1; 16.2; 18.1; 18.2; 18.3; 18.4; 18.6; 18.8; 92.1 (2d ed. 1991)

**Commentary**

**Basic Units of Prosecution**

Traditionally, the American prosecutor is a local official whose area of responsibility is limited to a particular district, county, or city. Division of prosecutorial responsibility on this basis serves to emphasize the
need for the prosecutor to be responsive to local conditions. Familiarity with the community aids the prosecutor in gathering evidence, in allocating resources to the various activities of the office, and in appraising the disposition appropriate to particular offenses and offenders. In most states, in addition to the unit of prosecution responsible for major prosecutions for violations of state law (chiefly felonies), there are prosecutorial offices of lesser territorial scope charged with the prosecution of violations of local ordinances.

The emphasis on a locally functioning prosecutor and a large, if not unlimited, autonomy for such an official developed from early American experience with distant crown officials who were not responsive to local attitudes and traditions. What began as valid opposition to nonrepresentation and nonresponsive officialdom took root and became, in some instances, a parochialism that persists today in spite of vastly changed conditions.

There are two common problems with the present system of prosecutorial offices. The first is the lack of coordination among prosecution offices resulting from their autonomy. This matter is treated in section (c) and is discussed below. The other major source of difficulty is the existence of offices serving extremely small territorial areas. Many territorial units are too small in terms of population to support more than a part-time prosecutor.1 Unfortunately, these small offices cannot provide the investigative resources, the accumulated skill and experience, and the variety of personnel desirable for the optimum functioning of an efficient prosecution office.2 Nor can they provide opportunities for developing a range of special skills and internal checks and balances within the office. Organization of the prosecution function on a district basis, extending over more than one county, offers the best hope for improving the prosecution structure in areas with insufficient population to support a substantial office on a countywide basis alone.

Statewide System

Some states have statewide systems of prosecution. Some studies of the prosecution structure have recommended the establishment of a

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1. "[T]here are many part-time prosecutors in the United States, both elected prosecutors and staff attorneys. This is an economic fact of life created by the overriding benefit of local accountability and control." NDAA National Prosecution Standards, The Prosecution Function, Commentary at p. 10 (2d ed. 1991).

2. See further Standard 3-2.4, Commentary.
statewide system. Because criminal law is largely the creation of state government, there is considerable appeal to this view. However, each state needs to examine its own geography, transportation, and government structure with a view to the adoption of the most desirable system. An example of effective administration on a nationwide basis is the Department of Justice, which functions through nearly one hundred appointed United States Attorneys in more than fifty states and territories, with central direction in the Attorney General in Washington. The possibility of moving to a system of statewide administration of the prosecution function should not be disregarded.

**Statewide Coordination**

Increased state coordination may provide the only means of overcoming the problems inherent in local autonomy. From the Wickersham Commission Report of the 1930s to the present, every major study of the prosecution function in the United States has concluded that, at a minimum, there is need for greater statewide coordination.

The recommendation for the establishment of a state association of prosecutors flows from the successful experience with similar bodies in the judiciary (judicial councils and conferences) and from the prosecution associations that now operate in several states. Each state should provide by statute for the establishment and adequate funding of an association of all of its officials engaged in the function of prosecution, including local and state officials. Meetings of such an association would provide an opportunity for the valuable exchange of experience and ideas among prosecutors and would enhance the likelihood that statewide prosecution policies will be formulated with an understanding of local and statewide needs. The suggestion that there be a statewide professional association of prosecutors has been endorsed by the National District Attorneys Association. 4

**Prosecution Resources and Personnel Pool**

The need for the assistance of a resources pool on the state level requires no documentation. Few local prosecution offices can support, either in volume of activity or in financial terms, the full complement

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of technical and professional experts necessary for effective investigation and prosecution under modern conditions. On the federal level, such services are made available to the various United States attorneys through the facilities of the Department of Justice, including the FBI, the Treasury Department, and other agencies, all of which are staffed by highly trained, career professionals.

Counsel with experience in certain types of litigation—for example, tax law violations, food and drug law offenses, and specialized types of criminal prosecutions—can also be provided by a state agency to assist in local prosecutions where the local office does not have sufficient resources to develop specialized personnel in these fields.\(^5\) The federal system presents a valuable model in this respect. Where such facilities are already available at the state level, local prosecutors should be encouraged to make full use of them.

\section*{Standard 3-2.3 Assuring High Standards of Professional Skill}

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.

(b) Wherever feasible, the offices of chief prosecutor and staff should be full-time occupations.

(c) Professional competence should be the basis for selection for prosecutorial office. Prosecutors should select their personnel without regard to partisan political influence.

(d) Special efforts should be made to recruit qualified women and members of minority groups for prosecutorial office.

(e) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

\footnote{5. \textit{See also} Standard 3-2.4(b), Commentary.}
History of Standard

Sections (a), (b), and (e) (which was formerly section (d)) are unchanged. Section (c) was revised to recognize affirmative action considerations in hiring (deletion of "only" before the word "basis" in first sentence; deletion of "on the basis of professional competence" before the word "without" in the second sentence). The word "staffs" in former section (c) was changed to "personnel" to conform to the change made in Standard 3-2.2(d). Section (d) is new to this Standard.

Related Standards

ABA Standard for Criminal Justice 5-4.1 (3d ed. 1992)
NDAA National Prosecution Standards 1.4; 5.1; 5.2; 5.3; 5.4; 5.5; 8.1; 8.2; 8.3; 8.4; 8.5; 8.6; 8.7; 8.8; 92.1(d) (2d ed. 1991)

Commentary

Career Service

In an effort to recruit the most competent law school graduates, prosecution offices have emphasized the many opportunities for trial experience that are available to graduates willing to spend a few years as prosecutors. It is indeed true that a young lawyer can acquire significant trial experience in a relatively short period of time in a prosecution office, but there is a limit to how much turnover of personnel is tolerable and consistent with effective prosecution. The most efficient prosecution offices are built on career-type service. Some chief prosecutors, moreover, will not appoint recent law school graduates unless they are willing to serve for at least three or four years. This policy has demonstrable advantages. A balanced staff of experienced personnel can be achieved by maintaining a continuing cadre of lawyers supplemented by an infusion of young lawyers, some of whom may continue in the office for several years. Career service need not require that all or even a majority of the staff dedicate their professional lives to this one task. Effective prosecution, however, requires continuity of service by a substantial number of lawyers.

Developing and maintaining a high degree of professional performance in a prosecution office requires a certain degree of continuity at several levels. In a large office, the most important of these levels is the cadre of experienced prosecutors in charge of the various sections,
bureaus, or divisions. When there is a chain of personnel receiving continuous experience, periodic changes in the office of chief prosecutor can be smoothly accommodated. Some turnover at lower levels of the staff is probably desirable in order to maintain a steady infusion of "new blood" and new ideas and to supply a source from which senior prosecutors can be promoted.

**Full-Time Occupation**

An important step in achieving the goal of professionalism is to make the position of prosecutor a full-time occupation. At present, there are still prosecutors who devote only a portion of their professional effort to the duties of their office, which causes many problems. As one study has noted of part-time prosecutors, "[t]he attorneys he deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients. Similar problems may arise in the prosecutor's dealings with his private clients whose activities may come to his official attention." Apart from the issue of conflicts of interest, which raises ethical problems, there is a risk that the part-time prosecutor will not give sufficient energy and attention to his or her official duties. Since the part-time prosecutor's salary is a fixed amount and his or her total earnings depend on what can be derived from private practice, there is a continuing temptation to give priority to private claims.

There may be some areas of the country in which geographical considerations make it impractical to establish prosecution offices requiring a full-time attorney, but in most parts of the country the area that the prosecutor serves can be enlarged so as to support and warrant the services of a full-time prosecutor. In larger districts where the prosecutor's office consists of more than one attorney, there is no substantial justification for retaining the practice of hiring assistants on a part-time basis. The experience and performance of the United States Department of Justice suggests that even remote and isolated areas can probably be served from a centrally located prosecutor's office without reliance on part-time assistants. The public interest requires that the

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2. See Standard 3-1.3(b).
3. See Standard 3-2.2(b) and Commentary.
practice of employing part-time prosecutors be eliminated wherever feasible.

Selection of the Prosecutor and Staff

Opinion has long been divided on the question of whether the office of prosecutor should be appointive or elective. These Standards take no position on this subject. The National District Attorneys Association, however, expressly favors local election of the chief prosecutor with a term of office of no less than four years. 4

Whether the prosecutor is elected or appointed, the ultimate goal is to remove the office from partisan politics. To do this requires the support and cooperation of both the bar and political parties. An effort should be made to reach an understanding that the position of public prosecutor should not be subject to the pressures and demands of partisan politics but that nominations are to be based on merit, after consultation with the bar, as is the case with elective judges in many states.

Regardless of the method by which the chief prosecutor is selected, the selection of assistants should be made on the basis of their fitness for the duties of office rather than on any political basis. Those considerations that may make it desirable that the chief prosecutor be politically responsible to the public do not extend to assistants. In some areas, these positions have been brought within the scope of career service or a similar system of merit selection and tenure. However, because of the nature of the professional relationships in a prosecutor's office, a career service method of selection should vest adequate discretion in the chief prosecutor to make the selection of assistants from a group of qualified candidates, including the discretion to refuse to make any appointment if the chief prosecutor is dissatisfied with the entire applicant group.

Affirmative Action

In the process of finding and selecting qualified assistants for the prosecutor's office, the prosecutor should be sensitive to the demographics of the community, including its particular racial, religious, and ethnic composition. Such sensitivity should include making special efforts to recruit and to hire as prosecutors qualified women and members of minority groups. A prosecutor's office can benefit in many different ways from employing a diverse group of prosecutors that is reflective of the diversity in the makeup of the prosecutor's jurisdiction.

The National District Attorneys Association has strongly endorsed this approach: "The prosecutor's staff should be hired on the basis of merit. However, as much as possible, it should represent a cross-section of the local community and statewide legal community including racial, ethnic, and religious minority groups. In order to achieve this representation, the prosecutor should actively recruit persons for employment." 5

Compensation

The salaries of the chief and assistant prosecutors should befit the dignity, responsibility, and importance of those positions. Salaries should be comparable to those paid for similar services in the private sector of the economy. The National District Attorneys Association recommends that the salary of the chief prosecutor be at least equivalent to that paid to the chief judge of the court of general trial jurisdiction in the prosecutor's district. 6

Under no circumstances should prosecutors be paid in part through fees on a case-by-case basis. It is clear that fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, and are totally unacceptable. 7

Standard 3-2.4 Special Assistants, Investigative Resources, Experts

(a) Funds should be provided to enable a prosecutor to appoint special assistants from among the trial bar experienced in criminal cases, as needed for the prosecution of a particular case or to assist generally.

(b) Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under the prosecutor's direct control, to the extent warranted by the responsibilities and scope of the office; the prosecutor should also be provided with funds for the employment of qualified experts as needed for particular cases.

Criminal Justice Prosecution Function and Defense Function Standards 3-2.4

History of Standard

This Standard is unchanged.

Related Standards

ABA Standard for Criminal Justice 3-3.1(a) (3d ed. 1993)
ABA Standard for Criminal Justice 5-1.4 (3d ed. 1992)
NDAA National Prosecution Standards 8.1; 8.2; 8.3; 8.4; 8.5; 8.6; 8.7; 92.1(c) (2d ed. 1991)

Commentary

Special Assistant Prosecutors

The nature of the prosecutor’s responsibilities is such that the flow of work through the office does not remain constant at all times. The incidence of crime is not sufficiently predictable to permit reliable calculation of staff needs at every moment during the year. It is important that the prosecutor have flexibility in meeting this situation so that the office is not forced to dispose of cases on a basis not fully compatible with the interests of the public merely because of an unusually heavy workload. The employment of qualified assistants on an ad hoc basis is the best remedy for the periodic ebb and flow of prosecution activity. It is particularly desirable that prosecutors have the discretionary authority and funds available to add on an occasional basis a temporary special prosecutor for the purpose of trying a particular case or cases.

Investigative and Other Supporting Personnel and Experts

Traditionally, most prosecutors have relied on the police, sheriff, and other law enforcement officers for investigation of crime. Their investigative work necessarily figures in much of the prosecutor’s activity since, in most cases, prosecution is initiated as the result of efforts on their part. However, the prosecutor may need to conduct investigations that the police are unable or unwilling to undertake, such as investigations of public officials, including the police themselves.1 The prosecutor may also need to carry out lengthy or unusually technical investigations. For all of these purposes, the prosecutor should be provided with independent professional investigative staff who are

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subject to his or her supervision. Where the size of the office does not permit this, the prosecutor should have access to investigators through a central resources pool.\(^2\)

In addition to investigative staff, a prosecution office, like any other law office, needs sufficient supporting personnel to permit it to operate efficiently. There are no savings for the taxpayer if relatively highly paid professionals are forced to perform stenographic and clerical duties because of a lack of secretarial personnel. The prosecutor should be provided with sufficient staff assistance to permit operations to be as efficient as those found in a private law office.

The prosecutor must also be provided with expert scientific assistance to keep pace with the need for effective investigation and prosecution of criminal activities. The value of a modern crime laboratory such as that maintained by the FBI, in the investigation and solution of crime, is universally recognized. Such scientific resources should be available to prosecutors at all levels. In addition, public funds should be provided for the employment of the services of psychiatrists, pathologists, chemists, document analysts, ballistics experts, and other experts as they may be needed for the effective functioning of the prosecutor’s office, just as they should be provided to public defenders’ offices.\(^3\)

**Standard 3-2.5 Prosecutor’s Handbook; Policy Guidelines and Procedures**

(a) Each prosecutor’s office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for subject matters declared “confidential,” when it is reasonably believed that public access to their contents would adversely affect the prosecution function.

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2. See Standard 3-2.2(d).
History of Standard

This Standard is unchanged.

Related Standards

ABA Standards for Criminal Justice 3-3.4(c); 3-3.9 (3d ed. 1993)
NDAA National Prosecution Standards 10.1; 10.2; 10.3 (2d ed. 1991)

Commentary

Policy Guidelines

It would be impossible to attempt to develop in these Standards a comprehensive statement of all the criteria optimally involved in the exercise of prosecutorial discretion. Some of the aspects of prosecutorial discretion about which there is widespread agreement are set forth in subsequent Standards. But the essence of the concept of discretion is the flexibility to cope with myriad and unique circumstances. Nevertheless, the very process of articulating policies in and of itself contributes to the formulation of sound policies by compelling consideration and evaluation of existing practices that may have outlived their usefulness.

Moreover, among the benefits accruing from the existence of such articulated policies are the following: providing guidance to inexperienced prosecutors; helping to insure equal treatment of similarly situated defendants; helping to eliminate consideration of any inappropriate basis for the exercise of prosecutorial discretion, such as the race, religion, sex, sexual preference, or ethnicity of either the defendant or the victim; and helping to protect prosecutors from undue judicial pressure on decisions that are discretionary rather than mandatory. The articulation of policies should be oriented to the ultimate goals of prosecution, that is, the fair, efficient, and effective administration of criminal justice. As the National District Attorneys Association advises, "policies and procedures should give guidance in the exercise of prosecutorial discretion and should provide information necessary for the performance of the duties of the staff."²

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1. See particularly Standard 3-3.9.
3-2.6 Criminal Justice Prosecution Function and Defense Function Standards

Office Handbook

The articulation of policies and procedures should be preserved in a handbook or manual that also reflects current rules, statutes, and judicial decisions. It should contain, in addition, detailed descriptions of the criteria governing the principal duties of the office. Highly useful manuals have been established in many prosecutors' offices. They serve to maintain consistent practices and continuity despite changing personnel and tend to assure that policies adopted at the highest levels of the office are observed by the staff. Perhaps of equal importance is the function of such a handbook as a teaching tool by which the accumulated experience of many former or senior prosecutors is preserved and transmitted to newer assistants.

Section (b) recommends that the prosecutor's handbook be treated as a public document except for matters designated "confidential" because of their unusual sensitivity. Accordingly, directives as to strategic and tactical matters should be accorded the confidential status of internal executive memoranda. Broad standards pertaining to the exercise of discretion, however, normally should be made available for public inspection.3

Standard 3-2.6 Training Programs

Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

History of Standard

This Standard is unchanged.

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3. The National District Attorneys Association suggests that where it is not feasible to make some parts of a handbook public and keep some parts confidential, "the prosecutor may develop separate manuals for internal use and for external availability." NDAA National Prosecution Standards 10.3 (2d ed. 1991).
Related Standards

ABA Standard for Criminal Justice 5-1.5 (3d ed. 1992)
NDAA National Prosecution Standards 9.1; 9.2; 9.3; 9.4; 9.5; 9.6; 9.7; 9.8; 9.9; 9.10; 92.1(d) (2d ed. 1991)

Commentary

Even lawyers with extensive experience in the trial of civil cases must undergo new training and added education in substantive criminal law and procedure before they can function effectively in the trial of a criminal case. In addition, as one study has noted, "[t]he training of a prosecutor is generally limited to his legal education and whatever courtroom experience he has had. While this may meet the need for the courtroom and trial aspects of the job, it does not necessarily prepare the man for his administrative and law enforcement functions."

In addition, indoctrination of new staff in the professionalism expected of them as prosecutors and education in the traditions and policies of the office are obviously also essential. Such training can be fostered through the use of office manuals and handbooks, selected writings from professional journals, and office discussions. It is critical, furthermore, that training within the prosecutor's office emphasize professional responsibility and conduct in the courtroom and proper relations with the court and opposing counsel.

Attendance at continuing legal education programs is also an essential part of a prosecutor's professional training, as well as a mandatory professional obligation in most states. Public funds should be provided to defray the expenses of prosecutors attending such programs.

Standard 3-2.7 Relations With Police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.

3-2.7 Criminal Justice Prosecution Function and Defense Function Standards

History of Standard

This Standard is unchanged.

Related Standards

ABA Model Rule of Professional Conduct 3.8(e) (1983)
ABA Standards for Criminal Justice 1-7.9; 1-7.10; 1-7.11 (2d ed. 1980)
NDAA National Prosecution Standards 19.1; 19.2; 20.1; 20.2; 22.1; 26.4; 35.1 (2d ed. 1991)

Commentary

Role as Legal Adviser

The necessity to develop methods of guidance to keep the police apprised of the meaning of new provisions of law or court decisions that affect their duties and powers is apparent. To aid in meeting this need, the prosecutor should endeavor to establish and maintain a relationship of mutual confidence and cooperation with the police. In some places, especially where large staffs are involved, a useful device may be to have the prosecutor and the police department each designate staff members through whom interoffice legal matters are conveyed.

Prosecutors should, however, take care to avoid any relationships with the police that might cast doubt on the independence and integrity of the office of the prosecutor. For example, as pointed out by the National District Attorneys Association, “[a]ssuming the role of an advisor to any member of the police department on civil or personal matters is beyond the scope of the duties of the office of prosecuting attorney. In many cases, such a role would place the prosecutor in a position of possible conflict of interest with other duties prosecution is obliged to perform.”

Role in Police Training

Many of the problems that have plagued the police—and indeed the public—in recent years can be traced to mistakes of the police, often entirely inadvertent, in carrying out such duties as securing warrants, making arrests, executing warrants, interrogating persons in custody, and conducting lineups for identification purposes. It is imperative that every police official, especially the police officer on the beat, be trained

carefully as to the limits of police authority and the applicability of exclusionary rules. This training cannot be casual or occasional but must be carefully organized and presented. Few lawyers are as well qualified to perform this function as is the prosecutor, who lives with the judicial response to police action on a day-to-day basis.

This function of the prosecutor is so important that allowance must be made in the budget for whatever personnel are required to perform effective police training. Appropriate governmental entities, moreover, should be encouraged to protect prosecutors from the liability that may potentially result from such provision of legal advice to police officers.2

Standard 3-2.8 Relations With the Courts and Bar

(a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.

(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions, ethical codes, and applicable law require between advocates and judges.

(c) A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(d) A prosecutor should not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecutor's position and not disclosed by defense counsel.

(e) A prosecutor should strive to develop good working relationships with defense counsel in order to facilitate the resolution of ethical problems. In particular, a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case as evidence before a jury for purposes of establishing defense counsel's client's culpability. However, nothing in this Standard shall prevent a prosecutor from offering

2. See Burns v. Reed, 111 S. Ct. 1934 (1991) (state prosecutor not entitled to absolute immunity in civil rights action for giving legal advice to police).
evidence of the fact of such delivery in a subsequent proceeding for the purpose of proving a crime or fraud in the delivery of the evidence.

History of Standard

Sections (a), (b), and (c) contain stylistic changes. Section (d) is new to this Standard and was taken from ABA Model Rule of Professional Conduct 3.3(a)(3). Former section (d) was moved to the Commentary in this Standard. Section (e) is a new addition to this Standard designed to complement Standard 4-4.6 in The Defense Function Standards.

Related Standards

ABA Model Code of Professional Responsibility DR 1-102(A)(5); 7-106(B)(1); 7-110 (1969)
ABA Model Rules of Professional Conduct 3.3(a)(1), (3), (4); 3.4(b); 4.1(a); 8.4(c) (1983)
ABA Standards for Criminal Justice 3-2.9(d); 3-4.1(c); 4-1.2(f), (g); 4-4.6; 4-7.1(b) (3d ed. 1993)
NDAA National Prosecution Standards 6.5; 23.3; 23.4; 25.2; 25.3; 25.4; 52.2 (2d ed. 1991)

Commentary

Misrepresentations and Disclosures

It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but it is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice.

A prosecutor is not required to make a disinterested exposition of the law, but he or she must recognize the existence of pertinent legal authorities. Furthermore, a prosecutor has an ethical obligation to disclose to the court directly adverse legal authority in the controlling

Preserving Professional Relationships

The prosecutor has the professional obligation to maintain a respectful attitude toward the court. This is necessary to give due recognition to the position held by the judge in the administration of the law. The prosecutor's attitude communicates to the layperson in the courtroom the professional relation that exists between judge and lawyer. The appropriate way to challenge the judge's decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by a show of belligerency that exceeds the need to make a record of what the prosecutor believes is error in the case. Moreover, a restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, is a mechanism that depends upon evidence and the rule of law, not upon vituperation or personality conflicts. Nevertheless, it is also important to the proper functioning of our adversary system that no artificial standards of courtroom conduct impede lawyers on either side of a criminal matter from engaging in vigorous advocacy.

Moreover, the practice of law requires the appearance as well as the reality of fairness in the administration of justice. Failure to observe professional relationships between advocates and with judges casts a shadow that lawyers, and especially prosecutors, should avoid. This stricture applies with special force to the prosecutor if for no other reason than that the performance of prosecutorial duties is likely to involve frequent and regular contact with judges concerning particular cases and matters of criminal justice administration. Because of this, it is natural that a cordial relationship of mutual respect often develops. It is only when this cordiality is carried to the point of frequent social contacts that the danger zone is reached.

Opposing counsel and the public cannot fail to be disturbed by the existence or the appearance of a close social relationship between one of the contending advocates and the "umpire." Often this kind of relationship develops innocently and gradually without an awareness on the part of the judge or prosecutor and indeed without a scintilla of actual impropriety. The appearance, however, can assume the importance of reality. For these reasons, the prosecutor should be scrupulous.

2. See ABA Model Rules of Professional Conduct 3.3(a)(3); ABA Model Code of Professional Responsibility DR 7-106(B)(1).
3-2.8 *Criminal Justice Prosecution Function and Defense Function Standards*

in avoiding anything except a correct and official relationship with the judges in the relevant jurisdiction. Even at the risk of giving offense, the prosecutor should exercise great care not to allow any relationship to develop that casts doubt upon the administration of justice or the independence of the court and of the prosecutor.

**Ex Parte Contacts with the Court**

There are, of necessity, occasions when a judge must discuss problems relating to the administration of the court's business with the prosecutor or members of the prosecutor's staff. The need for such appropriate discussions with a judge in chambers or in the courtroom should not be permitted to give rise to ex parte discussion concerning a particular case that is or may come before the court. Inappropriate ex parte contacts of whatever nature erode public confidence in the fairness of the administration of justice, the very cement that holds the system together. If such ex parte discussions do take place in some extraordinary circumstance, the prosecutor should thereafter fully apprise defense counsel of the fact and content of such communications.

Moreover, if a judge observes conduct by a staff prosecutor that is considered objectionable and the judge's corrective efforts addressed to the assistant are of no avail, the chief prosecutor may appropriately accept an invitation to confer ex parte with the judge in chambers concerning the objectionable behavior of the assistant. However, if the behavior of the assistant affects the fairness of the trial, the prosecutor should insist that the matter be dealt with in court or in chambers with opposing counsel present.

**Relations with Defense Counsel**

As in relations between judges and advocates, the appearance of relations between members of the bar often assumes the importance of reality. Obviously, in cases actually tried, the adversary process supplies an adequate prophylaxis, but since the vast majority of cases are disposed of on pleas of guilty, frequently involving reduction of charges and grants of probation, the appearance of any degree of improper personal or social relationship between a prosecutor and defense counsel tends to undermine the integrity and independence of both. Whenever defense counsel is regularly sought out by accused persons because it is thought that counsel has a special relationship with the prosecutor or the judge, the "symptoms of illness" are present and the courts, the bar, and the public may mistake the symptoms for the disease. Hence, the prose-
The articulation of standards of conduct in this sensitive area is difficult because subjective factors and motivations are crucial. On the one hand, there should be a sense of mutual professional purpose between prosecutors and defense counsel, fostered by cordial and continuing relationships. On the other hand, prosecutors should be alert to the possibility that members of the bar may seek to create the appearance of a relationship that will give them a seeming advantage in obtaining clients. Prosecutors, of course, need not and should not avoid friendly contacts with defense lawyers or participation in social and professional activities of bar groups.

Receipt of Physical Evidence from Defense Counsel

There are some circumstances in which defense counsel may be professionally obligated to turn over or to disclose the location of physical evidence relevant to a criminal investigation or proceeding to the prosecutor’s office on a *sua sponte* basis. The prosecutor’s concomitant professional obligation in such circumstances is to assure defense counsel that the fact that such evidence may be received from counsel will not be brought to the attention of the fact finder in a subsequent judicial proceeding for the purpose of establishing counsel’s client’s culpability. In addition to this professional obligation, in some jurisdictions courts have held that the prosecutor is not permitted by law to make such comment. In the absence of such an assurance by a prosecutor, defense counsel may decide not to turn over such evidence *sua sponte* or may decide to turn over such evidence anonymously, a decision which may create serious problems for the prosecutor receiving such evidence with respect to evidentiary matters, e.g., proving authenticity or chain of custody.

A prosecutor who receives such an item is not, of course, barred from introducing it, subject to the rules of evidence, in any proceeding for whatever probative value it may carry. The prosecutor simply should not use the fact of defense counsel’s temporary possession of the evidence (or knowledge of its location) as proof of the accused’s culpa-


The prosecutor is not, however, barred from discussing the source of the evidence outside the hearing of a jury, e.g., in argument before a judge seeking to establish such matters as authenticity or chain of custody. Nor is the prosecutor barred by this Standard from offering evidence of defense counsel’s delivery of such evidence in a subsequent proceeding for purposes of establishing a crime or fraud by counsel in the delivery of the evidence, e.g., where counsel produced a document sua sponte that counsel allegedly forged.

Standards 3-2.9 Prompt Disposition of Criminal Charges

(a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

(b) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(c) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs, and other papers. The prosecutor should emphasize to all witnesses the importance of punctuality in attendance in court.

(d) A prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(e) A prosecutor, without attempting to get more funding for additional staff, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

History of Standard

Section (a) is new to this Standard. The first sentence parallels Standard 4-1.3(b), relating to defense counsel. The second sentence of section (a) was taken from ABA Model Rule of Professional Conduct 1.3 and parallels Standard 4-1.3(a), relating to defense counsel. Sections (b) and (c) (formerly sections (a) and (b) respectively) are unchanged. Section (d) contains stylistic changes. Section (e) is new to this Standard and is similar to Standard 4-1.3(e), relating to defense counsel.
Related Standards

ABA Model Code of Professional Responsibility EC 6-4; EC 7-38; DR 7-102(A)(1), (4), (5) (1969)
ABA Model Rules of Professional Conduct 1.3, 3.2; 3.3(a)(1), (4); 8.4(c), (d) (1983)
ABA Standards for Criminal Justice 3-2.8(a); 4-1.3 (3d ed. 1993)
NDAA National Prosecution Standards 6.5(d), (g); 8.1(a); 63.1; 63.2; 63.3; 63.4; 63.5; 63.6; 63.7; 63.8; 63.9; 63.10; 64.1; 64.2; 64.3; 65.1; 65.2; 92.5(a) (2d ed. 1991)

Commentary

Diligence, Promptness, and Punctuality

Independent of statutory and constitutional requirements, the interests of the public and defendants are best served by prompt disposition of criminal charges. The prophylactic effect of criminal sanctions is dissipated by delay in bringing them to bear upon offenders. Congestion in the courts is often of such magnitude that, notwithstanding the priority given to criminal cases, the instrumentalities of the administration of criminal justice—the courts, prosecuting agencies, and the bar—encounter extreme difficulty in disposing of criminal charges with the promptness that an effective system of criminal justice requires. The causes of court congestion and the consequent delays in the processing of criminal cases are familiar ones: increasing population, burgeoning crime rates, and greater complexity in the processes of enforcing the criminal law, including the trial of criminal cases, as a result of judicial and legislative reinforcements of the protections of the rights of persons accused of crime. At the same time, the agencies of criminal justice are frequently handicapped in their attempts to keep pace with the phenomenon of increased criminal activity by society's reluctance to provide the necessary resources for the prompt processing of criminal charges. Consequently, prosecutors and the courts are often burdened with backlogs of untried criminal cases. In many prosecution offices, trial assistants are charged with caseloads of as many as seventy or more cases. This is an intolerable and unmanageable burden. Among other adverse consequences, cases are not adequately prepared and the prosecutor tends to consent to unwarranted continuances, simply because of insufficient time to prepare for trial.
Whether viewed from the standpoint of the accused or the public, it is desirable that the criminal justice system try criminal charges promptly. Moreover, perhaps no professional shortcoming is more widely resented than procrastination. Indeed, the government’s interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a critical eyewitness disappears, the viability of the government’s case may be compromised or destroyed. Even when the government’s interests are not affected in substance, however, unreasonable delay can cause all the affected parties—the victim and the accused alike—needless anxiety and may also undermine confidence in the prosecution office’s dedication and commitment to prosecution.

Lack of punctuality in attendance at court also disturbs the orderly processes of the court and inconveniences others waiting to be heard. It is costly in terms of wasted time of lawyers, witnesses, jurors, and the judge and staff. It is a disservice to the government as well because of the risk that it may irritate the court or the jury. Failure to be punctual in court appearances may sometimes be grounds for punishment for contempt. Punctuality in the filing of briefs and motions is also important. As a corollary to the prosecutor’s obligation to be punctual, it is incumbent upon the prosecutor to do everything possible to see to it that the witnesses are also punctual in their attendance at court.\(^1\)

**Delay for Tactical Advantage**

For centuries, lawyers have been portrayed satirically as employing dilatory tactics with the indulgence of judges. The problem must be attacked both on the level of improved procedures and on the level of professional ethics. The problem must also be attacked by direct sanctions against both prosecutors and defense counsel who exploit or abuse delay as a tactical weapon.\(^2\) The cost in the time of judges, court personnel, witnesses, and jurors is too great to permit the continuance of practices that allow lawyers to jockey for a particular judge or to exert pressure on their adversaries by delay. Judges are best able to detect these abuses, and a heavy responsibility rests upon them to separate the legitimate use of procedural devices from the abusive use calculated to obtain an unjustified delay.

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1. See also Standard 3-3.2(e), (f), and (g).
2. See also ABA Code of Professional Responsibility DR 7-102(A)(1); ABA Model Rule of Professional Conduct 3.2; Standard 4-1.3(b).
To the extent that the procedural rules permit dilatoriness by the taking of certain procedural steps, the fault is in the procedure and in lax judicial administration, not in the prosecutor's conduct. The remedy must come through reform of the procedural system. But instances undoubtedly do occur in which prosecutors blatantly demand and courts grant delays without substantial cause, sometimes for inappropriate motivations. Such conduct demeans the administration of justice. The responsibility must rest with prosecutors not to seek such favors and with the courts to refuse to grant them.

Further, paragraph (d) recognizes that "[a] prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance." As in Standard 3-2.8(a), this rule reflects recognition of the fact that prosecutors must be scrupulously candid and truthful in representations of any sort before the court.

Excessive Workload

Although prosecutors, like other people, vary in their capacity for effective performance, there is a limit to how much work any one prosecutor can effectively perform. Prosecutors have a duty to all the people who live in their jurisdictions not to carry so heavy a caseload that the interests of justice may be compromised thereby. While budgetary and political realities may make obtaining adequate staffing extremely difficult, the chief prosecutor should nonetheless make every feasible attempt to obtain additional funding for staff and other necessary support before permitting prosecutors in the office to be so overwhelmed with work that the prosecution function suffers.  

Standard 3-2.10 Supercession and Substitution of Prosecutor

(a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that the prosecutor is incapable of fulfilling the duties of office.

3. "[T]he prosecutor cannot be faulted for having a less than adequate staff if necessary funds are not provided by the funding agency." NDAA National Prosecution Standard 8, Commentary at p. 32 (2d ed. 1991).
(b) The governor or other elected official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.

**History of Standard**

This Standard is unchanged.

**Related Standards**

NDAA National Prosecution Standards 4.1; 4.2; 4.3 (2d ed. 1991)

**Commentary**

**Supersession**

There are occasions when a prosecutor may have to be superseded, for example, because poor health has rendered the prosecutor incapable of discharging duties effectively, because of the existence of a serious conflict of interest, or because of corruption or gross dereliction. Some states provide for removal of a local prosecutor from office by impeachment or by a similar procedure requiring participation by the legislature, but these are not efficient mechanisms under present-day conditions. Since legislatures are in session only infrequently and are occupied with pressing matters of general statewide concern, these procedures are ineffective in most instances. Infrequent elections, the long ballot, and the difficulty of communicating to the public the dimensions of the problem often make recourse to the polls a dubious remedy. Some form of summary action for emergencies and some procedures for supersession for particular cases are needed. In those jurisdictions where applicable special prosecutor legislation exists, it should be scrupulously followed in order to alleviate these problems.

Where there is no existing legislation on point, because the governor is the state's highest elected official and is directly responsibly to the electorate, it may be best to vest in the governor's office the power to supersede a local prosecutor, although this will vary according to the traditions of each state government and, especially, with the extent to which the attorney general in a particular state is regularly involved in the administration of prosecution functions. Physical disability to discharge the duties of office, dereliction of duty, serious conflicts of
interest, and other grounds encompassed in the traditional notion of "cause" should be considered grounds on which the governor or other designated official or public entity may act under appropriate procedures affording due process.

Substitution

A substitution may be called for in circumstances where supersession is not necessary. A temporary need may arise when a prosecutor asks to be relieved because of a conflict of interest or, where a prosecutor declines to do so, when substitution appears necessary. Temporary illness or leave of absence, for example, to campaign for other office, are other examples of situations in which it may be necessary to substitute prosecutors.

Standard 3-2.11 Literary or Media Agreements

A prosecutor, prior to conclusion of all aspects of a matter, should not enter into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter.

History of Standard

This Standard is new to this edition and reflects the approach taken by ABA Model Rule of Professional Conduct 1.8(d).

Related Standards

ABA Model Code of Professional Responsibility DR 5-104(B) (1969)
ABA Model Rule of Professional Conduct 1.8(d) (1983)
ABA Standards for Criminal Justice 3-1.3(a), (f); 4-3.4 (3d ed. 1993).

Commentary

An agreement by which a prosecutor acquires literary or media rights concerning a pending criminal matter can create a conflict between the interests of the government in obtaining a just and fair outcome and the personal interests of the prosecutor in having a good (or outrageous) story to tell. Measures that should be taken in the interests of effective
prosecution may detract from the publication value of a subsequent account of the prosecution. Hence, entering into such literary or media agreements prior to the conclusion of all aspects of a criminal matter should be scrupulously avoided.
Standard 3-3.1 Investigative Function of Prosecutor

(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion.

(c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(d) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.

(e) A prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.

(f) A prosecutor should not promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(g) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.
History of Standard

Sections (a) and (g) (formerly section (f)) are unchanged. Sections (c), (d), (e), and (f) (formerly sections (b), (c), (d), and (e) respectively) contain stylistic changes only. Section (b) is new to these Standards.

Related Standards

ABA Model Code of Professional Responsibility DR 1-102(A)(3), (4), (5), (6); DR 5-101(B); DR 5-102(A); DR 7-102(A)(3), (5); DR 7-103(A); DR 7-109 (1969)
ABA Model Rules of Professional Conduct 3.3(a)(1), (2), (3), (4); 3.4(a), (b), (f); 3.7; 3.8(a); 4.4; 8.4(b), (c), (d), (e), (f) (1983)
ABA Standards for Criminal Justice 3-2.4(b); 4-4.1; 4-4.2; 4-4.3(d), (e) (3d ed. 1993)
ABA Standards for Criminal Justice 11-3.3; 11-4.1 (2d ed. 1980)
NDAA National Prosecution Standards 39.1; 39.2; 42.4; 43.1; 43.2; 43.3; 43.4; 43.5; 43.6 (2d ed. 1991)

Commentary

Affirmative Responsibility to Investigate

The bulk of a prosecutor's work consists of cases in which a complaint has been made by a citizen or by a public agency or cases that develop subsequent to an arrest made by the police. But there are instances in which a citizen is reluctant to prosecute, from ignorance, fear, inertia, or other motive, or in which the police have not taken the initiative. This may be because the area of illegal activity in question is not one that attracts law enforcement interest, as in the case of certain commercial frauds, or where law enforcement officials are themselves involved.

It is important, therefore, that in some circumstances the prosecutor take the initiative to investigate suspected criminal acts independent of citizen complaints or police activity. As one court has stated: "With the vast extension of the field of criminal law made necessary by complex social and economic conditions . . . it is not only the right but the duty of the prosecutor in such cases to himself take the initiative." Most prosecutors are no doubt willing to accept this responsibility, provided, of course, that they have adequate investigative resources to undertake

1. State ex rel. McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91, 98 (1940).
this task. The implementation of this Standard, therefore, is directly related to fulfillment of Standard 3-2.4(b), providing that adequate professional investigative personnel be made available to the prosecutor.

**Discriminatory Investigation or Prosecution**

While prosecutors have wide discretion in deciding who to investigate (and who not to investigate) and who to charge (and who not to charge), it is nonetheless improper for such otherwise appropriate prosecutorial discretion to be exercised in an arbitrary or discriminatory manner. The integrity of the prosecution office is severely if not fatally compromised when such bias is introduced into the decision-making process; indeed, even the appearance of such a discriminatory motivation in this setting can hamper the effective operation of the prosecution function by diminishing respect for the office in the eyes of the public. In addition to obviously inappropriate, arbitrary factors relating to investigation or charging decisions, such as the race, religion, sex, sexual preference, or ethnicity of either the defendant or the victim, prosecutors should never investigate or charge a person simply to meet the dictates of a quota system. Prosecutors should also scrupulously avoid the consideration of any other factor deemed improper in their jurisdiction as a basis for investigative or charging decisions, such as veteran status, alienage, or partisan affiliation.

**Illegality in Obtaining Evidence**

The injunction against the use of illegal means to obtain evidence hardly needs explanation. "Lawless law enforcement" is universally condemned as breeding disrespect for law and the agencies charged with upholding the rule of law. Such conduct by public officers is self-defeating in another respect, as demonstrated by the expansion of the exclusionary rule dictating that evidence obtained by methods violative of the rights of the accused will not generally be admitted in a court of law.

Prosecutors, as representatives of the people in upholding all of the laws, must take the lead in assuring that investigations of criminal activities are conducted lawfully and in full and ungrudging accordance with the safeguards of the Bill of Rights, as implemented by legislation and the decisions of the courts. In addition, prosecutors should also avoid

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2. See, e.g., Standards 3-3.4; 3-3.9.
whatever temptation may exist to use defense counsel in pending cases as informants themselves, given the threat inherent in such contacts to the rights of accused persons protected by the Sixth Amendment right to counsel.

**Obstructing Communications Between Witnesses and the Defense**

Prospective witnesses should not be treated as partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not “belong” to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either side to suggest to a witness that the witness not submit to an interview by opposing counsel.

It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel who declines such an interview). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that there is no legal obligation to submit to an interview. It is proper, however, and may be the duty of both counsel in most cases to interview all persons who may be witnesses and it is in the interest of justice that witnesses be available for interview by counsel.4

It is proper for a prosecutor to tell a witness that he or she may contact the prosecutor prior to talking to defense counsel. The prosecutor may also properly request an opportunity to be present at defense counsel’s interview of a witness, but may not make his or her presence a condition of holding the interview. It is also proper to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person. In the event that a written statement is signed or otherwise acknowledged by the witness as a correct representation of facts known to the witness, a copy of the statement should be furnished to the witness upon request.

This Standard does not impose any professional obligation upon a prosecutor to disclose the identity of prospective witnesses. The prose-

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4. For cases in which prosecutors sought to prevent interviews of government witnesses by defense counsel, see, e.g., United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969).
Criminal Justice Prosecution Function and Defense Function Standards 3-3.1

cutor’s obligation in this respect is governed by the applicable law in the jurisdiction pertaining to discovery and the furnishing of the names of witnesses who are intended to be called.

Use of Colorable Judicial Process

There is evidence that some prosecution offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial subpoenas or similar judicial process even though they lack subpoena power in these instances. Such practices are improper and amount to a subversion and usurpation of judicial power. Absent specific statutory subpoena power, a prosecutor’s communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons that the prosecutor does not have power to issue. Section (e) does not apply, however, without more, to such communications as a prosecutor’s letter to a potential witness written on letterhead.

Promise Not to Prosecute

A prosecutor may not grant “dispensation” for criminal conduct because the actor is cooperating with the prosecutor in other areas of law enforcement. However, the need for and propriety of the use of informants in law enforcement is universally recognized and accepted, as long as they are not used to instigate criminal activity. Accordingly, this Standard recognizes that it is not improper for a prosecutor to promise not to prosecute an informant for specific criminal activity in which the informant may engage as a part of a supervised effort to obtain evidence of crime committed by other actors. An example is found in the use of “undercover” agents or informants who make purchases of illicit narcotics.

5. See, e.g., United States v. Thomas, 320 F. Supp. 527, 530 (D.D.C. 1970) (prosecutor ordered to “cease sending to prospective witnesses ... before the trial date any form which includes the word ‘Summons’ or any derivative thereof or which in its format and language resembles an official judicial subpoena or similar judicial process or which conveys the impression that non-appearance is subject to sanction . . . . “). It also has been held to be improper for a prosecutor to arrange for the issuance of a proper subpoena for the sole purpose of interviewing the witness personally. See, e.g., in Re Lopreato, 511 F.2d 1150 (1st Cir. 1975); Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).
Interviews by the Prosecutor Personally

Two possible problems can arise in relation to the impeachment of witnesses. The first may arise out of a prosecutor's interview with a "friendly" witness. The second relates to the need to interview witnesses likely to be called by the defense so that the prosecutor will be better able to conduct cross-examination or to decide whether to cross-examine at all. The "friendly" witness is likely to be cooperative in giving and signing a statement, and the problem of impeaching the witness will arise only if, unexpectedly, the witness's testimony varies from the pretrial statement and takes counsel by surprise.

The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what the witness gave the prosecutor before trial. It is here that there may be a need to conduct interviews of witnesses with a third person present, since hostile witnesses do not often sign written statements for opposing counsel. Use of a third person is virtually the only effective means of later impeaching such a witness. A prosecutor is in an exceedingly difficult situation in seeking leave to withdraw and to substitute other counsel so that the prosecutor might take the stand to relate what the adverse witness previously said to him or her.

Although a lawyer is sometimes permitted to withdraw in order to testify, this is largely a matter entrusted to the court's discretion, and the court will undoubtedly be influenced by the importance of the testimony, whether another prosecutor is available to try the case, or whether a mistrial must be declared. It is normally not appropriate, however, for a lawyer to offer impeachment testimony and also remain in the case as counsel.

After written statements are secured by investigators, it is proper under our system, and indeed wise, for the prosecutor to interview such witnesses personally, not only to verify the investigator's report but to become familiar with the personality of the witness in order to anticipate how the witness will react on the stand. Here again, the prosecutor should take the precaution of having an investigator or other third person present.

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7. See ABA Model Rule of Professional Conduct 3.7(a); ABA Model Code of Professional Responsibility DR 5-101(B) and DR 5-102(A).
Standard 3-3.2 Relations With Victims and Prospective Witnesses

(a) A prosecutor should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be for transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.

(c) The prosecutor should readily provide victims and witnesses who request it information about the status of cases in which they are interested.

(d) The prosecutor should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded such protections where feasible.

(e) The prosecutor should insure that victims and witnesses are given notice as soon as practicable of scheduling changes which will affect the victims' or witnesses' required attendance at judicial proceedings.

(f) The prosecutor should not require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.

(g) The prosecutor should seek to insure that victims of serious crimes or their representatives are given timely notice of: (i) judicial proceedings relating to the victims' case; (ii) disposition of the case, including plea bargains, trial and sentencing; and (iii) any decision or action in the case which results in the accused's provisional or final release from custody.
(h) Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecutor prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.

**History of Standard**

The title to this Standard has been revised to include the words “Victims and.” Section (a) contains stylistic changes only. Section (b) was substantially revised. In the previous edition, section (b) read as follows: “Whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, the prosecutor or the prosecutor’s investigator should advise the witness concerning possible self-incrimination and the possible need for counsel.” Sections (c) through (h), relating to a prosecutor’s relations with victims and witnesses, are new to this Standard.

**Related Standard**

ABA Model Code of Professional Responsibility DR 7-109(C) (1969)
ABA Model Rules of Professional Conduct 3.4(b); 3.8(b) (1983)
ABA Standard for Criminal Justice 4-4.3(b), (c) (3d ed. 1993)
NDAA National Prosecution Standards 26.1; 26.2; 26.3; 26.4; 26.5; 26.6; 26.7; 26.8; 27.1; 27.2; 27.3; 27.4; 27.5; 69.4 (2d ed. 1991)

**Commentary**

Compensation of Witnesses

Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony, although they may be paid ordinary witness fees. However, it is well accepted that the prohibition against paying for testimony does not forbid reimbursement of witnesses for their actual expenses and reasonable payment for loss of income.¹

¹ See ABA Model Rule of Professional Conduct 3.4, Comment; ABA Model Code of Professional Responsibility DR 7-109(C); ABA Committee on Professional Ethics, Informal Opinion No. 847 (1965).
Self-Incrimination of Witnesses

It is the ethical obligation of the prosecutor to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." Similarly, the prosecutor has a professional obligation to advise witnesses of their right to counsel and other applicable constitutional rights, such as the right against self-incrimination when prevailing constitutional, statutory, or decisional law in the prosecutor's jurisdiction so requires. Individuals, for example, as a matter of federal constitutional law, must be informed of specified constitutional rights when they are subjected to "custodial interrogation." Conversely, where there is no legal or constitutional requirement that witnesses be so informed, the prosecutor has no concomitant professional obligation to provide such advice.

Nonetheless, the prosecutor may advise witnesses of the existence of such constitutional rights when the prosecutor believes it is otherwise appropriate to do so or when the prosecutor knows or believes that the witnesses are or subsequently may be the subject of a criminal investigation or prosecution. It is, however, inappropriate and unprofessional for a prosecutor who is not required by law to provide such advice to witnesses to do so simply for the purpose of influencing them for or against testifying in a criminal proceeding, e.g., by unduly scaring them into believing that if they testify they may incriminate themselves and may, as a result, face subsequent prosecution.

Victim and Witness Requests for Information

Unfortunately, it is not uncommon during the course of criminal proceedings for victims and witnesses who initially regarded the criminal justice system as their ally to conclude that the system is, in fact, part of "the problem." Embarrassing service of subpoenas, unexpected demands on time and financial resources (babysitting, loss of wages, etc.), frequent scheduling changes, and perceived (even if misperceived) disregard of victims' and witnesses' convenience and interests all may contribute to this destructive change in attitude. It is true, of course, that one reason for this problem is that victims' and witnesses' concerns are often different from the concerns of the criminal justice system and the overall interests of justice. Prosecutors should nonethe-

2. ABA Model Rule of Professional Conduct 3.8(b).
less take care to address victims' and witnesses' concerns where feasible in order to forestall such unfortunate and counterproductive alienation from the interests of the criminal justice system. Advance explanations to victims and witnesses of what may be expected of them throughout the process and why the system requires what it does can, for example, reduce victim and witness resentment substantially and strengthen cooperation with the prosecution. Moreover, for the same reasons of alleviating concerns and fostering cooperation, a victim and witnesses should be made to feel free to inquire about the status of the case in which they are interested at any time from the commission of the crime to final disposition or release of an accused. Prosecutors should endeavor, in turn, to make every reasonable effort to provide such information to victims and witnesses when it is requested.

Protection Against Intimidation

Intimidation of victims and witnesses is a widespread and pervasive problem in the criminal justice system with serious implications for both the individual victim or witness and the system itself. Prosecutors should become, and remain, involved in developing strategies to combat such intimidation. Mechanisms that might profitably be used in some jurisdictions to deal with this problem include: extra police patrols; temporary or permanent victim or witness relocation; temporary restraining orders requiring the accused to maintain a specified geographical distance from the victim or witness; police "hot lines" for intimidation calls; transportation to and from work or the court; phone disconnect or monitoring; mail stop and forward services; and phone traces. Where it is feasible, the prosecutor should evaluate criminal proceedings for the potential existence of unlawful intimidation and should inform victims and witnesses of whatever appropriate protections against intimidation exist.

The prosecutor should not, however, create or encourage false expectations. They are unfair—and possibly dangerous—to the victim or witness, and can be detrimental to the successful prosecution of the case itself. Prosecutors should candidly inform victims and witnesses who appear to need protection against intimidation when public resources are not available and, where appropriate, suggest alternative, lawful means of protection. For example, if the prosecutor knows that extra patrols of a victim's residence are not possible or likely, the prosecutor
might simply suggest that the victim move temporarily to a friend's home.

**Victim and Witness Scheduling and Attendance**

It is typically impractical, if not impossible, to schedule criminal cases for the convenience of all concerned parties. Moreover, once criminal proceedings have been scheduled, scheduling changes are often necessary for a wide variety of legitimate reasons. Nonetheless, even appreciating these systemic realities, there is no justification for the fact that victims and witnesses are often the last persons to learn about scheduling and scheduling changes, sometimes learning about changes only after they have already rearranged their lives and appeared at scheduled proceedings. To ameliorate this problem (and its counterproductive effect upon victim and witness attitudes and desire to cooperate), prosecutors should strive to make reasonable efforts to alert victims and witnesses of scheduling changes as soon as it is practicable.

Similarly, prosecutors should respect the interests of victims and witnesses in avoiding inconvenient and costly appearances by not requiring their attendance at criminal proceedings where unnecessary and by attempting to keep to a minimum the actual time they are required to be in attendance at such proceedings.

**Notice to Victims**

When witnesses are subpoenaed to testify, they are, of course, notified of the time, date, and place they are expected to appear. However, the fact that a victim's appearance may not be required at a particular proceeding does not necessarily diminish that person's interest in knowing what and when proceedings are about to take place. This interest is likely to be particularly strong where a victim has a right, if not the obligation, to participate in the proceedings. Even in other instances where victim participation is not possible, victims may have an understandable desire to attend proceedings or at least to be alerted to the fact that a significant decision is about to be made that might affect the victim's safety, e.g., the release of the accused. Accordingly, where it is feasible, every victim of a serious crime should be provided timely notice of all significant judicial proceedings relating to his or her case, final disposition of the case, and decisions or actions that result in the accused person's release from custody.
Consultation with Victims

The prosecutor should be sure that he or she has all available information regarding the true nature and consequences of an alleged serious crime prior to deciding not to prosecute, to dismiss charges, or to offer an accused a plea agreement. As part of this information, where it is practical to do so, the prosecutor should give victims an opportunity to consult and to provide relevant information prior to the prosecutor's taking such final action. Since, however, the prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction, the prosecutor obviously retains the discretionary authority to make such decisions without regard to the victim's—or any other person's—views on the matter.

Standard 3-3.3 Relations With Expert Witnesses

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) A prosecutor should not pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

History of Standard

Section (a) is unchanged. Section (b) contains stylistic changes only.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(6); DR 7-109(C); EC 7-28 (1969)
ABA Model Rules of Professional Conduct 1.2(d); 3.4(b) (1983)
ABA Standard for Criminal Justice 4-4.4 (3d ed. 1993)
NDAA National Prosecution Standards 77.8; 81.1; 81.2; 81.3 (2d ed. 1991)
Commentary

Advising the Expert Witness

Statements made by physicians, psychiatrists, and other experts about their experiences as witnesses in criminal cases indicate the need for circumspection on the part of prosecutors who engage experts. Nothing should be done by a prosecutor to cast suspicion on the process of justice by suggesting that the expert color an opinion to favor the interests of the prosecutor. Depending on the extent of the expert’s experience with courtroom procedure, the prosecutor should explain the workings of the adversary system and the expert witness’s role within it as an independent and impartial expert. The prosecutor should also explain that the expert is to testify in accordance with the standards of the expert’s discipline without regard to what is best for the prosecution.

Fees to Experts

It is important that the fee paid to an expert not serve to influence the substance of the expert’s testimony. To avoid both the existence and the appearance of influence, the fee should not be made contingent on a favorable opinion or result in the case, and the amount of the fee should be reasonable.1

Standard 3-3.4 Decision to Charge

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.
(b) Prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek the approval of a prosecutor in close or difficult cases.
(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.
(d) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should

be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

**History of Standard**

Sections (a), (c), and (d) are unchanged. Section (b) has been substantially revised. Former section (b) read: "Absent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor."

**Related Standards**

ABA Standards for Criminal Justice 3-2.5; 3-3.9 (3d ed. 1993)  
NDAA National Prosecution Standards 10.1; 40.1; 40.2; 40.3; 40.4; 40.5; 40.6; 42.1; 42.2; 43.1; 92.2(a) (2d ed. 1991)

**Commentary**

*Initiation by Prosecutor*

Whatever may have been feasible in the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official. The need for law-trained judgment to guide the exercise of the power to charge a citizen with a criminal act is discussed elsewhere in these Standards.1

*Arrest and Search Warrants*

In some jurisdictions, statutes or court rules may require the approval of a prosecutor before an arrest or search warrant can issue. In other jurisdictions, it is common practice for such approval to be obtained, although it is not formally required by binding legal authority. Where statutes or rules apply, prosecutors obviously must scrupulously obey them. Where there is no such legal requirement of prosecutorial approval of warrants, prosecutors should nonetheless require law enforcement officers to obtain prosecutorial approval in close or difficult cases as

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1. *See Standard 3-2.1 and Commentary.*
defined in advance for law enforcement entities by the prosecution office.²

Whether or not such binding statutes or rules are in effect in a prosecutor's jurisdiction, prosecutors should make reasonable efforts to ensure that law enforcement officers under their control are adequately trained in the law and procedural rules relating to the issuance and execution of warrants. Prosecutors should also make every reasonable effort to ensure that law enforcement officers do not use unnecessary or excessive force in making arrests or executing warrants.

Screening Procedures

The important function of evaluating complaints before initiating criminal proceedings should not be left to ad hoc judgments. Vesting the primary responsibility for the decision to prosecute in the prosecutor's office requires that orderly procedures be established for the screening of cases initiated by the police.³ It is highly desirable, as is done in some of the larger prosecution offices, that a complaint unit and an indictment unit serve these functions. Over the years, they gather experience and judgment in the exercise of their screening function. This specialization is particularly effective where the prosecution office places these screening functions in the hands of staff lawyers whose familiarity with trial and appellate problems gives them a broad base for evaluating cases.

If the prosecutor's screening processes are effective, acquittals should not be frequent. In fact, a high acquittal rate is probably a prime indicator of either inadequate exercise of discretion in making a charge or inadequate preparation for or presentation at trial. But it is the duty of the prosecutor to do justice, not merely to "win" convictions. If competent and experienced lawyers, following screening processes involving several layers of independent professional appraisal, conclude that a

². The National District Attorneys Association has provided that "[t]he office of the prosecutor should review and approve all applications for search warrants within the prosecutor's jurisdiction, whenever practical." NDAA National Prosecution Standard 40.1 (2d ed. 1991). Standard 40.2 applies identically to arrest warrants. Standard 40.3 provides that "[t]he office of the prosecutor should review and approve the use of all electronic surveillance by law enforcement entities within the prosecutor's jurisdiction."

³. "Screening by the prosecutor provides a mechanism by which individual treatment may be accorded all violations, and decisions may be rendered which meet the individual variations and complexities of each circumstance." NDAA National Prosecution Standard 42, Commentary at p. 127 (2d ed. 1991).
case should proceed, it is not unreasonable to assume that there is a
strong case against the accused. When the rate of acquittals is inordinately high, those in authority and the public have a basis for inquiry into the reasons.

Some of the most effective prosecution offices have established a postmortem procedure for evaluating the conduct of every case in which a verdict of not guilty is returned or a dismissal or mistrial occurs. This is done to determine what took place, and it is both educational and correctional. Such a process may disclose that the charge should not have been made initially, that it should have been dismissed in the postcharge screening, or that it was inadequately prepared or ineptly tried. Sometimes no explanation can be found other than the vagaries of a particular juror or jury. In a rare case, the inquiry might suggest the possibility of jury tampering. In any event, a posttrial evaluation serves useful purposes in improving the performance of prosecutors.

Citizen Complaints

Historically, the power to initiate a prosecution was not vested exclusively in public officials but was shared with private citizens. The essential screening to determine whether there was substance to a charge was performed by the magistrate at the preliminary hearing or by the grand jury. The emergence of the professional prosecutor, which occurred in the United States, fundamentally altered this situation. The advent of the office of public prosecutor provided a new and professional medium of screening that had not previously been available. Moreover, it provided continuity in office and experience in the evaluation of evidence to determine the need for prosecution.

In some jurisdictions, misdemeanor prosecutions may be instituted by the filing of a complaint with a magistrate authorized to issue an arrest warrant.\footnote{See Annot., 66 A.L.R.3d 732, 734 (1975) (footnote omitted): “In practically all jurisdictions statutes or rules provide a method whereby a private citizen may make a criminal accusation against one alleged to have violated the law by making oath, affidavit, complaint, or the like, before a judicial officer who, on finding probable cause to be present, may issue a warrant or process thereon. Under many provisions of this nature it is evident that the approval or authorization of the prosecuting attorney is not contemplated at the time the initial criminal accusation is made.”} The effectiveness of these systems varies greatly, depending chiefly on the quality of the magistrates who administer them. Where there are still nonlawyer justices of the peace, screening may be at a minimum and the magistrate may not exercise independent
and competent judgment. At the other extreme, as the result of laxity or corruption, prosecutions may be dismissed by a magistrate where charges should have been brought.

There are sound general policy reasons that argue for the joint screening of cases by both the prosecutor and the magistrate. The prosecutor brings trial experience, continuity in office, and the perspective of public responsibility to bear on a decision. Beyond this, the sharing of responsibility in the decision whether to prosecute is an important application of "checks and balances" to the field of prosecution. Where a magistrate has the power to issue a warrant on the complaint of a citizen, it is desirable that a public prosecutor either endorse the magistrate's approval or be afforded the means of recording his or her reasons for declining prosecution.

Standard 3-3.5 Relations With Grand Jury

(a) Where the prosecutor is authorized to act as legal adviser to the grand jury, the prosecutor may appropriately explain the law and express an opinion on the legal significance of the evidence but should give due deference to its status as an independent legal body.

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury should be on the record.

History of Standard

This Standard is unchanged.

Related Standards

ABA Model Rule of Professional Conduct 3.3(d) (1983)
ABA Standard for Criminal Justice 3-3.6 (3d ed. 1993)
NDAA National Prosecution Standards 58.6; 60.1; 60.2; 60.3 (2d ed. 1991)
Commentary

In jurisdictions where the grand jury is used to determine whether charges should be brought against a person, the prosecutor still plays an important role in the process. The case ordinarily is presented to the grand jury by the prosecutor, who has prepared it to that point. Because of the prosecutor's knowledge of the case and legal training, it is appropriate for the prosecutor to "explain" to the grand jury "the law" and the "legal significance of the evidence." Prosecutors must be careful to remember, however, that the ultimate decision to indict belongs to the grand jury.

Thus, a prosecutor must not take advantage of his or her role as the ex parte representative of the state before the grand jury to unduly or unfairly influence it in voting on charges brought before it. In general, the prosecutor should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury. Since grand jury proceedings are generally secret and ex parte, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury.

Standard 3-3.6 Quality and Scope of Evidence Before Grand Jury

(a) A prosecutor should only make statements or arguments to the grand jury and only present evidence to the grand jury which the prosecutor believes is appropriate or authorized under law for presentation to the grand jury. In appropriate cases, the prosecutor may present witnesses to summarize admissible evidence available to the prosecutor which the prosecutor believes he or she will be able to present at trial. The prosecutor should also inform the grand jurors that they have the right to hear any available witnesses, including eyewitnesses.

(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.

1. See also Standard 3-3.6(b); ABA Model Rule of Professional Conduct 3.3(d): "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision whether or not the facts are adverse." The Comment to Model Rule 3.8 ("Special Responsibilities of a Prosecutor") adds that "Rule 3.3(d), governing ex parte proceedings, . . . [includes] grand jury proceedings . . . ."
(c) A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant, the prosecutor should not seek to compel the witness's testimony before the grand jury without informing the witness that he or she may be charged and that the witness should seek independent legal advice concerning his or her rights.

(e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to judicially challenge the exercise of the privilege or to seek a grant of immunity according to the law.

(f) A prosecutor in presenting a case to a grand jury should not intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, or abuse the processes of the grand jury.

(g) Unless the law of the jurisdiction so permits, a prosecutor should not use the grand jury in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information.

(h) Unless the law of the jurisdiction so permits, a prosecutor should not use the grand jury for the purpose of aiding or assisting in any administrative inquiry.

**History of Standard**

Section (a) has been substantially revised. Former section (a) provided: "A prosecutor should present to the grand jury only evidence which the prosecutor believes would be admissible at trial. However, in appropriate cases, the prosecutor may present witnesses to summarize admissible evidence available to the prosecutor which the prosecutor believes he or she will be able to present at trial." Section (b) was revised to follow the general approach of ABA Model Rule of Professional Conduct 3.8(d). The last clause in section (b) formerly read: "which will tend substantially to negate guilt." Section (c) was revised stylistically. Section (d) is unchanged. Section (e) was revised to include the language "judi-
cially challenge the exercise of the privilege or to.’” Sections (f), (g), and (h) are new additions to this Standard.

Related Standards

ABA Model Code of Professional Responsibility DR 7-103(B) (1969)
ABA Model Rules of Professional Conduct 3.3(d); 3.8(f) (1983)
ABA Standards for Criminal Justice 3-3.5; 3-3.7 (3d ed. 1993)
NDAA National Prosecution Standards 58.3; 58.4; 58.5; 60.1; 60.2; 60.3 (2d ed. 1991)

Commentary

Statements and Arguments to Grand Jury

A prosecutor acts properly when he or she follows applicable law relating to the admissibility of evidence before a grand jury. Secondary evidence, when used, should be reliable.

The need to use a summary of available evidence may arise in cases involving voluminous records or where an absent witness has given a written statement but is unavailable and circumstances justify prompt grand jury action. Similarly, where the victim of a criminal act is seriously injured and cannot attend, someone to whom the relevant facts have been related should be permitted to testify before the grand jury. A third illustrative situation is where the safety of an important witness reasonably warrants that his or her identity remain secret and recorded statements of the witness be presented to the grand jury.

Because it is the grand jury itself, not the prosecutor, who is to make the decision whether or not to indict, prosecutors should inform the grand jurors of the existence of and their right to hear additional available witnesses.

Disclosure of Evidence

Section (b) goes beyond the minimum requirements of constitutional law, following the general approach of the ABA Model Rules of Professional Conduct by requiring prosecutors to make timely disclosure to the grand jurors of the same evidence that must be disclosed to the defense, namely, all evidence known to the prosecutor tending to

negate the guilt of the accused or to mitigate the offense. For example, when a police officer has seriously injured or killed a person in the line of duty, prosecutors often present all available information and witnesses to the grand jury so that an evaluation of probable cause can be made by an entity independent of the prosecutor. Such a procedure enhances public confidence in the ultimate decision on whether to prosecute. The obligation to present evidence that tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice.

**Recommendation Not to Indict**

Similarly, the prosecutor’s duty to seek justice obligates the prosecutor to recommend to the grand jury that it not indict where the prosecutor believes the evidence would not warrant the initiation of criminal charges in the absence of a grand jury.

**Potential Defendants as Witnesses**

In the investigation of a crime or in the unfolding of evidence before a grand jury, it may become apparent to the prosecutor that a person who proposes to give highly relevant testimony or other evidence may also be implicated in the crime as a potential defendant. In these circumstances, before seeking to require the person’s testimony before a grand jury, the prosecutor should advise such a person that he or she may be implicated and that independent legal advice should be sought. Similarly, it would dilute and impinge upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and there claim the privilege when the prosecutor has been assured in advance, preferably in writing, that the witness would do so and where the prosecutor does not intend to challenge the assertion of the privilege. Such a tactic is unfair in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury.

**Defense Counsel As Witness**

While this Standard takes no position on this subject, ABA Model Rule of Professional Conduct 3.8(f), adopted by the ABA House of Delegates in 1990, provides that """"[t]he prosecutor in a criminal case

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2. ABA Model Rule of Professional Conduct 3.8(d). See also ABA Model Code of Professional Responsibility DR 7-103(B).
3. See Standard 3-1.2(c).
4. See Standard 3-3.9(a).
shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.” In contrast, the National District Attorneys Association has provided simply that “[t]he prosecutor should exercise caution when obtaining evidence by subpoena from persons who, in the course of their profession, obtain information the disclosure of which is protected by an evidentiary or other privilege. Subpoenas to such persons should only be issued when the prosecutor has a reasonable, good faith belief that the information sought is not privileged. The prosecutor should be required to establish the non-privileged nature of the information sought only in response to a properly filed motion to quash or an equivalent motion based on an asserted privilege.”

Proper Grand Jury Practice

Sections (f), (g), and (h) state in very general fashion the boundaries of a prosecutor’s professional conduct relating to grand jury practice. Sections (g) and (h) were adapted from the ABA Section of Criminal Justice’s Grand Jury Principles (1977).

Standard 3-3.7 Quality and Scope of Evidence for Information

Where the prosecutor is empowered to charge by information, the prosecutor’s decisions should be governed by the principles embodied in Standards 3-3.6 and 3-3.9, where applicable.

5. The Comment to this provision provides that it “is intended to limit the issuance of lawyer subpoenas . . . to those situations in which there is a genuine need to intrude into the lawyer-client relationship. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.”

6. NDAA National Prosecution Standards 80.3 (2d ed. 1991). The Commentary to this rule adds, inter alia, that “there is little to recommend a privilege that would bar any witness’s testimony on the basis of the witness’s status alone. Such privileges seriously impede the truth-determining process of a criminal trial, with little benefit to anyone other than the defendant.”
History of Standard

This Standard contains stylistic changes only.

Related Standards

ABA Standards for Criminal Justice 3-3.6; 3-3.9 (3d ed. 1993)

Commentary

The same considerations that support the provisions of Standards 3-3.6 and 3-3.9 apply to the exercise of the power to proceed by information rather than indictment where the power is granted to the prosecutor by law. As provided in Standard 3-3.9(a), for example, a prosecutor should not institute a criminal proceeding in the absence of probable cause, and no criminal case should be instituted or permitted to continue "in the absence of sufficient admissible evidence to support a conviction."

Standard 3-3.8 Discretion as to Noncriminal Disposition

(a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

History of Standard

Section (a) was revised, the words "consider in appropriate cases" replacing the word "explore," the phrase "including programs of rehabilitation" deleted after the first clause, and the words "which would otherwise be supported by probable cause" added before the semicolon. Section (b) is unchanged.
Related Standards

ABA Standard for Criminal Justice 3-3.9(a) (3d ed. 1993)
NDAA National Prosecution Standards 29.1; 29.2; 29.3; 44.1; 44.2; 44.3; 44.4; 44.5; 44.6; 44.7; 44.8; 92.3 (2d ed. 1991)

Commentary

The opportunity to dispose of a case that is otherwise supported by probable cause by resort to other corrective social processes, before or after formal charge or indictment without pursuing the criminal process, should be given careful consideration in appropriate situations. Indeed, it has long been the practice among many experienced prosecutors to defer prosecution upon the fulfillment of certain conditions, such as a firm arrangement for the offender to seek psychiatric assistance where a disturbed mental condition may have contributed to the aberrant behavior. Another technique of long standing is for prosecutors not to prosecute an offender who has agreed to enter the military service, who has obtained new employment, or who has embarked in some other manner on what can broadly be considered a rehabilitative program.

To administer a diversionary program, prosecutors need staffs cognizant of the alternatives available and alert to their uses. Legislative action may sometimes be necessary to entitle prosecutors to the assistance of probation or parole departments to evaluate cases before rather than after conviction. When adequate resources are available, social work personnel can secure job placements, screen applicants for the armed forces, make referrals to clergy, and conduct other rehabilitative programs. Prosecution, meanwhile, should be deferred or dismissed when a case is turned over to a probation or parole department. It is hoped that a combination of jobs and counseling will give the charged person a stable base in the community. Where diversion of the defendant is successful, the dismissal of charges or the suspension of sentence is appropriate.

Standard 3-3.9 Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the

1. Noncriminal disposition should only be considered as to charges supported by probable cause. See Standard 3-3.9(a).
prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to
the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

_history of standard_

Section (a) has been revised stylistically and to substitute the phrase "the prosecutor knows" for the former phrase "it is known." Sections (b), (d) (formerly (c)), and (e) (formerly (d)) are unchanged. Sections (c) and (g) are new additions to this Standard. Section (f) (formerly section (e)) was revised to add the last clause "or than are necessary to fairly reflect the gravity of the offense."

Related Standards

ABA Model Code of Professional Responsibility DR 7-103(A) (1969)
ABA Model Rule of Professional Conduct 3.8(a) (1983)
ABA Standards for Criminal Justice 3-1.3(f); 3-2.5; 3-3.4; 3-3.7 (3d ed. 1993)
NDAA National Prosecution Standards 43.1; 43.2; 43.3; 43.4; 43.5; 43.6 (2d ed. 1991)

Necessity for Probable Cause

The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be brought requires that the greatest effort be made to see that this power is used fairly and uniformly. By its very nature, however, the exercise of discretion cannot be reduced to a formula. Nevertheless, guidelines for the exercise of discretion should be established.¹ This Standard is not intended to be a substitute for developing appropriate prosecution policies on a local level. At most, it illustrates basic factors that should be included or excluded in the exercise of discretion.

A prosecutor ordinarily should prosecute if, after full investigation, he or she finds that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty. Consistent with ABA model ethical codes, this Standard suggests that it is unethical for a prosecutor to institute

¹. See Standard 3-2.5.
criminal proceedings where he or she knows probable cause is lacking.\footnote{See ABA Model Rule of Professional Conduct 3.8(a); ABA Model Rule of Professional Responsibility DR 7-103(A).}

A probable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings. Section (a) also provides that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."

There is continuing disagreement among prosecutors about the related question of whether it is proper for a prosecutor to accede to a guilty plea when he or she knows that conviction is no longer possible, e.g., a witness whose testimony was necessary to establish probable cause has died or is otherwise no longer available to testify at trial. This Standard takes no position on this question.

**Factors That May Properly Be Considered**

The breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs. Moreover, some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor should adopt a "first things first" policy, giving greatest attention to those areas of criminal activity that pose the most serious threat to the security and order of the community.

Nor is it desirable that the prosecutor prosecute all crimes at the highest degree available. Crimes are necessarily defined in broad terms that encompass situations of greatly differing gravity. Differences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence.
In exercising discretion in this way, the prosecutor is not neglecting his or her public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the "letter of the law," but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion.

Subsections (b)(i)-(vii) provide a series of guidelines for the exercise of the prosecutor's discretion. In addition to the obvious reasonable doubt test, the extent of the harm caused by the offense is an important factor to be considered in deciding whether to charge and what charges to bring. If prosecution is sought by a private party out of malice or to exert coercion on the defendant, as is sometimes the case in matters involving debt collection, for example, the prosecutor may properly decline to prosecute.

Another relevant consideration is the refusal of the victim to testify. A prosecutor may have difficulty establishing a case if an indispensable witness declines to testify. This sometimes occurs when the case involves evidence that, if made public, will cause great pain or harm to the victim. In serious cases, however, the interests of the community may require that the prosecutor try to obtain the victim's cooperation and, in some instances, it may be the prosecutor's duty to use the subpoena power to compel attendance of the witness. In contrast, the prosecutor may justifiably decline to prosecute less serious offenses because of lack of witness cooperation. This discretion is commonly exercised in family conflicts where minor violence has occurred. Often the injured party who calls the police is later reluctant about prosecution, either because the dispute has been resolved or because of the harmful consequences of prosecution to the family. The prosecutor should, however, assure himself or herself that the reason a witness has become uncooperative is not because he or she is being intimidated to act in this way.

Prosecutors frequently and properly choose to pursue a lenient course with one participant in a criminal activity in order to bring other, more serious, offenders to justice. The underlying rationale is expressed in statutes, found in many jurisdictions, that permit the grant of immunity from prosecution in exchange for testimony. Consistent with subsection (b)(vi), the Pleas of Guilty chapter of these Standards suggests that charge and sentence concessions are appropriate for a defendant whose "cooperation has resulted or may result in the successful prosecution
of other offenders engaged in equally serious or more serious conduct."

The broad span of federal criminal statutes presents many cases of overlapping federal and state jurisdiction. Particularly where federal laws are largely auxiliary to state laws, the federal prosecutor is faced with the problem that his or her power to prosecute may result in a defendant's being punished in two tribunals for the same conduct. Where overlapping federal and state jurisdiction is present, federal action is justified in the presence of one or more of the following circumstances: (1) when the states are unable or unwilling to act; (2) when the jurisdictional feature—for example, use of the mails—is not merely incidental or accidental to the offense but an important ingredient of its success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a number of states, transcending the local interests of any one; (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.

When the possibility of double prosecution arises because the crime is punishable in more than one state, similar considerations should be taken into account in deciding whether to defer to the other jurisdiction's right to prosecute. Where the issues already have been tried in another state, in the interests of fairness the prosecutor should ordinarily not seek to relitigate the case by bringing a new prosecution.

Compelled Prosecution by a Supervisor

Subsection (b)(i) provides that a prosecutor exercising his or her professional discretion may properly choose not to prosecute when he or she has a reasonable doubt about the guilt of the accused, despite the fact that probable cause may otherwise appear to exist. Implicit in this consideration—and explicit in section (c)—is the concomitant rule that a prosecutor should not be compelled by his or her supervisor to prosecute such a case. Supervising prosecutors should create an atmosphere in the prosecution office where subordinate prosecutors feel free to disclose and discuss such doubts about the guilt of an accused; in order to create such an atmosphere, supervising prosecutors should respect the views of their subordinates even if they do not share them. Nonetheless, a case that a prosecutor seeks not to prosecute because of doubts about guilt may properly be reassigned for prosecution to another

prosecutor in the prosecution office who does not share the first prosecutor's doubts about the guilt of the accused.

**Personal Advantage Not to Be Considered**

A prosecutor should avoid measuring his or her record by the "conviction rate" of the office. Accordingly, a prosecutor should never allow the decision to proceed in a particular case to be influenced by a desire to inflate the success record of the office in obtaining convictions. Nor should the prosecutor hesitate to reduce a charge or decline presentation of a case because of such consideration.\(^4\)

**Community Indifference to Serious Crime**

There are cases in which even if convictions seem quite unlikely, perhaps because of hostile community attitudes toward the victims, a prosecutor should nonetheless proceed in the interests of justice if satisfied that a serious crime has been committed, the offender can be identified, and the necessary evidence is available. Another instance in which conviction would be difficult is where there has been widespread corruption in government. A prosecutor may have the duty in such a situation to take the case to a grand jury, where available, and, if successful in obtaining an indictment, to proceed with trial even though conviction would be exceedingly difficult to obtain. These actions represent more than gestures on the part of the prosecutor, for such tactics can successfully alert the community to wrongdoing and create a community commitment to rectify the offending conditions.

**Discretion in Selecting the Number and Degree of Charges**

The structure of the substantive law of crimes is such that a single criminal event will often give rise to potential criminal liability for a number of different crimes. Defense counsel often complain that prosecutors charge a number of different crimes, that is, "overcharge," in order to obtain leverage for plea negotiations. Although there are many different conceptions of what "overcharging" actually is, the heart of the criticism is the belief that prosecutors have brought charges, not in the good faith belief that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.

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\(^4\) See also Standard 3-1.3(f) and Commentary.
From the prosecutor's point of view, the charging decision is one that must be made at a stage when all the evidence is not necessarily in the form it will take at trial. The prosecutor must make a preliminary evaluation in order to proceed, knowing that at later stages dismissal of charges or an election among charges may be necessary. If the facts fairly warrant multiple charges growing out of a single episode, the prosecutor is, of course, entitled to charge broadly. A defendant accused of breaking and entering, robbery, rape, and murder committed in a single course of conduct involving one victim can hardly complain of "overcharging" if there is evidence of conduct supporting each charge. At some stage, of course, a voluntary dismissal of one or more of the lesser charges may very well be necessary, but a prosecutor cannot fairly be criticized for charging on all tenable counts initially.

The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without "piling on" charges in order to unduly leverage an accused to forgo his or her right to trial.

**Actions Premised upon Promises Not to Sue**

A 5 to 4 majority of the United States Supreme Court has held that agreements in which a prosecutor agrees to dismiss charges or take similar actions in exchange for an accused person's promise not to sue law enforcement officers, the governmental entity, or other government officials, are not per se void as against public policy. As long as—and where—such agreements are lawful, it is proper for prosecutors to use them in appropriate circumstances. However, as the Supreme Court also recognized, such agreements can be used improperly, not to protect the community against unwarranted, time-consuming, and expensive lawsuits, but rather to cover up actual incidences of law enforcement or other governmental misconduct, including serious violations of individuals' constitutional rights. To protect against such abuse, a prosecutor should never seek to obtain such an agreement unless the accused has agreed to the action knowingly and intelligently, and freely and

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voluntarily, and unless the agreement is approved by an appropriate judicial officer.\(^6\)

**Standard 3-3.10  Role in First Appearance and Preliminary Hearing**

(a) A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused. A prosecutor should not fail to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

(b) The prosecutor should cooperate in good faith in arrangements for release under the prevailing system for pretrial release.

(c) The prosecutor should not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

(d) The prosecutor should not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.

(e) Except for good cause, the prosecutor should not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.

(f) The prosecutor should ordinarily be present at a preliminary hearing where such hearing is required by law.

**History of Standard**

Section (a) has been revised by the addition of the second sentence which was taken from ABA Model Rule of Professional Conduct 3.8(b). Sections (b), (d), (e), and (f) are unchanged. Section (c) was revised to

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\(^6\) The National District Attorneys Association has concluded that it is proper for a prosecutor to consider in exercising his or her discretion not to prosecute "the expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary." NDAA National Prosecution Standard 42.3(o) (2d ed. 1991).
reflect the language of ABA Model Rule of Professional Conduct 3.8(c). It formerly read as follows: "The prosecutor should not encourage an uncounseled accused to waive preliminary hearing."

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-104(A) (1969)
ABA Model Rules of Professional Conduct 3.8(b), (c); 4.2; 4.3 (1983)
ABA Standard for Criminal Justice 5-6.1 (3d ed. 1992)
NDAA National Prosecution Standards 45.1; 46.1; 46.2; 47.3; 47.4 (2d ed. 1991)

**Commentary**

*First Appearance of the Accused*

The prosecutor should ordinarily be present at the first appearance of the accused before a judicial officer.\(^1\) If in attendance, the prosecutor should cooperate in implementing relevant ABA Standards in the chapter on Providing Defense Services,\(^2\) in making sure that the accused has been advised of the right to counsel and has had the opportunity to exercise this right,\(^3\) and in making arrangements for release of the accused unless unusual circumstances impose a duty to object to release.\(^4\) With respect to the right to counsel, a prosecutor has acted reasonably and properly under this Standard if he or she simply lets the judge raise this subject with the accused.

In most cases, there will be no basis for the prosecutor to oppose the accused's release on appropriate bond or other conditions. The prosecutor should not ask for excessive bail to prevent release or in an attempt to coerce a plea agreement or other concessions through the accused’s continuing incarceration.

Since eventually (if not immediately) counsel will usually represent the accused, the prosecutor should not communicate with the defendant at or after the first appearance of the accused before a judicial officer until arrangements for legal representation have been made or

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1. The National District Attorneys Association adds, however, that "[t]he prosecutor’s presence at the first appearance should not be required." NDAA National Prosecution Standard 46.2 (2d ed. 1991).
3. See ABA Model Rule of Professional Conduct 3.8(b).
counsel is waived, unless the prosecutor’s reasons for doing so relate strictly to obtaining counsel for the accused or assisting in arrangements for pretrial release. This is consistent with the spirit of both ABA model ethics codes, which prohibit counsel from communicating with a party known to be represented by another lawyer.5

**Seeking Uncounseled Waivers or Continuances**

In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Moreover, prosecutors sometimes seek postponement of the preliminary hearing in order to bring the case before the grand jury to obtain an indictment that renders the preliminary hearing moot. Although an adversary preliminary hearing is not a constitutional necessity,6 such practices may deprive the defendant of valuable information without serving any important public interest. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or any important pretrial rights from unrepresented accused persons.7 This proscription does not apply, however, to an accused person appearing pro se with the approval of the tribunal nor does it forbid the questioning of a person who has lawfully waived his or her rights to counsel or to remain silent.

Some situations may arise in which considerations of valid public policy exist for a continuance of a preliminary hearing at the prosecutor’s request; for example, there may be a genuine need to protect an undercover agent or the life or safety of a material witness. However, since the function of the preliminary examination is to determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. Postponement of such a hearing should be sought only for good cause and never for the sole purpose of mooting the preliminary hearing by securing an indictment.

**Appearance at Preliminary Hearing**

The prosecutor should ordinarily be present at the preliminary hearing.8

5. See ABA Model Rule of Professional Conduct 4.2; ABA Model Code of Professional Responsibility DR 7-104(A)(1).
7. ABA Model Rule of Professional Conduct 3.8(c).
Standard 3-3.11 Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

History of Standard

Section (a) has been revised stylistically and to incorporate language taken from ABA Model Rule of Professional Conduct 3.8(d). The former section read as follows: "It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." Section (b) was revised to adopt the language of ABA Model Rule of Professional Conduct 3.4(d). The former section read as follows: "The prosecutor should comply in good faith with discovery procedures under the applicable law." Section (c) contains stylistic changes.

Related Standards

ABA Model Code of Professional Responsibility DR 7-103(B) (1969)
ABA Model Rules of Professional Conduct 3.4(d); 3.8(d) (1983)
ABA Standards for Criminal Justice 3-6.2(b); 4-4.5 (3d ed. 1993)
NDAA National Prosecution Standards 25.4; 52.2; 53.1; 53.2; 53.3; 53.4; 53.5; 92.5(c) (2d ed. 1991)
Commentary

Withholding Evidence of Innocence

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution. This obligation, which is virtually identical to that imposed by ABA model ethical codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law. The National District Attorneys Association similarly requires prosecutors to “disclose the existence or nature of exculpatory evidence pertinent to the defense.”

Compliance with Discovery Request

The development of discovery procedures in criminal cases entails obligations on the part of prosecutors to seek diligently and in good faith to make the procedures function effectively. Prosecutors should not compel defense counsel to resort to a court order for discovery in order to harass the defense, make discovery more costly, or obstruct the flow of information when the prosecutor knows the information sought is discoverable. Where there is no obligation to produce that which is sought in a discovery request, however, a response which makes this point is in compliance with this Standard.

Nonetheless, independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant’s best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.

1. See ABA Model Rule of Professional Conduct 3.8, Comment; ABA Model Code of Professional Responsibility EC 7-13.
2. ABA Model Rule of Professional Conduct 3.8(d); ABA Model Code of Professional Responsibility DR 7-103(B).
Intentional Ignorance of Facts

Just as it is unprofessional for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.

5. See Standard 4-3.2(b).
PART IV.
PLEA DISCUSSIONS

Standard 3-4.1 Availability for Plea Discussions

(a) The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.

(b) A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.

(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.

History of Standard

Section (a) was revised to add the words "have and." Section (b) was revised stylistically and the last clause was revised substantively. It formerly read as follows: "although ordinarily a verbatim record of such discussions should be made and preserved." Section (c) was revised stylistically.

Related Standards

ABA Model Code of Professional Responsibility DR 1-102(A)(4), (5); DR 7-102(A)(5); DR 7-104(A)(1) (1969)
ABA Model Rules of Professional Conduct 3.4(b); 4.1; 4.2; 8.4(c), (d), (e) (1983)
ABA Standards for Criminal Justice 3-2.5; 3-2.8(a); 3-3.11(a); 3-4.2; 4-6.1; 4-6.2 (3d ed. 1993)
ABA Standards for Criminal Justice 11-1.1; 11-5.2(b); 14-3.1(a), (c) (2d ed. 1980)
NDAA National Prosecution Standards 24.2; 24.4; 24.5; 67.1 (2d ed. 1991)
Commentary

Availability of Prosecutor

Prosecutors should make themselves and their staffs available to defense counsel for the purpose of discussing the prospects of disposition without trial, whether or not by plea agreement, and a willingness to discuss pleas should be affirmatively declared. Meaningful discussions must be timely; hence, they should occur after both sides have the facts but well in advance of trial. Effective discussion is best conducted in a calm, unhurried, and private atmosphere rather than at the last moment in a courtroom or courthouse corridor, although there should be no barrier to disposition by plea at any stage. The National District Attorneys Association similarly provides that "[t]he prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings. The prosecution should be available for plea negotiations but need not enter into such discussions on the telephone and may require the setting of a definite appointment." Of course, willingness to discuss a possible disposition by plea imposes no obligation on the prosecutor to make concessions.

Discussion Through Counsel

Section (b) takes the approach of the ABA model ethics codes, which aptly prohibit communications with a represented party without the consent of his or her counsel or in the absence of legal authorization to do so.2 The obvious policy behind such rules is to protect a litigant against overreaching by adversary counsel and it is applicable to criminal cases as well as to civil litigation. Indeed, it has been held to be a denial of the right to counsel for the prosecutor to negotiate directly with the defendant in the absence of the defense attorney.3

Of course, the accused has the right to waive his or her right to counsel for these purposes, assuming a lawful waiver of such right. Where

2. ABA Model Rule of Professional Conduct 4.2; ABA Model Code of Professional Responsibility DR 7-104(A)(1).
this occurs, given the unequal bargaining positions between prosecutor and accused and in order to protect the prosecutor from subsequent charges of exerting undue influence, the prosecutor should, where possible under all of the circumstances, make and preserve an appropriate record of the plea discussions.

Moreover, where the prosecutor is dealing with an unrepresented accused, he or she must take great care not to state or imply to the accused that the prosecutor is disinterested or on the accused person’s “side.” When the prosecutor knows or reasonably should know that the unrepresented person misunderstands the prosecutor’s role in the matter, the prosecutor must make reasonable efforts to correct such a misunderstanding.⁴

**Misrepresentation by Prosecutor to Defense Counsel**

Disciplinary sanctions may be imposed against a prosecutor who intentionally deceives defense counsel.⁵ Although the prosecutor is under no obligation to reveal any evidence to the defense counsel in the course of plea discussions, truth is required in the presentation of facts relating to the case, whether or not they are mitigating facts.⁶ The prosecutor during plea discussions must also avoid the use of deception in dealing with the evidence and must refrain from misrepresenting the law or sentencing practices of the court. Not only does misrepresentation reflect on the integrity of the prosecutor and jeopardize the achievement of justice, but it also frustrates dispositions by plea since lawyers are understandably reluctant to negotiate with a prosecutor who cannot be trusted.

**Standard 3-4.2 Fulfillment of Plea Discussions**

(a) A prosecutor should not make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence or a suspension of sentence; a prosecutor may properly advise the defense what position will be taken concerning disposition.

⁴ ABA Model Rule of Professional Conduct 4.3. See also ABA Model Code of Professional Responsibility DR 7-104(A)(2).

⁵ See, e.g., Monroe v. State Bar, 55 Cal. 2d 145, 358 P.2d 529, 10 Cal. Rptr. 257 (1961); see also ABA Model Rule of Professional Conduct 4.1; ABA Model Code of Professional Responsibility DR 7-102(A)(5).

⁶ See Standard 3-3.11(a).
(b) A prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.
(c) A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

History of Standard
The changes in this Standard are entirely stylistic.

Related Standards
ABA Model Code of Professional Responsibility DR 1-102(A)(4); DR 7-102(A)(5) (1969)
ABA Model Rules of Professional Conduct 3.4(b); 4.1; 8.4(c), (e) (1983)
ABA Standards for Criminal Justice 3-4.1; 4-6.2(c) (3d ed. 1993)
NDAA National Prosecution Standards 69.1; 69.2; 69.3 (2d ed. 1991)

Commentary
Misrepresentation of Intention or Power
It is essential that pleas be entered intelligently and voluntarily. With this goal in mind, all plea discussions between the prosecution and the defense and any plea agreements should be explored on the record by the judge before whom the plea is entered. Accordingly, if a prosecutor has made promises or commitments that he or she cannot fulfill, this fact should emerge when the court inquires of the parties concerning their plea discussions and whether an agreement was reached. But if a plea is entered as the result of a prosecutor’s promising concessions beyond his or her power to fulfill, the plea is involuntary and the defendant is entitled to withdraw it. Sometimes it may not be a matter of intentional deception by the prosecutor but rather a failure to make clear that the prosecutor is without power to effect a particular disposition by the court.

It is therefore important that the prosecutor make clear that he or she is not able to assure the judicial consequences of a guilty plea where

that is in fact the law of the jurisdiction.\textsuperscript{2} For example, a court has labeled fraudulent the practice of promising to recommend a lenient sentence “if asked” for a recommendation when the prosecutor is aware that it is not the practice of the court to ask the prosecutor for such a recommendation.\textsuperscript{3} Intentional deception of defense counsel or defendant by the prosecutor respecting the sentence to be imposed and the prosecutor’s power to influence the disposition of the case should be regarded as unprofessional conduct.\textsuperscript{4} This is consistent with the ABA Model ethics codes, which prohibit a lawyer from knowingly making a false statement of fact or law outside of court.\textsuperscript{5}

**Honoring Plea Agreements**

A prosecutor’s refusal to honor a plea agreement concerning a recommendation to the court after a guilty plea is made undermines the voluntariness of the plea and results in fundamental unfairness to the defendant.\textsuperscript{6} The prosecutor should, accordingly, comply scrupulously with the letter and spirit of plea agreements. The National District Attorneys Association adds that “[i]f the prosecution is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecution should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.”\textsuperscript{7}

A prosecutor may—but should have no obligation to—fulfill his or her part of a plea agreement where the defendant fails to comply with his or her part of the agreement (e.g., does not make restitution as promised) or there are other extenuating circumstances (e.g., facts concerning the defendant’s past previously unknown by the prosecutor are discovered).

\textsuperscript{2} See also NDAA National Prosecution Standard 69.1 (2d ed. 1991).
\textsuperscript{3} See Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); McKeag v. People, 7 Ill. 2d 586, 131 N.E.2d 517 (1956).
\textsuperscript{4} See also NDAA National Prosecution Standard 69.2 (2d ed. 1991).
\textsuperscript{5} ABA Model Rule of Professional Conduct 4.1; ABA Model Code of Professional Responsibility DR 7-102(A)(5).
\textsuperscript{7} NDAA National Prosecution Standard 69.3 (2d ed. 1991).
3-4.3 Record of Reasons for Nolle Prosequi Disposition

Whenever felony criminal charges are dismissed by way of nolle prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

History of Standard

This Standard is unchanged.

Related Standards

NDAA National Prosecution Standard 42.7 (2d ed. 1991)

Commentary

Some jurisdictions require the consent of the court for dismissal of criminal charges, but this is not a universal requirement. But whether or not judicial consent is required, a public record should be made of the reasons for the prosecutor's action. This requirement would perhaps be unduly onerous in relation to misdemeanors, and this Standard therefore is limited to felony criminal charges. An alternative short of placing control in the court is the practice in a number of states of requiring that the prosecutor make an on-the-record statement of the grounds for dismissal.
PART V.
THE TRIAL

Standard 3-5.1 Calendar Control

Control over the trial calendar should be vested in the court. The prosecuting attorney should advise the court of facts relevant in determining the order of cases on the court's calendar.

History of Standard

The second sentence of the former Standard has been deleted. It read as follows: “The prosecuting attorney should be required to file with the court as a public record periodic reports setting forth the reasons for delay as to each case for which the prosecuting attorney has not requested trial within a prescribed time following charging.” The last sentence has been revised stylistically.

Related Standards

ABA Standard for Criminal Justice 12-1.2 (2d ed. 1980)
NDAA National Prosecution Standard 61.1 (2d ed. 1991)

Commentary

The vesting of calendar control in the court avoids even the appearance of a lack of fair and evenhanded administration of the docket. Ultimate responsibility for determining which cases are to be tried and when they should be tried should be recognized as a judicial function, although the court obviously should receive relevant information from both the prosecution and the defense in establishing its priorities.

Standard 3-5.2 Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.
(b) When court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

(c) A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

(d) Prosecutors should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

**History of Standard**

The title to this Standard has been revised to substitute the word “Professionalism” for the word “Decorum.” Section (a) has been revised by adding the first clause, substituting the phrase “codes of professionalism” for “the rules of decorum,” and substituting the phrase “a professional attitude” for “an attitude of professional respect.” Section (b) was revised stylistically. Former sections (c) and (e) were deleted. Former section (c) read as follows: “It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.” Former section (e) read as follows: “A prosecutor should be punctual in all court appearances and in the submission of all motions, briefs, and other papers.” Language similar to former section (e) is contained in Standard 3-2.9(c). Section (c) (formerly section (d)) is unchanged. Section (d) (formerly section (f)) was revised by substituting the word “professionalism” for the phrase “decorum and professional etiquette.”

**Related Standards**

ABA Code of Professional Responsibility DR 7-106(A), (C)(5), (6), (7) (1969)

ABA Model Rules of Professional Conduct 3.4(c), (d); 3.5(a), (c) (1983)

ABA Standards for Criminal Justice 3-2.9(c); 4-7.1(a), (c), (d), (e) (3d ed. 1993)

NDAA National Prosecution Standards 6.3; 6.5; 23.1; 23.2; 23.3; 25.1; 25.2; 83.3 (2d ed. 1991)
Commentary

Professionalism and the Dignity of Judicial Proceedings

Codes of professional conduct are needed to ensure that contending advocates work in harmony for what should be their common cause: the fair administration of justice. Prosecutors must not allow themselves to be diverted from this pursuit by irrelevant or extraneous factors or disruptive behavior. Basic to an efficient and fair functioning of our adversary system of justice is an atmosphere of mutual respect by all participants for all of the other participants. This can be achieved only by strict adherence to codes of professionalism that should be adopted and adhered to in every jurisdiction.

Judicial proceedings are no place and no occasion for rudeness or overbearing, oppressive conduct. Opposing counsel must act as professionals in every sense of that word. At the very minimum, they must refrain from inappropriate, intemperate, or contemptuous behavior and should be courteous and polite to all participants. Ultimately, the presiding judge has the responsibility to govern the conduct of all persons in the courtroom and especially the conduct of the advocates who, as officers of the court, are subject to the court’s control.

The obligation of the prosecutor to maintain a respectful attitude toward the court is necessary to give due recognition to the position held by the judge in the administration of the law. The prosecutor’s attitude communicates to the layperson in the courtroom the professional relation that exists between judge and prosecutor. The appropriate way to challenge the judge’s decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by a show of belligerency that exceeds the need to make a record of what the prosecutor believes is error in the case.

The objective of this Standard is to keep the understandably contentious spirit of the opposing advocates within appropriate bounds and constructive channels in order that issues may be resolved on the merits and proceedings not be diverted by the intrusion of factors such as personality, acrimonious exchanges between advocates or between advocates and witnesses, and histrionics in an effort to sway jurors by other than legitimate evidence. “Baiting” of witnesses for the other side, or of the trial judge, blurs and confuses the very issues that the trial is intended to sharpen and clarify. Lawyers must expect that every intrusion of bad manners or other rudeness into a trial will be dealt with swiftly and sternly by the presiding judge. Necessarily, the "ground
rules" of the professional conduct must be known by prosecutors and violations of rules made the subject of disciplinary action by courts and bar grievance committees.

Moreover, a restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, is a mechanism that depends upon evidence and the rule of law, not upon vituperation or personality conflicts. Public respect for law derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must also be the appearance of justice. The law is a great teacher not only in its substantive principles but also in the example it sets of dispassionate and rational methods for the resolution of conflicts. An important aspect of the image of justice is the relations that are seen to exist in the courtroom among the lawyer-participants: defense counsel, prosecutor, and judge.

The same considerations that call for professional attitudes on the part of advocates similarly require that judges maintain scrupulously neutral and fair attitudes. Deviations from standards of appropriate judicial conduct should be made part of the record so as to be brought to the attention of reviewing courts or judicial conduct review boards.

**Exchanges Between Lawyers**

A breach of courtroom professionalism occurs when lawyers address each other directly rather than through the court. Such exchanges may begin with innocent purpose relating to the trial and escalate because of the natural tensions of the courtroom. In the courtroom, as in legislative bodies or where other formal proceedings occur, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. A challenge to a statement of opposing counsel should be made in the form of an objection or a request to the judge rather than to opposing counsel directly. Both the formality of the request and the intermediary role it imposes upon the judge serve to temper the exchange and to provide an insulation that reduces the risk of friction. The need to curb direct exchanges between counsel is greatest when a jury is present since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers.
Compliance with Court Orders

The relationship between the court and the prosecutor is most severely put to the test on those occasions when the judge issues a direct command to the prosecutor—for example, instructing him or her to cease interrogation of a witness or to desist from a particular line of argument. As the Supreme Court has instructed:

Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court’s considered ruling. . . . But if the ruling is adverse, it is not counsel’s right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.1

Corresponding to the prosecutor’s obligation to accede respectfully to the court’s command is the duty of the court to permit an adequate record to be made of the court’s order and the circumstances under which it was made, as seen by the prosecutor.

Codes of Professionalism

The particular formalities observed in American courts differ from place to place. A prosecutor is entitled to know precisely what standards of conduct are expected in a particular court, especially with regard to such matters as the use of conventional forms of address, when the prosecutor is required to stand, and where he or she is allowed to be in the courtroom during trial. To avoid misunderstanding between court and prosecutor concerning such formalities, achieve greater uniformity within jurisdictions, and generally improve the dignity of courtroom proceedings, prosecutors should take the lead in developing written codes governing these matters.2

Standard 3-5.3 Selection of Jurors

(a) The prosecutor should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection

of the jury and the exercise of challenges for cause and peremp­tory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of the prosecutor should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use the voir dire to present factual matter which the prosecutor knows will not be admissible at trial or to argue the prosecution's case to the jury.

History of Standard

This Standard is unchanged.

Related Standards

ABA Code of Professional Responsibility DR 7-106(C)(1); DR 7-108(E) (1969)
ABA Model Rules of Professional Conduct 3.4(e); 3.5(a), (b); 4.4 (1983)
ABA Standard for Criminal Justice 4-7.2 (3d ed. 1993)
NDAA National Prosecution Standards 73.4; 73.5 (2d ed. 1991)

Commentary

Preparation for Jury Selection

The selection of a jury is an important phase of the trial and requires the alert attention of the lawyer. As elsewhere in the trial, in the selection of the jury, the prosecutor's decisions must be made under time pressure. They can be made wisely only if the prosecutor has prepared adequately before trial.

Pretrial Investigation of Jurors

Pretrial investigation of jurors may permit a more informed exercise of challenges than reliance solely upon voir dire affords. The practice of conducting out-of-court investigations of jurors presents serious
problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. To minimize these risks, the prosecutor should be careful to conduct any investigations of jurors in a manner that scrupulously avoids invasions of privacy. Except in unusual circumstances of necessity, the prosecutor should limit the inquiry to records already in existence rather than, for example, questioning contemporaneously a potential juror's neighbors.

Use of Voir Dire

The process of voir dire examination of prospective jurors by lawyers is often needlessly time consuming and is frequently used to influence the jury in its view of the case. In those jurisdictions that retain the practice of permitting the prosecutor to conduct the questioning of jurors, the responsibility must rest with the prosecutor, supervised by the court, to limit questions to those that are designed to lay a basis for the lawyer's challenges. The observation that the voir dire may be used to influence the jury in its view of the case is rejected as an improper use of the right of reasonable inquiry to ensure a fair and impartial jury.

The use of the voir dire to inject inadmissible evidence into the case is a substantial abuse of the process. Treatment of legal points in the course of voir dire examination should be strictly confined to those inquiries bearing on possible bias in relation to the issues of the case.

Standard 3-5.4 Relations With Jury

(a) A prosecutor should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during trial. The prosecutor should avoid the reality or appearance of any such communications.

(b) The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, a prosecutor should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If the prosecutor believes that the verdict may be subject to legal challenge, he or she may properly,
if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

**History of Standard**

Section (a) has been revised stylistically and by addition of the word "intentionally" to exclude unintentional conversations with jurors. Section (a) has also been revised by deleting the phrase "concerning the case" which appeared in the previous edition after the word "jurors" in the first sentence and deleting the word "improper" which also appeared in the previous edition before the word "communications" in the second sentence. These deletions reflect the view that the prosecutor should not talk on any subject to people he or she knows are jurors before or during the trial.

Section (b) is unchanged. Section (c) has been revised stylistically and the last sentence is new to this edition.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-108(A), (B), (C), (D); EC 7-36 (1969)
ABA Model Rules of Professional Conduct 3.5(a), (b); 4.4 (1983)
ABA Standard for Criminal Justice 4-7.3 (3d ed. 1993)
ABA Standard for Criminal Justice 15-4.7 (2d ed. 1980)
NDAA National Prosecution Standard 87.4 (2d ed. 1991)

**Commentary**

*Communication with Jurors Before or During Trial*

Discussing the case privately with a juror before verdict is a gross impropriety and may also be criminal conduct.\(^1\) Moreover, it is improper for a prosecutor knowingly to engage in *any* conversation with a jury member, however innocent in purpose or trivial in content, since the mere fact that counsel is seen conversing with a juror may raise the question of whether the juror reached the verdict solely on the evidence.\(^2\) The prosecutor's legitimate communication must be with the jury as an

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entity—not with jurors individually. For obvious reasons, these stric-
tures apply as well to communications with persons summoned for jury
duty who may or may not be impaneled as jurors in a particular case.

**Attitude Toward Jury**

The prosecutor should avoid undue solicitude for the comfort or
convenience of the judge or jury and should avoid any other conduct
calculated to gain special or unfair consideration. The prosecutor should
not address jurors individually by name, for example. Just as respect
for the position of the judge requires that the judge be addressed
formally as “your honor,” the jury’s symbolic position as representa­
tives of the community in the courtroom requires that a degree of
formality be observed in addressing the jury. A typical form of address
is, of course, “ladies and gentlemen of the jury” or “members of the
jury.”

**Posttrial interrogation**

Since it is vital to the proper functioning of the jury system that jurors
not be influenced in their deliberations by fears that they subsequently
will be harassed by lawyers or others who wish to learn what transpired
in the jury room, neither the prosecutor nor defense counsel should
discuss a case with jurors after trial in a way that is critical of the verdict. 3
Where prevailing law permits such inquiries, the prosecutor may discuss
a case with former jurors for the purpose of ascertaining the existence
of juror misconduct. However, the prosecutor must carefully avoid any
harassment of the jurors in the course of such inquiries. Finally, it is not
improper, in states where the law and ethics codes so permit, for the
prosecutor to communicate in an informal manner for the purpose of
self-education with former jurors who are willing to talk about their
jury service.

**Standard 3-5.5 Opening Statement**

The prosecutor’s opening statement should be confined to a state-
ment of the issues in the case and the evidence the prosecutor intends
to offer which the prosecutor believes in good faith will be available
and admissible. A prosecutor should not allude to any evidence

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3. See also Standard 3-5.10.
unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

**History of Standard**

This Standard has been revised stylistically. In addition, the word "brief," which appeared before the word "statement" in the first sentence in the previous edition, has been deleted as there is no ethical obligation to be brief in every case.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-106(C)(1); EC 7-25 (1969)
ABA Model Rule of Professional Conduct 3.1; 3.4(e) (1983)
ABA Standards for Criminal Justice 3-5.8; 4-7.4 (3d ed. 1993)
NDAA National Prosecution Standards 76.1; 76.2 (2d ed. 1991)

**Commentary**

The primary purpose of the opening statement is to give the prosecutor an opportunity to outline the issues and matters he or she believes can and will be supported by competent and admissible evidence introduced during the trial. In that statement, the prosecutor should scrupulously avoid any utterance that he or she believes cannot and will not later actually be supported with such evidence.¹ If, through honest inadvertence, the proof actually offered at trial falls significantly short of points made in the opening statement, the court should be asked to give a clarifying instruction to avoid either advantage or penalty. In other respects, the opening statement is governed by the Standard for closing argument.²

**Standard 3-5.6  Presentation of Evidence**

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of

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¹. See also ABA Model Rule of Professional Conduct 3.4(e); ABA Model Code of Professional Responsibility DR 7-106(C)(1).
². See Standard 3-5.8.
witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

History of Standard

This Standard contains stylistic changes only.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(4); DR 7-106(C)(1), (7); EC 7-25 (1969)
ABA Model Rules of Professional Conduct 3.3; 3.4(b), (c), (e); 4.1 (1983)
ABA Standard for Criminal Justice 4-7.5 (3d ed. 1993)
NDAA National Prosecution Standard 6.5(g) (2d ed. 1991)

Commentary

False Evidence or Known Perjury

A prosecutor is barred from introducing evidence that he or she knows is false.¹ This obligation applies to evidence that bears on the credibility

¹. See ABA Model Rule of Professional Conduct 3.3(a)(4); ABA Model Code of Professional Responsibility DR 7-102(A)(4).
of a witness as well as to evidence on issues going directly to guilt.\textsuperscript{2} Even if false testimony is volunteered by the witness and takes the prosecutor by surprise, if the prosecutor knows it is false, it is the prosecutor’s obligation to see that it is corrected. Although some courts have granted new trials to defendants even when the prosecutor was unaware of the falsity of the evidence,\textsuperscript{3} disciplinary action against prosecutors should be limited to those cases in which the falsity of the evidence was known to, or reasonably should have been discovered by, the prosecutor.

**Presenting Inadmissible Evidence**

The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder. Moreover, the damage may only be emphasized by an objection to the evidence so that the offer of inadmissible matter may leave opposing counsel with no effective remedy. This practice and the similar tactic of arguing to the bench or making comments on or off the record in a manner calculated to influence the jury clearly are improper.\textsuperscript{4} Such conduct may indeed be grounds for declaring a mistrial or granting a new trial.

A prosecutor should exercise great care in deciding what evidence to use. A strong case should not be jeopardized by introducing evidence that is essentially cumulative but that may bring about a reversal. It is obviously not easy to forgo using reliable and probative evidence when it is at hand, but the prosecutor must do so in many instances. A high level of experienced litigation judgment is often required, and a prosecution office should have its senior litigation lawyers available for consultation on these difficult decisions.

**Display and Tender of Tangible Evidence**

The rationale underlying section (b), as explained above, applies as well to sections (c) and (d). Tangible evidence requires special treatment because such evidence is immediately subject to scrutiny once it is brought into the courtroom. As in section (b), dealing with testimonial


\textsuperscript{3} See, e.g., Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

\textsuperscript{4} See ABA Model Rules of Professional Conduct 3.4(c), (e); 3.5(a); ABA Model Code of Professional Responsibility DR 7-106(C).
evidence, the purpose of sections (c) and (d) is to prevent tangible evidence from coming to the attention of the trier of fact unless and until it is offered. The premature display of a tangible article of evidence in the courtroom may be unduly inflammatory even though it is later admitted. Hence, such an article should not be exposed to view until it is formally offered for admission in evidence.

Moreover, the offer must be made in good faith. If there is any doubt as to the admissibility of the article, the display and tender should be made outside the presence of the jury.

Standard 3-5.7 Examination of Witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) The prosecutor’s belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.

(d) A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

History of Standard

The last sentence in section (a) in the prior edition ("Proper cross-examination can be conducted without violating rules of decorum.") has been deleted as unnecessary. Section (b) is unchanged. Section (c) has been revised stylistically and by substitution of the phrase "in the presence of the jury" for the clause which appeared at the end of this sentence in the prior edition ("for the purpose of impressing upon the jury the fact of the claim of privilege"). Section (d) has been revised stylistically.
3-5.7 Criminal Justice Prosecution Function and Defense Function Standards

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(5); DR 7-106(C)(1), (2) (1969)
ABA Model Rules of Professional Conduct 3.3(a)(1); 3.4(e); 3.5(c); 4.1; 4.4 (1983)
ABA Standards for Criminal Justice 3-5.2; 4-7.6 (3d ed. 1993)
NDAA National Prosecution Standards 77.1; 77.2; 77.3; 77.4.; 77.5; 77.6 (2d ed. 1991)

Commentary

Direct and Cross-Examination

The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined beyond those contained in rules of evidence. Witnesses should not be subjected to degrading, demeaning, or otherwise invasive or insulting questioning unless the prosecutor honestly believes that such questioning may prove beneficial to the case. Nor should a prosecutor be abusive or inconsiderate in the interrogation of a witness. As with all courtroom behavior, the prosecutor should strive to act professionally and should not adopt an unwarranted or unnecessary combative demeanor in direct or cross-examination. While the prosecutor should not harass a witness without just cause, this caveat does not preclude otherwise vigorous cross-examination.

Ultimately, the prosecutor must always exercise discretion in determining the extent to which damage done to the reputation of a witness is justified by the contribution that a particular line of questioning may make to the truth-finding function of the trial.

Undermining a Truthful Witness

A question of long standing is whether a prosecutor, in cross-examining a witness, should be restrained by the belief that the witness has testified truthfully. Generally, a prosecutor is not required to substitute personal opinion for the available fact-finding processes of the trial and may, therefore, properly invoke the usual cross-examination techniques to test the witness’s capacity and opportunity for observation and the witness’s ability to recall. However, it is sometimes argued that the

1. See also Standard 3-5.2, Commentary.
manner and tenor of cross-examination ought to be restricted where an examining prosecutor believes in the truthfulness of the testimony given by the witness.

Where the prosecutor knows that the testimony of the witness is accurate, paragraph (b) adopts the view that the power of cross-examination may not be invoked to destroy or undermine the truth. In this regard, it is believed that the duty of the prosecutor differs from that of the defense lawyer, who on occasion may be required to challenge known truthful witnesses of the prosecution in order to put the State to its proofs.2

Forcing a Claim of Privilege Before the Jury

Most courts preclude a jury from drawing evidentiary inferences from the fact that a witness has claimed a privilege.3 The theory underlying these cases is "the impossibility of effective cross-examination and the possibility that the jury may give inferences from the claim of privilege more weight than they deserve."4 If these effects are to be minimized, it is desirable that issues relating to a claim of privilege be heard out of the presence of the jury whenever possible. If the prosecutor is informed in advance that the witness will claim a privilege and wishes to contest the claim, the matter should be treated without the presence of the jury and a ruling obtained.5

Concern has been expressed that the failure of the jury to be informed that the nonappearance of a witness having possibly relevant information is due to a claim of privilege will leave an opening for argument based on the failure of the adversary to call the witness. This reasoning has been offered as a ground for permitting the prosecutor to compel a claim of privilege in the jury's presence. Since the prosecutor is precluded from calling a person who will claim a privilege, defense counsel is under a correlative obligation not to argue any inference from the absence of the person as a witness.

2. See Standard 4-7.6(b) and Commentary.
Unfounded Questions

It is an improper tactic for either the prosecutor or defense counsel to attempt to communicate impressions by innuendo through questions directed to a witness that would be advantageous to have answered in the negative—for example, “Have you ever been convicted of the crime of robbery?” or “Weren’t you a member of the Communist party?” or “Did you tell Mr. X that . . .?”—when the questioner has no evidence to support the innuendo. Generally, a question may be asked by a prosecutor on cross-examination if, however, as set out in section (d), a “good faith belief” in the factual predicate implied in the question is present.

Standard 3-5.8 Argument to the Jury

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

History of Standard

Section (a) has been revised stylistically and by adding the first clause. Section (b) has been revised stylistically. In section (c), the word “make” replaces the word “use” and the phrase “appeal to the prejudices” replaces the phrase “inflame the passions or prejudices.” In section (d), the final clause which appeared in the prior edition (“by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict”) has been deleted.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(5); DR 7-106(C)(3), (4) (1969)
Commentary

The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office.

Unfortunately, some prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument. Of course, a prosecutor must be free to present arguments with logical force and vigor. Nonetheless, as the Supreme Court has remarked, "while he may strike hard blows, he is not at liberty to strike foul ones." To attempt to spell out in detail what can and cannot be said in argument is impossible since it will depend largely on the facts of each case. Nevertheless, certain broad guidelines based on the function of argument and the experience of courts in typical situations can be established.

Inferences Warranted by the Evidence; Misrepresentation

The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn from it. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. Prosecutors have aptly been condemned by courts for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial. Standard 3-5.6 treats this subject more fully.

The intentional misstatement of evidence is particularly reprehensible. It has long been established that a lawyer may not knowingly

2. Id. at 88.
3. Id.
misquote testimony of a witness or in argument assert as a fact that which has not been proved. 4

**Personal Belief**

Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued. Such argument is expressly forbidden by the ABA model ethics codes, 5 and many courts have recognized the impropriety of such statements. This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as "The evidence shows . . ." or something similar.

The line between permissible and impermissible argument is a thin one. Neither advocate may express a personal opinion as to the justice of his or her cause or the veracity of witnesses. Credibility is to be determined solely by the triers of fact, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition in this Standard pertains to the prosecutor's personally endorsing, vouching for, or giving an opinion. The cause should turn on the evidence, not on the standing of the prosecutor, and the testimony of witnesses must stand on its own.

**Appeals to Prejudice**

Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. There are many cases in which courts have reversed convictions as the result of inflammatory remarks made by a prosecutor containing references to the defendant's race, religion, or ethnic background.

There are, of course, occasions when the matter of prejudice is itself an issue in a case. In such circumstances, reference to the subject in

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4. See also ABA Model Rules of Professional Conduct 3.3(a)(1) and 3.4(e); ABA Code of Professional Responsibility DR 7-102(A)(5) and DR 7-106(C)(1).
5. See ABA Model Rule of Professional Conduct 3.4(e); ABA Model Code of Professional Responsibility DR 7-106(C)(4).
argument would be appropriate if restricted to the evidence and inferences derived therefrom.

**Digression from Evidence**

The prosecutor should not make arguments that encourage the jury to depart from its duty to decide the case on the evidence and the inferences reasonably derived therefrom. References, for example, to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision. Predictions about the effect of an acquittal on lawlessness in the community also go beyond the scope of the issues in the trial and are to be avoided.

Of course, the restriction must be reciprocal; a prosecutor may be justified in making such a reply to an improper argument of defense counsel if made without provocation by the prosecutor. The better solution to this problem, however, lies in adequately instructing both advocates on the limits of proper argument and on the willingness of trial judges to enforce fair rules pertaining to such limits.

The prosecutor should not, moreover, use arguments which are, in essence, personal attacks on defense counsel. The prosecutor should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. The duty to avoid such a personal attack is also, obviously, reciprocal.6

**Standard 3-5.9 Facts Outside the Record**

The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

**History of Standard**

This Standard contains stylistic changes only.

3-5.9  Criminal Justice Prosecution Function and Defense Function Standards

Related Standards

ABA Model Code of Professional Responsibility DR 7-106(C)(1); EC 7-24 (1969)
ABA Model Rule of Professional Conduct 3.4(e) (1983)
ABA Standard for Criminal Justice 4-7.8 (3d ed. 1993)

Commentary

The problem of digression from the record can arise at both the trial and the appellate levels. At the trial level, it is highly improper for a prosecutor to refer in colloquy, argument, or any other setting to factual matter beyond the scope of the evidence or the range of judicial notice, other than in response to defense counsel's nonprovoked statements outside of the record. This is true whether the case is being tried to a court or to a jury, but it is particularly offensive in a jury trial. It can involve the risk of serious prejudice, with a mistrial as a possible remedy.

Ordinarily, a trial court should summarily exclude any reference to factual matter that is beyond the scope of the evidence in any significant way. The broad discretion a trial court has in such matters enables it to deal with them as they arise by allowing a party to reopen the case or to take other appropriate steps to enlarge the record so as to provide an evidentiary basis for the matter the party wishes to argue but has for some reason failed to establish.

At the appellate level, it is also a grave violation of ethical standards to argue factual matters outside the record.

Standard 3-5.10  Comments by Prosecutor After Verdict

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

History of Standard

This Standard is unchanged.
Related Standards

ABA Model Code of Professional Responsibility DR 8-102(B) (1969)
ABA Model Rule of Professional Conduct 8.2(a) (1983)
ABA Standard for Criminal Justice 15-4.6 (2d ed. 1980)
NDAA National Prosecution Standard 34, Commentary (2d ed. 1991)

Commentary

The chapter on Trial by Jury recommends that the trial judge refrain from praising or criticizing jurors for their verdict, noting that such remarks may improperly influence the jurors in other cases to which they may be assigned.¹ For like reasons and also because of the prosecutor’s influence as the representative of the people, the prosecutor should refrain from making public statements critical of a jury’s verdict. The prosecutor should similarly avoid the fact or appearance of trying to intimidate a judge when the case is tried without a jury.

However, this Standard is inapplicable to posttrial prosecutorial comments following the rare case in which it is clear that a crime was committed at trial, e.g., jury tampering.

¹. See Standard 15-4.6 and Commentary.
PART VI.  
SENTENCING  

Standard 3-6.1  Role in Sentencing

(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

(b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

History of Standard

Sections (a) and (c) are unchanged. The last sentence in former section (b) was deleted in the belief that a prosecutor's office that has a policy of not making sentencing recommendations should not be obliged to do so. The last sentence of section (b) in the prior edition read as follows: "When requested by the court to furnish a sentencing recommendation, the prosecutor should have the obligation to do so."

Related Standards

ABA Standards for Criminal Justice 3-5.8(c); 3-6.2 (3d ed. 1993)  
NDAA National Prosecution Standards 88.1; 88.2; 88.3; 88.4; 92.6(c) (2d ed. 1991)

Commentary  
Severity and Fairness of Sentence

The prosecutor's status as a minister of justice makes it totally inappropriate to measure prosecutorial effectiveness by the severity of the
sentences imposed in prosecuted cases. There are times, of course, when the prosecutor may need to urge the courts to take a stronger stand in sentencing where the prosecutor believes their policies have been erroneous. But the prosecutor's overriding obligation is to see that justice is fairly done. This can most effectively be achieved by seeking to make the sentencing process operate in a fair and equitable manner with the best available information.

Public pressure on prosecutors to seek severe sentences is often present. However, once guilt is determined, it is important that prosecutors, like judges, maintain an attitude of fairness and objectivity. In the long run, this can be achieved more easily if prosecutors avoid implying to the public, either in campaigns for office or in other public statements, that their success is properly to be measured by the severity of the sentences they have obtained.

**Recommendations to the Court**

The sentencing process is, in the final analysis, an adversary proceeding. Accordingly, the prosecutor must be permitted in all cases, at his or her discretion, access to information pertaining to the appropriate sentence and the opportunity to make a sentencing recommendation. Where the sentencing court requests a sentencing recommendation from the prosecutor, the prosecutor should ordinarily respond with such a recommendation. However, this Standard does not obligate the prosecutor to make such a recommendation if the prosecution office has a formal policy of not making sentencing recommendations.

In addition, plea discussions may result in an agreement that the prosecutor will make a sentencing recommendation. In such circumstances, the prosecutor must, of course, honor his or her agreement by making the recommendation agreed upon.¹

**Presentation of Evidence to a Sentencing Jury**

The same concerns about the fair presentation of evidence during the guilt phase of an adjudicative proceeding apply with full force to the penalty phase.² Moreover, even where the rules of evidence permit some evidence at trial to be introduced as bearing on the sentence issue, the prosecutor should avoid unnecessarily presenting evidence of an

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¹ See Standard 3-4.2(c).
² See Standard 3-5.8 and Commentary.
inflammatory nature that may prejudice the jury's decision on the issue of guilt.

**Standard 3-6.2 Information Relevant to Sentencing**

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

**History of Standard**

Section (a) is unchanged. Section (b) was revised to follow the scope of the obligation to disclose set forth in ABA Model Rule of Professional Conduct 3.8(d). Section (b) in the prior edition read as follows: "The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in the prosecutor's files which is relevant to the sentencing issue."

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-103(B) (1969)
ABA Model Rule of Professional Conduct 3.8(d) (1983)
ABA Standards for Criminal Justice 3-3.11(a); 3-6.1 (3d ed. 1993)
NDAA National Prosecution Standards 25.4; 28.1; 88.4; 88.5 (2d ed. 1991)

**Commentary**

One of the most important contributions the prosecutor can make in the sentencing process is to see that the information that the prosecutor
has gathered for use at trial is brought to bear on the issue of sentence to the extent relevant, whether that information is favorable or unfavorable to the convicted defendant. Unless the sentencing judge directs otherwise, the prosecutor should forward relevant information to the officer responsible for preparation of the presentence report. It is also desirable that the prosecutor have access to the report, or a summary, after it is prepared in order to check on its completeness and accuracy in light of the prosecutor's information.

As a minister of justice, the prosecutor also has the specific obligation to see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence, including consideration by the sentencing judge of exculpatory evidence known to the prosecutor.\(^1\) The exception to this rule contained in section (b) recognizes that a prosecutor may seek an appropriate protective order with respect to some such evidence from the tribunal if its disclosure to defense counsel could result in substantial harm to an individual or to the public interest.\(^2\)

\(^{1}\) See also Standard 3-3.11(a) and Commentary.
\(^{2}\) See also ABA Model Rule of Professional Conduct 3.8(d) and Comment.
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Standard 4-1.1 The Function of the Standards

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

History of Standard

This Standard is new, but the language is not. Most of the language is taken from Standard 4-1.1(f) in the second edition. The concept of "unprofessional conduct" used in Standard 4-1.1(f) was used throughout these Standards in the second edition and has been deleted. The word ""honorable"" before the phrase "professional conduct" has also been deleted. The remainder of Standard 4-1.1 in the second edition is now Standard 4-1.2, as revised, in this edition.

Related Standards

ABA Model Rules of Professional Conduct Scope (1983)
ABA Standards for Criminal Justice 3-1.1 (3d ed. 1993)

Commentary

These Standards are intended to provide defense counsel with reasoned and appropriate professional advice. They are also intended to serve as a guide to what is deemed to be proper conduct. These Stan-
Standards are not intended, however, to serve as rules to be used as the basis for the imposition of professional discipline; applicable codes of ethics adopted in each jurisdiction serve that function. Moreover, these Standards are not intended to create substantive or procedural rights which might accrue either to accused or convicted persons or to counsel.

The commentary occasionally refers to judicial decisions specifically or generally involving issues of competency or effectiveness of counsel insofar as such decisions cast light on standards that courts have concluded are applicable to the conduct of counsel. Nonetheless, it is beyond the scope of these Standards to attempt to determine the conditions under which deviation from the recommendations made here warrants reversal or vacation of a conviction.

Standard 4-1.2 The Function of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards.
Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

History of Standard

Standard 4-1.2 was Standard 4-1.1 in the second edition. Section (b) has been revised stylistically, the "officer of the court" language has been added, and the concluding phrase, "the utmost of his or her learning and ability and according to law," has been replaced with objective language, "render effective, quality representation." Sections (c), (d), and (g) are new editions to these Standards. Sections (e) and (f) contain stylistic revisions. Section (h) has been revised stylistically, the last phrase in the first sentence has been changed from "and in this chapter" to "applicable in defense counsel's jurisdiction," and the last sentence has been revised to incorporate language from what was Standard 4-3.9 in the second edition. The final section in this Standard—former Section (f)—has been deleted, but some of the language has been moved to Standard 4-1.1.

Related Standards

ABA Model Code of Professional Responsibility DR 1-102(A)(4); DR 7-102(A)(5), (7); DR 7-106(B)(1); EC 6-1; EC 7-2-3; EC 9-6 (1969)
ABA Model Rules of Professional Conduct Preamble; 1.1; 1.2(d); 3.3(a)(1), (3), (4); 3.4(b); 4.1; 8.4(c), (e) (1983)
ABA Standards for Criminal Justice 3-1.2; 3-2.8 (3d ed. 1993)
ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)

**Commentary**

**Role of Defense Counsel**

In our legal system, a court constituted to try a criminal case should consist of a judge (and jury), a prosecutor, and a defense lawyer, all essential to the fulfillment of the court's responsibility in the administration of criminal justice.¹ Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In so doing, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system.² The adversary system requires defense counsel's presence and zealous professional advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge. Defense counsel should not be viewed as impeding the administration of justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment.

The role of counsel for the accused is difficult because it is complex, involving multiple obligations. Toward the client, the lawyer is a counselor and an advocate; toward the prosecutor, the lawyer is a professional adversary; toward the court, the lawyer is both advocate for the client and officer of the court. The lawyer is obliged to counsel the client against any unlawful future conduct and to refuse to implement any illegal or unethical conduct. But included in defense counsel's obligations to the client is the responsibility of furthering the defendant's interest to the fullest extent that the law and the applicable standards of professional conduct permit.

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted

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¹ Guidelines for the assignment of attorneys for persons unable to afford counsel are contained in ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992).

in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment. The lawyer privately retained is free to require assurance of payment of reasonable compensation; if the lawyer has been appointed to provide representation, compensation is governed by other criteria.  

Because the law is a learned profession, lawyers must take pains to guarantee that their training is adequate and their knowledge up-to-date in order to fulfill their duty as advocates. Even after the most comprehensive training in fundamentals there remains the final—and important—step of learning the art of advocacy.

Role of Defense Counsel in Capital Cases

It is a truism, of course, that the client in a capital case faces the possibility of receiving an extraordinary penalty: the loss of his or her life. While defense counsel has the obligation to render effective, quality representation in all criminal cases, defense counsel in a capital case must, given this extraordinary penalty, make extraordinary efforts on behalf of the accused. Such extraordinary efforts do not include illegal or unethical efforts; "extraordinary" does not mean "extralegal" or "extraprofessional." Because the client's life is on the line, however, defense counsel should endeavor, within the bounds of law and ethics, to leave no stone unturned in the investigation and defense of a capital client. In particular, counsel in a capital case should consult and comply with the detailed suggestions made in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

The Limits of Professional Conduct

The "alter ego" concept of a defense lawyer, which regards the lawyer strictly as a "mouthpiece" for the client, is fundamentally wrong and destructive of the lawyer's image; more important to the accused,

perhaps, this idea is destructive of the lawyer's usefulness. The lawyer's value to each client stems in large part from the lawyer's independent stance as a professional representative rather than as an ordinary agent. What the lawyer can accomplish for any one client depends heavily upon his or her reputation for professional integrity. The court and opposing counsel will treat the lawyer with the respect that facilitates furthering the client's interests only if the lawyer maintains proper professional detachment and conduct in accord with accepted professional standards. Such professional integrity and detachment is furthered by counsel's actions, independent of client representation, to engage in necessary and appropriate law reform activities or to seek to remedy injustices that counsel sees in the administration of criminal justice generally in his or her jurisdiction.

It is fundamental that defense counsel must be scrupulously candid and truthful in representations of any matter before a court. This is not only a basic ethical requirement but it is essential if the lawyer is to be effective in the role of advocate, for if the lawyer's reputation for veracity is suspect, he or she will lack the confidence of the court when it is needed most to serve the client.

A lawyer is not required to make a disinterested exposition of the law, but he or she must recognize the existence of pertinent legal authorities. Furthermore, an advocate has a duty to disclose directly to the court adverse legal authority in the controlling jurisdiction that has not been disclosed by the opposing party.

4. "Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim... that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's case." ABA Canons of Professional Ethics 15 (1968). "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law..." ABA Model Code of Professional Responsibility EC 7-1. "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." ABA Model Rules of Professional Conduct 3.1, Comment.

5. See ABA Model Rules of Professional Conduct 3.3(a)(1) and 4.1(a); ABA Model Code of Professional Responsibility DR 7-102(A)(5). See also, e.g., In re Curl, 803 F.2d 1004 (3d Cir. 1986); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908 (1969); State ex rel. Oklahoma Bar Ass'n v. Hensley, 661 P.2d 527 (Okla. 1983).

Familiarity with Professional Standards

Knowledge of applicable professional standards of conduct is obviously a prerequisite to their fulfillment. In recent years, both the law schools and the organized bar have taken steps to ensure that lawyers are cognizant of the standards governing their conduct. While no lawyer can perform adequately in ignorance of the applicable law, knowledge of the standards of conduct of the bar should receive the same priority as that accorded legal principles. Ongoing attention should be paid to ethical problems in law school curricula and in continuing legal education programs. Likewise, the bar should undertake to see that every lawyer has access to applicable standards of conduct and the decisions interpreting them.

Nature of Defense Counsel’s Employment

Standards governing professional ethics apply equally to counsel for the poor, the middle class, and the rich, just as judges must apply the law equally to everyone. However, there are sometimes differences in the relation of lawyer and client arising from the nature of the lawyer’s employment. A lawyer who is privately retained generally has the confidence of the client, who after all has made a conscious choice of counsel. The client’s desire to retain the lawyer gives the lawyer’s persuasion greater standing with the client; the threat of withdrawal may be enough to discourage any inclination of the client to engage in impropriety or to demand it of the lawyer. By contrast, the lawyer who is appointed or who serves in an organized defender office must win the confidence of the client, who usually has had no say in the choice of an advocate. Such factors as the eminence of the lawyer will obviously affect the relationship, but it is clear that the nature of the employment will itself have an impact on the relationship. These Standards have not been drawn in disregard of such considerations, but at no point has it been thought appropriate to set a different standard according to the nature of the employment. Although the difficulties of fulfilling the Standards may vary in this respect, they will also vary according to many other circumstances of individual cases, none of which would justify discrimination in the application of the Standards.

Standards of Professional Conduct

The tensions of the role and the intensity of the pressure of multiple decisions during trial make it highly desirable that defense counsel be
thoroughly familiar with these standards and imperative that counsel be knowledgeable about provisions of codes or rules of professional conduct applicable to defense counsels' conduct in the jurisdictions in which defense counsel practices law. Counsel's place in our adversary process of justice requires that counsel be guided constantly by the obligation to pursue the client's interests. Counsel must not be asked to limit his or her zeal in the pursuit of those interests except by definitive standards of professional conduct.

Standard 4-1.3 Delays; Punctuality; Workload

(a) Defense counsel should act with reasonable diligence and promptness in representing a client.
(b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.
(c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.
(d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
(e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

History of Standard

Section (a) is a new addition to this Standard. Section (c) contains stylistic changes. The first sentence of section (e) is new and replaces a more general approach; the second sentence contains stylistic changes.

Related Standards

ABA Model Rules of Professional Conduct 1.3; 3.3(a)(1), (3), (4); 3.4(a), (b); 8.4(c), (d), (e) (1983)
ABA Standards for Criminal Justice 3-2.9; 4-8.4 (3d ed. 1993)

Commentary

Diligence, Promptness, and Punctuality

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. Defense counsel should act with commitment and dedication to the interests of his or her client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.¹

Perhaps no professional shortcoming is more widely resented than procrastination.² A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when an exculpating eyewitness disappears, the viability of a client's defense may be compromised or destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Lack of punctuality in attendance at court also disturbs the orderly processes of the court and inconveniences others waiting to be heard. It is costly in terms of wasted time of lawyers, witnesses, jurors, and the judge and staff. It is a disservice to the client because of the risk that it may irritate the court or the jury. Failure to be punctual in court appearances may sometimes be grounds for punishment for contempt. Punctuality in the filing of briefs and motions is also important. As a corollary to counsel's obligation to be punctual, it is incumbent upon counsel to do everything possible to see to it that the client and witnesses are punctual in their attendance at court. When additional time is needed properly to prepare a case, the correct course is to seek a continuance.

¹. See Standard 4-5.2.
4-1.3  Criminal Justice Prosecution Function and Defense Function Standards

Misrepresentation to Obtain a Continuance

Paragraph (c) recognizes that "[d]efense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance." As in Standard 4-1.2(f), this rule reflects recognition of the fact that defense counsel must be scrupulously candid and truthful in representations of any sort before the court.

Delay for Tactical Advantage

A frequent complaint of the public against our system of justice is that excessive delays are permitted, which undermines the enforcement of law. This is perhaps as true today as when Roscoe Pound wrote about the problem around the turn of the century.2 Because it is essential that legal procedures be calm and deliberative rather than hasty and unreflective, to some extent the legal process could never be as expeditious as popular sentiment might wish it, especially when that sentiment is inflamed by an outrageous crime or during a period of crisis in law enforcement.

A lawyer may be tempted to abuse procedure and employ dilatory tactics in order to gain time for the advantage of a client. However, delays sought in the hope that testimony will be lost or become stale or that the prosecuting parties will be inconvenienced until they abandon the case undermine the entire system. These practices also bring the bar into disrepute. Such tactics may backfire when judge and prosecutor realize they are being employed; stern judicial response may then operate to the disadvantage of an accused. The abuse of procedure for purposes of delay ultimately leads to procedural restrictions that are harmful to those with legitimate needs. Thus, there is an obligation on defense counsel to do everything possible to avoid delays and to expedite the trial.

Since the reasons for invoking procedural devices that result in delay are buried in the mental processes of the lawyer, it is understandably difficult to enforce sanctions for the use of such devices. Indeed, an overly aggressive concern for delay may impel a lawyer to eschew a remedy which in good faith the lawyer believes should be pursued in the client's interest. It may also tend to imply that the law is more concerned with expedition than with justice, an implication that inevitably will cause disrespect for its processes and thus undermine its effi-

cacy. To the extent that the procedural rules permit dilatoriness by the taking of certain procedural steps, the fault is in the procedure and in lax judicial administration, not in the lawyer's conduct. The remedy must come through reform of the procedural system. But instances undoubtedly do occur in which lawyers blatantly demand, and courts grant, delays without substantial cause, sometimes for crass motivations. Such conduct demeans the administration of justice. The responsibility must rest with counsel not to seek such favors and with the courts to refuse to grant them.

**Excessive Workloads**

Although lawyers, like other people, vary in their capacity for effective performance, there is a limit to how much work any one lawyer can effectively perform. Some sophisticated defendants have been known to engage a lawyer because the lawyer had so many cases on the calendar that normal priorities of the docket would preclude an additional case from trial for an inordinate period. Obviously it is improper for a lawyer to participate in such a fraud on the courts; apart from that, the lawyer has a duty to accept no more employment than can be effectively performed without unreasonable delay. Moreover, it is improper for defense counsel to accept so much work that the quality of representation or counsel's professionalism is in any way diminished for that reason.

**Standard 4-1.4 Public Statements**

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

**History of Standard**

This Standard has been substantially revised. Section (a) of the former Standard prescribed that counsel "should avoid personal publicity

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4. See, e.g., United States v. Stoneberger, 805 F.2d 1391, 1394 (9th Cir. 1986); United States v. Gerrity, 804 F.2d 1330 (7th Cir. 1986); In re Martinez, 717 P.2d 1121 (N.M. 1986).
connected with the case before trial, during trial, and thereafter.” Section (b) of the former Standard dictated compliance with the ABA Standards for Criminal Justice, Fair Trial and Free Press Standards (2d ed. 1980). The present text of Standard 4-1.4 replaces both of these former sections.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-107 (1969)
ABA Model Rules of Professional Conduct 3.6(a) (1983)
ABA Standards for Criminal Justice 3-1.4; 3-5.10 (3d ed. 1993)
ABA Standards for Criminal Justice 5-5.3 (3d ed. 1992)
ABA Standards for Criminal Justice 8-1.1(a) (2d ed. 1980)

**Commentary**

*Fair Trial-Free Press*

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, however, particularly where trial by jury is involved. If there were no such limits, the result might be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. An accused may never be more in need of the First Amendment right of freedom of speech than when officially labeled a wrongdoer by indictment or information and, perhaps, by the media before family, friends, neighbors, and business associates. Moreover, the public has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. The subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

**Relationship to Other Standards**

The language in this standard is virtually identical to the language used in ABA Standards for Criminal Justice, Fair Trial and Free Press Standard 8-1.1(b) (3d ed. 1992), which was adopted by the ABA House of Delegates on the same day as the Defense Function Standards. In addi-
tion, both Standards are patterned after ABA Model Rule of Professional Conduct 3.6(a).

The only substantive differences between Standard 4-1.4 and Model Rule 3.6(a) are: (1) the addition of the phrase "or authorize the making of" in Standard 4-1.4, (2) the use of the phrase "a criminal" in Standard 4-1.4 rather than "an adjudicative" before the final word "proceeding," and (3) the omission of the word "materially" before the word "prejudicing" in Standard 4-1.4. The first difference reflects the view that defense counsel may not avoid compliance with these rules by using another person to make statements that counsel should not or could not make. The second difference reflects the view that application of this Standard is appropriate in any criminal proceedings, whether or not they can be formally labeled "adjudicative." The third difference reflects the view that it is inappropriate for defense counsel to "prejudice" a criminal proceeding to any extent.¹

Both Model Rule 3.6 and the Fair Trial and Free Press Standards contain lists of the types of statements that can ordinarily be presumed to violate or not to violate the strictures of this Standard. Fair Trial and Free Press Standards 8-1.1(b) and (c) provide as follows:

(b) Statements relating to the following matters are ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding:

1. the prior criminal record (including arrests, indictments, or other charges of crime) of a suspect or defendant;
2. the character or reputation of a suspect or defendant;
3. the opinion of the lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case;
4. the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;
5. the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
6. the identity, expected testimony, criminal record or credibility of prospective witnesses;

¹ The Supreme Court has narrowly held constitutional under the First Amendment the standard of substantial likelihood of material prejudice (as opposed to a stricter standard such as "clear and present danger"). Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2738, 2745 (opinion of Rehnquist, C.J.); id. at 2748 (opinion of O'Connor, J.).
(7) the possibility of a plea of guilty to the offense charged, or other disposition; and
(8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.
(c) Notwithstanding paragraphs (a) and (b), statements relating to the following matters may be made:

(1) the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty;
(2) the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;
(3) the name, age, residence, occupation and family status of the accused;
(4) information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;
(5) a request for assistance in obtaining evidence;
(6) the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;
(7) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;
(8) the identity of the victim where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;
(9) information contained within a public record without further comment;
(10) the scheduling or result of any stage in the judicial process.

Furthermore, Fair Trial and Free Press Standard 8-1.1(d) provides that:

Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her, or to preclude or inhibit any lawyer from making an otherwise permissible statement which serves to educate or
inform the public concerning the operations of the criminal justice system.

In the absence of specifically applicable rules, this Standard is intended to apply to related criminal or “quasi-criminal” proceedings, e.g., juvenile or mental health proceedings.

**Standard 4-1.5 Advisory Councils on Professional Conduct**

(a) In every jurisdiction, an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.

(b) Communications between an inquiring lawyer and an advisory council member have the same attorney-client privilege for protection of the client's confidences as ordinarily exists between any other lawyer and client. The council member should be bound by statute or rule of court in the same manner as a lawyer is ordinarily bound in that jurisdiction not to reveal any disclosure of the client. Confidences may also be revealed, however, to the extent necessary:

(i) if the inquiring lawyer's client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council member, or

(ii) if the inquiring lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.

**History of Standard**

Section (b) has been revised to make clearer the applicability of the attorney-client privilege.

**Related Standards**

None.
Commentary

Need for Advisory Councils

Disciplinary bodies of courts, local bars, and state bars interpret codes of professional conduct and apply them in specific cases. These groups, however, invariably operate after the fact by way of judging questioned conduct rather than by acting as a council of advisers to lawyers who desire assistance and who are in need of prompt answers before the fact. Bar association advisory bodies on legal ethics often are available to deal with pending problems of lawyers, but these groups usually include a cross-section of the bar so that many advisers are unfamiliar with the litigation or ethical problems particular to criminal defense counsel. In a bar in which trial lawyers are often a minority and criminal defense counsel an even smaller fraction, it is unlikely that many members of a legal ethics committee will be thoroughly familiar with the problems confronted by defense counsel in criminal cases.

The standards of the profession are steadfast in their fundamental principles, but their application is frequently difficult in criminal cases, requiring an intimate knowledge of practice and procedure in litigation problems available only to trial specialists and, often, only to trial specialists in a particular locality. Accordingly, this Standard recommends the formation of appropriate criminal defense advisory councils in every jurisdiction.

Confidentiality of Advisory Council Opinions

A significant factor in determining whether a lawyer complies with the ethical standards of the profession is the extent of support the lawyer receives from professional colleagues when the lawyer is faced with a difficult ethical decision. An important function of an advisory council is to provide that support. Jurisdiction over discipline should be entirely separate. The maintenance of a record of each inquiry and the response given will be beneficial if the lawyer’s conduct is ever challenged again by a client, the bar, or the courts, while avoiding the prejudice to the client that might result if the lawyer were to make a record of the ethical dilemma with the judge or others not necessarily pledged to respect the client’s (and the inquiring lawyer’s) confidence. An inquiring lawyer should be treated as a client by the council member dealing with the inquiry. Hence, the fact that a lawyer has made an inquiry to a council member and its response should be privileged, just as any exchange of
Two exceptions to the attorney-client privilege should apply in this setting as well. First, the privilege should be deemed to be waived if the inquiring lawyer's conduct is challenged by the client, as is already an established doctrine of law. Second, the privilege should be deemed to be waived if the inquiring lawyer's conduct becomes the subject of an investigation involving possible discipline for breach of professional standards. In the latter event, the record of the inquiry into the lawyer's conduct and the response may be made available to an authorized professional or judicial body conducting such investigation. The confidentiality of the lawyer's inquiry to the council should not protect the client if the client attacks counsel as ineffective, nor should it protect counsel charged with conduct contrary to the advice given him or her. Of course, the fact that a lawyer fails to follow the advice given by the council does not per se make the conduct improper, but it may be considered by the disciplinary body along with all the evidence. In short, the dialogue between the lawyer and the advisory council should generally be treated as confidential and privileged except that the accused should not be permitted to take advantage of the privilege of confidentiality to injure the lawyer and the lawyer should not be permitted to exploit it for personal benefit after having sought the advice of the council and failed to follow it.

This Standard, although included in the first and second editions, appears not to have been implemented in any jurisdiction. Nevertheless, the Standard has been retained because it is still believed that establishment of advisory councils is a sound idea. It remains exceedingly important for the legal profession to create a more prompt and reliable mechanism for supplying to defense counsel authoritative information for their guidance in criminal cases.

Standard 4-1.6 Trial Lawyer's Duty to Administration of Justice

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by lawyers. Lawyers should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.
(b) All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Such qualified lawyers should not assert or announce a general unwillingness to appear in criminal cases. Law firms should encourage partners and associates to become qualified and to appear in criminal cases.

(d) Such qualified lawyers should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law, representing the accused is likely to result in an unreasonable financial burden on the lawyer, or the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

**History of Standard**

Sections (a), (b), and (c) have been revised to reflect the view that all lawyers, not just current trial lawyers, should be encouraged to become qualified to participate in criminal cases. Section (d) is a new addition to this Standard.

**Related Standards**

ABA Model Code of Professional Responsibility EC 2-26 to 2-29 (1969)
ABA Model Rules of Professional Conduct 1.2(b); 6.2 (1983)
ABA Standards for Criminal Justice 5-2.2 (3d ed. 1992)

**Commentary**

**Goal of Wide Participation**

Wide participation by qualified members of the bar in the defense of criminal cases is important to the health of the administration of criminal justice and to the fulfillment of the bar's obligation to ensure the availability of qualified counsel to every accused. However, lawyers and judges are unanimous in acknowledging that not every lawyer licensed to practice is actually able to try a case in court effectively. Though only
a fraction of all criminal cases go to trial, the judgment and experience of a trial lawyer are also essential in the process of negotiation leading to a disposition without trial. But lawyers who are not currently litigators can obtain such training through study and attendance at litigation-skills training programs and, most important, through association with experienced trial practitioners.

Moreover, the nature of a trial lawyer's experience in civil trial practice is such as to qualify the lawyer for participation in criminal practice if additional training and experience in criminal law and procedure is acquired. Such training is also available through study and attendance at continuing legal education programs. "On-the-job" experience in criminal practice can be appropriately gained by assigning lawyers with little or no criminal trial experience to act as associate counsel to lawyers who are more experienced in the criminal courts.

By encouraging the significant number of lawyers who are now active only in civil practice to become qualified for criminal training and experience, and to make themselves available and willing to undertake the defense of criminal cases, the bar will take a significant step toward making certain that competent counsel is provided. At the same time, the participation in the criminal justice system of lawyers whose practice is largely in the civil courts will help avert the undesirable professional isolation of criminal trial specialists. Civil lawyers' increased familiarity and acquaintance with the procedures and problems of the administration of criminal justice may also encourage such lawyers to play a larger role in the reform and improvement of the criminal law and its processes.¹

Unpopular Clients

The highest tradition of the American bar is found in the obligation, in the lawyer's oath, never to reject "from any consideration personal to myself, the cause of the defenseless or oppressed." Criminal defense counsel has the duty to provide legal assistance even to the most unpopular of defendants. The great tradition of the bar is reflected in the history of eminent lawyers—such as John Adams in his defense of the British "redcoats" after the Boston Massacre—who have risked

¹. See also ABA Standards for Criminal Justice, Providing Defense Services Standard 5-2.2 (3d ed. 1992).
Criminal justice prosecution function and defense function standards

Public disfavor to defend a hated defendant. The sure way to guarantee adherence to this tradition of denying no defendant competent legal representation is for all trial lawyers to prepare themselves to act in criminal cases.

Criminal defense counsel should bear in mind, in the words of the ABA Model Rules, that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Nonetheless, defense counsel should be aware of—and prepared for—the fact that the public often (improperly) associates criminal defense counsel with their clients, so-called guilt by representation.

Section (d), which is almost identical to Model Rule 6.2, makes clear that despite such popular misconceptions of defense counsel's role, qualified criminal defense counsel should seldom decline appointments to represent an accused. Such declinations should be based only upon good cause. Good cause exists, for example, if counsel is not qualified or otherwise competent to assist in the defense of a particular criminal matter, or if undertaking the representation would result in an improper conflict of interest, as when the client or the crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to zealously represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

Announced Unwillingness to Take Criminal Cases

Lawyers who unabashedly state that they do not practice in the criminal courts denigrate their role and function as advocates. The bar should discourage lawyers from privately or publicly proclaiming that they disdain criminal practice. In a more positive vein, the leaders of the trial bar should take the initiative in becoming qualified to accept and by accepting criminal cases and by encouraging other lawyers to do so. More than two decades ago, the President's Crime Commission suggested that "law firms should not discourage prospective associates from a 2- to 5-year stint of defense or prosecution work and should be

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3. ABA Model Rule of Professional Conduct 1.2(b).
willing to grant leaves of absence to those of its young lawyers who would like to spend a period in criminal practice and then return." The commission also believed that "it is essential that law firms make lawyers available to handle assigned cases, or to assist a defender's office." In encouraging broader participation by qualified lawyers in the criminal courts, these recommendations are not intended to imply that a division of function within a given law office is inappropriate. In a firm of trial lawyers, for example, it is entirely proper for criminal cases to be directed to a particular member or members of the firm.

6. Id.
PART II.
ACCESS TO COUNSEL

Standard 4-2.1 Communication

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

History of Standard

There are no changes.

Related Standards

ABA Standards for Criminal Justice 5-6.1; 5-8.1 (3d ed. 1992)
ABA Standards for Criminal Justice 23-6.1(f) (2d ed. 1980)

Commentary

Most jurisdictions long have provided by statute for the right of a person in custody to communicate with an attorney, either by a message carried by a peace officer or by a telephone call. If this right is to be meaningful, it must be interpreted to permit prompt completion of the communication and not be narrowly limited to any fixed number of calls for the purpose of arranging for employment of counsel. Communication should be permitted until arrangements for counsel have been completed. Communication facilities should be made available promptly following arrest. In terms of implementation, this may require not one but as many telephones as are reasonably needed to fill the need. One such telephone may be adequate in a small precinct station or jail; numerous telephones may be needed in a larger facility. It is part of the function of defense counsel to engage the aid of the organized bar to ensure that adequate communication facilities are made available and that the services of an adequate number of lawyers are available. Private criminal defense counsel and defender organizations should also be vigilant to make sure that custodial facilities make telephone calls to
defense counsel free for those detained persons unable to pay for them.¹

This Standard is consistent with a similar provision in the ABA Standards for Criminal Justice on Providing Defense Services: "Custodial authorities should provide access to a telephone, the telephone number of the defender, assigned counsel or contract for services program, and any other means necessary to establish communication with a lawyer."² Those Standards further provide that "[t]he defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody. An attorney or representative from the appropriate program should be available to respond to a person in custody who requests the services of counsel."³

Standard 4-2.2 Referral Service for Criminal Cases

(a) To assist persons who wish to retain defense counsel privately and who do not know a lawyer or how to engage one, every jurisdiction should have a referral service for criminal cases. The referral service should maintain a list of defense counsel willing and qualified to undertake the defense of a criminal case; it should be so organized that it can provide prompt service at all times.

(b) The availability of the referral service should be publicized. In addition, notices containing the essential information about the referral service and how to contact it should be posted conspicuously in police stations, jails, and wherever else it is likely to give effective notice.

History of Standard

There is a stylistic change only.

¹ See also ABA Standards for Criminal Justice, Legal Status of Prisoners Standard 23-6.1(f) (2d ed. 1980).
Related Standards

ABA Model Code of Professional Responsibility DR 2-103(C)(1), (D)(3) (1969)
ABA Model Rules of Professional Conduct 7.2(c) (1983)
ABA Standards for Criminal Justice 5-8.1 (3d ed. 1992)

Commentary

Referral Service

The ABA has energetically supported lawyer referral plans for many years, and hundreds, if not thousands, of such plans are now in existence throughout the nation. Typically, a supervisory committee of the local bar selects and maintains a list of attorneys willing to participate in the plan and a referral officer is appointed to administer the system. Many plans permit lawyers to indicate those areas of law in which they feel they are specifically qualified. Some provide for screening by the supervisory committee to determine whether the lawyers possess the special skill they claim.

The special problems of providing counsel in criminal cases require certain adjustments in the conventional lawyer reference system for all types of cases. Considerations of time and function suggest that a reference system for criminal cases should be somewhat separate from the ordinary referral service for civil cases. Given the urgency of the accused's need, it is imperative that access to the referral service be possible at any time of day or night, Sundays and holidays included. Telephone answering facilities make this feasible. The list of lawyers willing and able to serve in criminal cases should be compiled and maintained separately from the list of lawyers available for civil cases.

The thrust of the referral service should be to provide immediate access to a lawyer who will respond promptly to calls from accused persons at a time of acute stress. The list should also be carefully screened by the supervisory committee so that it includes only lawyers qualified by experience to handle criminal cases. If the regular committee does not include enough lawyers active in criminal trial practice to make this possible, it should consult with such lawyers, or a separate committee for referrals in criminal cases should be established. The screening of lawyers presumably will be somewhat simpler in those jurisdictions that certify practitioners as specialists in criminal law. Careful screening, it is hoped, will lead to a situation in which inclusion on the referral list
will be considered a badge of distinction among trial lawyers, thus serving the goal of broadening participation in the criminal courts.

Publicity and Notices

A lawyer referral service cannot fulfill its function without publicity to make its existence and purpose known to those who need it. In addition to making the referral plan generally known to the public, there is the special need in criminal cases to give widespread notice of its existence, its purpose, and the manner of contacting the service at those places where accused persons are taken into custody. The ABA Standards for Criminal Justice on Providing Defense Services further provide that “[t]he defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody.”

Standard 4-2.3 Prohibited Referrals

(a) Defense counsel should not give anything of value to a person for recommending the lawyer's services.

(b) Defense counsel should not accept a referral from any source, including prosecutors, law enforcement personnel, victims, bondsmen, or court personnel where the acceptance of such a referral is likely to create a conflict of interest.

History of Standard

Both sections have been substantially revised. Section (a) was revised to reflect the language of ABA Model Rule of Professional Conduct 7.2(c). Section (b) was revised by taking the last clause of former section (a) and adding prosecutors and victims to the list of questionable referral sources, by adding the language "any source, including," and by establishing that unpaid referrals are not a problem unless they involve conflicts of interest.

Related Standards

ABA Model Code of Professional Responsibility DR 2-103(A), (B), (C); EC 2-8 (1969)
ABA Model Rules of Professional Conduct 5.4(c); 7.2(c) (1983)
ABA Standards for Criminal Justice 3-1.3(h) (3d ed. 1993)

Commentary

Paying for Referrals

Modern professional ethics rules permit lawyers to pay for appropriate advertising but otherwise do not permit lawyers to pay another person for channeling professional work to them. This restriction does not apply to payments made to other attorneys as referral fees where such fees are permitted under applicable ethics codes. Nor does this restriction prevent an organization or person other than the lawyer from advertising or recommending the lawyer’s services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Furthermore, section (a) does not prohibit a lawyer from paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by applicable ethical codes.

Inappropriate Referrals

Regardless of the factor of compensation, the acceptance of referrals from individuals involved in the investigation, prosecution, or adjudication of criminal cases may raise many of the pernicious consequences of compensated solicitation. Even when the prosecutor, police officer, bondsman, or court employee making the referral is motivated by friendship for the lawyer or honest sympathy for the defendant’s plight, the potential for abuse is substantial. A potential conflict of interest exists, for example, when the person making the referral is a police officer, regardless of whether compensation is involved, since the officer

2. ABA Model Rule of Professional Conduct 7.2(c); ABA Code of Professional Responsibility DR 2-103(B).
3. See Standard 4-3.3(d); ABA Model Rule of Professional Conduct 1.5(e); ABA Code of Professional Responsibility DR 2-107(A).
may be called as a witness in the proceedings. Moreover, any practice of police referrals is likely to direct the defense of criminal cases into the hands of a few lawyers and not necessarily to the most competent and ethical members of the bar. Similarly, acceptance of a referral from an alleged victim of the crime in question is likely, in all but the most unusual of cases, to raise problems of simultaneous conflict of interest.

These prohibitions do not preclude a lawyer generally from accepting unpaid referrals from a friend, for example, or from a former client, a member of the clergy, or other such persons. Unpaid referrals are typically not an ethical problem unless they involve conflicts of interest or potential conflicts of interest. Nonetheless, a lawyer accepting a referral should seek to assure himself or herself that the referral was made with the best interests of the client in mind. Similarly, when making a referral to another lawyer, a referring lawyer should consider only the client’s best interests and should make such a referral to a lawyer the referring lawyer knows to be fully qualified.

Regulation of Police Officers, Court Personnel, Bondsmen, and Others

Unprofessional referral practices that have existed in some jurisdictions cannot be eliminated by action taken against participating lawyers alone. To be effective, sanctions must be directed at all parties to the transaction. Some major police departments have provided by departmental regulation that an officer may not recommend a lawyer to a person in custody. Such regulations should be universal. Likewise, those responsible for the licensing or supervision of bondsmen, or others in a position to be tempted to make such referrals, should undertake to discourage the practice by the imposition of appropriate sanctions pursuant to regulations. Undoubtedly, court rules could aid in achieving this goal in many jurisdictions.
PART III.

LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1 Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel’s obligation of confidentiality makes privileged the accused’s disclosures.

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

History of Standard

The first sentence of section (a) has been revised by the addition of the final clause, “and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal.” The second sentence has been revised stylistically, the phrase “extent to which counsel’s” has been added, and the phrase “relating to the case,” which appeared in the second edition, has been deleted. Former section (b) was deleted as the subject is covered in detail in Standard 4-5.2. Sections (b) and (c) were renumbered to reflect the deletion of former section (b), and both sections were revised stylistically.

Related Standards

ABA Model Code of Professional Responsibility DR 4-101; EC 4-1 (1969)
ABA Model Rules of Professional Conduct 1.2(c); 1.6; 1.14 (1983)
ABA Standards for Criminal Justice 4-3.2(b); 4-8.3; 4-8.5 (3d ed. 1993)
ABA Standards for Criminal Justice 5-6.3 (3d ed. 1992)
ABA Standards for Criminal Justice 23-6.1 (2d ed. 1980)

Commentary

Discussion of Representation Objectives and Means

As is discussed elsewhere in this chapter, both lawyer and client have authority and responsibility in determining the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. He or she has the right to decide, for example, what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to take an appeal if convicted. In questions of means, the lawyer should assume responsibility for technical and legal, strategic and tactical issues, such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions to make, and what evidence to introduce. But defense counsel should consult with his or her client on these questions where such consultation is feasible, and counsel should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

In any event, defense counsel should discuss these means and objectives with his or her client at the earliest possible opportunity so that the client is aware of and understands counsel's role, so that the client is aware of and understands the decisions the client can or must anticipate making as criminal proceedings progress, and so that client confidence and trust in counsel is maximized. In order to ensure that the client fully understands the scope of counsel's role and in order to prevent later misunderstandings, counsel should also clearly state to an accused client early in their relationship whether or not counsel will be available to represent the client on appeal should the proceedings at issue end in conviction.

The existence of such discussions between counsel and client about the appropriate ends and means of representation do not signify, of

1. See Standard 4-5.2.
2. See also Jones v. Barnes, 463 U.S. 745, 751, 753 n.6 (1983).
course, that counsel must simply defer to whatever decisions the client makes about how the representation should proceed. A lawyer is not required to pursue objectives or employ means simply because a client may wish or demand that the lawyer do so. Indeed, a clear distinction between objects and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In any event, early and frequent discussions about the progress of applicable proceedings and the events which the client might reasonably anticipate will occur should help to foster the relationship of trust and confidence for which defense counsel should strive.

**Removal of Defense Counsel**

Because the trust and confidence inherent in a well-functioning attorney-client relationship is so important, defense counsel should resist inappropriate efforts by the prosecution or a court to obtain his or her removal when the client objects to such removal.3

**Client with Mental Disability**

During his or her initial or early discussions with the client, defense counsel should also take care to observe whether the client appears to be suffering from any mental disability. If counsel suspects that such disability may exist, this fact does not diminish the lawyer's obligation to treat the client with attention and respect.4 A client with a mental infirmity may still possess the ability to understand, deliberate upon, and reach reasonable conclusions about matters affecting his or her own well-being. Nonetheless, since an incapacitated person may not be able to make legally binding decisions, counsel should consult applicable ethics codes, if any, about how to proceed.5 Counsel should also consider whether a competency evaluation by an appropriate diagnostician, appointment of a legal representative, or some other course of action is in the client's best interests.

**Confidentiality**

Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may

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4. See, e.g., Florida Bar v. Betts, 530 So. 2d 928, 929 (Fla. 1988); State ex rel. Nebraska State Bar Ass’n v. Walsh, 294 N.W.2d 873 (Neb. 1980).
5. See ABA Model Rule of Professional Conduct 1.14.
withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution. The obligation of confidentiality in the lawyer-client relation has been established, therefore, to encourage candor and full disclosure. The ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct both vigorously demand adherence to the ancient doctrine that a lawyer must preserve all confidences that relate to the representation of the accused.  

There are, however, some few exceptions to the general rule of confidentiality recognized in the ethics rules or codes specifically applicable to lawyers in every jurisdiction. Because it is critical to a healthy lawyer-client relationship that a client not be surprised by the revelation of confidences made by an attorney at some time in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction. Counsel should not, however, give the client the impression that he or she must or should conceal facts so as to afford counsel the opportunity to take some action counsel would be precluded from taking if counsel knew such facts.  

Facilities for Private Interview

Even if accused persons are permitted to contact a lawyer and counsel is allowed to see the client, the assistance of counsel cannot be rendered fully unless interviews can be held in private and at convenient times. This is true while an accused is in custody pending trial or while he or she is incarcerated after conviction if an appeal or a postconviction proceeding is pending or contemplated.

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7. Standard 4-3.2(b).

8. Standard 4-3.2(a).
These matters should not be relegated to postconviction relief or the seeking of court orders before and during trial. Regulations governing custodial institutions and rules of court should provide for adequate opportunities for consultation between lawyer and client. Unfortunately, some jail regulations limit the hours and frequency of consultations in a manner that severely restricts necessary lawyer-client discussions. Restrictions to weekdays during daytime hours, for example, may make such interviews unduly expensive in terms of the lawyer's time or may intrude on the lawyer's other obligations. Courts in formulating reasonable provisions and in drafting regulations pertaining to them should emphasize flexibility in all arrangements for lawyer-client contacts. Defense counsel should protest any barriers to reasonable lawyer-client communication.

A responsibility rests heavily upon the courts, the bar, and law enforcement authorities to see that invasions of the privacy of the lawyer-client relation do not occur. Placing a guard in a position to overhear conversations between lawyer and client is, for example, not only likely to be held unlawful but is highly improper as destructive of the lawyer-client relationship. Indeed, any secretive encroachment on the privacy of interviews is improper and must be resisted by the bar. Such encroachments include particularly the tapping or monitoring of telephone or other conversations.9 Law enforcement personnel should be trained and otherwise encouraged to respect the vital interest that society has in maintaining lawyer-client privacy, and appropriate measures should be taken at all levels to see that such privacy is ensured.

Correspondence Between Lawyer and Client; Censorship of Mail

It is fundamental that the communication between client and lawyer be untrammeled. The reading by prison officials of correspondence between prisoners and their lawyers inhibits communication and impairs the attorney-client relationship, may compel time-consuming and expensive travel by the lawyer to assure confidentiality, or even prevent legitimate grievances from being brought to light. This Standard insists that censorship be prohibited with respect to all correspondence between lawyer and client concerning a pending or prospective case or appeal.

Standard 4-3.2 Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses. Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

History of Standard

There are stylistic revisions only.

Related Standards

ABA Standards for Criminal Justice 4-3.1(a) (3d ed. 1993)

Commentary

Securing Facts from the Client

The client is usually the lawyer's primary source of information for an effective defense. An adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial. The lawyer needs to know essential facts, including the events surrounding the act charged, information concerning the defendant's background, and the defendant's record of prior convictions, if any. In criminal litigation, as in other matters, information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively.1

The client, whether innocent or guilty, often knows facts that may tend to be incriminating. For example, though the defendant may be innocent, he or she may have been near the scene of the crime at the time it was committed and, hence, may be reluctant to disclose that fact to the lawyer for fear the lawyer will lose confidence in his or her innocence and thus fail to pursue the case zealously. The lawyer must recog-

1. See also Standard 4-3.1 Commentary.
nize this reluctance and overcome it in order to obtain the facts necessary for an effective defense.

Defense counsel has sometimes been depicted as following the strategy of informing the client of the legal consequences of various factual situations in order to influence the client to adopt the factual version most favorable to a legal defense, for example, the claim of insanity. A lawyer who follows this course handicaps an effective defense by promoting ignorance of facts that may ultimately be revealed at trial.

**Calculated Ignorance of Facts by the Lawyer**

The most flagrant form of "intentional ignorance" on the part of defense lawyers is the tactic of advising the client at the outset not to admit anything to the lawyer that might handicap the lawyer's freedom in calling witnesses or in otherwise making a defense. This tactic is most unfortunate in that the lawyer runs the risk of being the victim of surprise at trial. A lawyer should make clear to the client the imperative need to know all aspects of the case; the lawyer should explain that all of the client's statements and those of other witnesses must be fully investigated. To secure candid disclosure from the client of facts that are often both incriminating and embarrassing, the client must be sure that these facts will not be divulged by the lawyer. Accordingly, the client should be given an explanation of the extent of the privileged status of all information revealed to counsel.

**Standard 4-3.3 Fees**

(a) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee.

(b) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and ability of defense counsel, and the capacity of the client to pay the fee.

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(c) Defense counsel should not imply that his or her compensation is for anything other than professional services rendered by defense counsel or by others for defense counsel.

(d) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethical codes of conduct.

(e) Defense counsel not in the same firm should not divide fees unless the division is in proportion to the services performed by each counsel or, by written agreement with the client, each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(f) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(g) When defense counsel has not regularly represented the client, defense counsel should communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing the representation.

History of Standard

Section (a) (formerly section (c)) has been revised stylistically and to substitute the term "unreasonable" for the phrase "clearly excessive." Sections (b) (formerly section (a)), section (c) (formerly section (b)), and section (f) (formerly section (e)), all have been revised stylistically. Section (d) has been revised to refer counsel to applicable ethical codes that take differing positions on the question whether or when it is proper to share fees with a nonlawyer. Section (e) has been added to reflect the position taken on referral fees in the ABA Model Rules of Professional Conduct. Section (g) has been added to reflect the position taken on communication of fee information in the ABA Model Rules of Professional Conduct.

Related Standards

ABA Model Code of Professional Responsibility DR 2-106; DR 2-107; DR 3-102; EC 2-20 (1969)
ABA Model Rules of Professional Conduct 1.5; 5.4(a) (1983)
Commentary

Overreaching

It is generally accepted in the United States that attorneys’ fees are a matter of agreement between lawyer and client, although the lawyer should be guided by the considerations enumerated in section (b). However, it is improper for a lawyer to charge a fee that is unreasonable. Unreasonable fees include those that are flagrantly excessive or result from overreaching. In criminal cases, because of the intensity of the values at stake, there is a special danger that a lawyer may exploit a client’s apprehensions and difficulties to the lawyer’s pecuniary advantage. As a result, disciplinary measures can and should be invoked when such overreaching is egregious and can be clearly demonstrated.¹

A lawyer who demands that the client pay an additional fee on the eve of trial beyond that which had been previously agreed may be particularly suspect, since once the relationship of lawyer and client has been established, the lawyer stands in a fiduciary relationship to the client and typically can no longer claim that the additional fee demanded in those circumstances resulted from arm’s-length bargaining. Misrepresentation to the client of the extent of the client’s predicament is also a form of overreaching that should lead to discipline.

Family ties and loyalties often lead others to offer financial assistance to an accused, even though they are not legally obligated to pay for the defense. While it is not improper for a lawyer to accept fees derived from such sources if the client consents and no conflict of interest results, a lawyer should avoid the appearance of overreaching that in some circumstances may follow if the lawyer urges the accused to appeal to such sources. A fortiori, the lawyer should not bypass the client and appeal directly to family and friends except when requested to do so by a client in custody.

Determination of Fee

The factors to be properly considered in establishing a lawyer’s compensation can be traced back at least as far as an ordinance of the City of London of 1280.² The factors listed in section (b) to be consid-

1. See, e.g., United States v. Strawser, 800 F.2d 704 (7th Cir. 1986), cert. denied, 480 U.S. 906 (1987); Florida Bar v. Johnson, 530 So. 2d 306 (Fla. 1988); Goeldner v. Mississippi State Bar Ass’n, 525 So. 2d 403 (Miss. 1988); Mahoning Co. Bar Ass’n v. Pagac, 528 N.E.2d 948 (Ohio 1988).

2. See H. DRINKER, LEGAL ETHICS 173 (1953).
Criminal Justice Prosecution Function and Defense Function Standards

Considered by defense counsel in setting a fee are substantially the same factors set forth in both the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct. Since it is common for lawyers to accept criminal cases only if the fee is paid or assured in advance, factors of time and effort should be carefully estimated.

**Implication That Fee Is for Other Than Professional Services**

Clients in criminal cases are sometimes more willing to pay lawyers for results secured by unethical or illegal conduct than for skillful representation within the law and the rules of professional conduct. A lawyer should scrupulously avoid permitting an impression that the fee will be used for undefined purposes or vaguely defined purposes that may be interpreted as including bribery, or that the service provided has a special value because of the lawyer's relationship to the prosecutor, judge, or other officials, or because of any factors unrelated to the lawyer's professional services.

**Division of Fees with Nonlawyers**

Division of fees with laypersons has traditionally been prohibited because of its perceived tendency to promote control of the conduct of the case by one who is not subject to professional discipline. However, some jurisdictions have recently begun to permit such a division of fees where the layperson involved agrees, inter alia, to follow lawyers' ethics rules applicable in the jurisdiction in question. This Standard continues the approach of prohibiting such a division unless permitted by applicable rules of professional conduct.

**Division of Fees with Lawyers**

A division of fees with other lawyers refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. Such a division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Section (e), following the approach taken by ABA Model Rule of Professional Conduct 1.5(e),

3. ABA Model Rule of Professional Conduct Rule 1.5(a); ABA Model Code of Professional Responsibility DR 2-106(B).

4. See ABA Model Rule of Professional Conduct 5.4; ABA Model Code of Professional Responsibility DRs 3-102 and 5-107(C).
permits lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

**Contingent Fees**

Fees contingent upon the successful disposition of a case have long been prohibited in criminal cases.\(^5\) It has been argued that such fee arrangements may tempt the advocate to employ improper or corrupt tactics to enhance the fee. Although the contingent fee conflicts with the principle that the lawyer should not have a pecuniary interest in the litigation, it has been regarded as necessary in some civil cases lest a large segment of the public be denied the opportunity to litigate just claims because of lack of financial capacity. In the administration of criminal justice the stakes are high, and thus the danger of abuse resulting from a contingent fee is especially great. Moreover, the right to counsel is guaranteed by the Constitution in criminal cases, and accused persons therefore should not have to fear a lack of legal representation.

An agreement for payment of an additional fee contingent on acquittal is prohibited. However, an agreement for payment of one amount if the case is disposed of without trial and a larger amount if it proceeds to trial is not a contingent fee but merely an attempt to relate the fee to the time and service involved.

**Communication of Fee Information**

Section (g) follows the approach taken in ABA Model Rule of Professional Conduct 1.5(b), and prescribes that counsel should take steps to ensure that the client promptly understands the fee basis or rate. When the lawyer has regularly represented the client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or

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5. See ABA Model Rule of Professional Conduct 1.5(d)(1); ABA Model Code of Professional Responsibility DR 2-106(C). See also, e.g., In re Fasig, 444 N.E.2d 849 (Ind. 1983); State v. Hilton, 538 P.2d 977 (Kan. 1975).
to identify the factors that may be taken into account in finally fixing
the fee. When developments occur during the representation that render
an earlier estimate substantially inaccurate, a revised estimate should
be provided to the client. A written statement concerning the fee reduces
the possibility of misunderstanding. Furnishing the client with a simple
memorandum or a copy of the lawyer’s customary fee schedule is suffi-
cient to satisfy this Standard if the basis or rate of the fee is set forth.

Standard 4-3.4 Obtaining Literary or Media Rights
from the Accused

Defense counsel, prior to conclusion of all aspects of the matter
giving rise to his or her employment, should not enter into any
agreement or understanding with a client or a prospective client by
which defense counsel acquires an interest in literary or media rights
to a portrayal or account based in substantial part on information
relating to the employment or proposed employment.

History of Standard

This Standard has been revised stylistically and to reflect the inclu-
sion of “media rights” as set out in ABA Model Rule of Professional
Conduct 1.8(d).

Related Standards

ABA Model Code of Professional Responsibility 5-104(B) (1969)
ABA Model Rules of Professional Conduct 1.8(d) (1983)
ABA Standards for Criminal Justice 3-2.11 (3d ed. 1993)

Commentary

An agreement by which a lawyer acquires literary or media rights
concerning the conduct of the representation can create a conflict
between the interests of the client and the personal interests of the
lawyer. Measures suitable in the representation of the client may detract
from the publication value of an account of the representation. This
Standard does not, however, prohibit a lawyer representing a client in
a transaction concerning literary property from agreeing that the lawyer’s
fee shall consist of a share in ownership in the property if the arrange-
Criminal Justice Prosecution Function and Defense Function Standards 4-3.5

ment conforms to strictures of applicable ethics codes.¹

Standard 4-3.5  Conflicts of Interest

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

(i) the several defendants give an informed consent to such multiple representation; and

(ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former repre-

¹. See ABA Model Rules of Professional Conduct 1.5, 1.8(d) and (j).
presentation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

(i) the accused consents after disclosure;
(ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
(iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

(f) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

(g) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

(h) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

(i) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.
(j) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(k) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

History of Standard

Section (a) is new to the third edition, although it is an expansion of Standard 4-1.6 in the second edition, which provided: “The duties of a lawyer to a client are to represent the client’s legitimate interests, and considerations of personal and professional advantage should not influence the lawyer’s advice or performance.” The first sentence of section (b) (formerly section (a)) was revised stylistically and to make clear that conflict problems must be disclosed even if they develop after retention or appointment of counsel. The second sentence in section (b) is new and reflects the definition of “consult” in ABA Model Rules of Professional Conduct, Terminology. Section (c) (formerly section (b)) was revised stylistically and to make clear both that the possibility of a conflict must be considered as it may relate to every stage of the proceedings and that sometimes common conflictive representation can be in the client’s best interests.

Section (d) is new to this Standard but reflects language in ABA Model Rule of Professional Conduct 1.9(c)(1). Section (e) (formerly section (c)) was revised stylistically and to reflect language in ABA Model Rules of Professional Conduct 1.8(g) and 5.4(c). Section (f) (former section (d)) was revised stylistically and the clarifying language “in the same case” was added.

Sections (g), (h), (i), (j), and (k) are new to this Standard. Section (h) reflects language in ABA Model Rules of Professional Conduct 1.11(a) and (b). The first sentence of section (i) reflects language in Model Rule 1.8(i), although the final clause of Model Rule 1.8(i) was not adopted (“except upon consent by the client after consultation regarding the relationship”). Section (j) is former Standard 4-3.6(b) with stylistic changes and with the former concluding phrase “or for others” replaced by the language “represented by counsel or for any other accused in the same or a related case.”
Related Standards

ABA Model Code of Professional Responsibility DR 5-101(A); DR 5-105; DR 5-106; DR 5-107; Canon 9 (1969)
ABA Model Rules of Professional Conduct 1.2(c); 1.7; 1.8(f), (g), (i); 1.9; 1.10; 1.11; 5.4(a), (c), (d) (1983)
ABA Standards for Criminal Justice 3-1.3; 4-1.2; 4-1.6; 4-3.1; 4-3.8; 4-6.2(d), (e) (3d ed. 1993)

Commentary

Personal or Other Interests

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his or her client and free of any compromising influences and loyalties. The lawyer's own interests should never be permitted to have an adverse effect on representation of a client. A lawyer's need for income, for example, should not lead the lawyer to prolong matters that could be resolved swiftly and competently at a more reasonable fee. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Furthermore, defense counsel should not allow his or her political or personal beliefs to interfere with the zealous representation of a client's interests. While defense counsel is free, for example, to decide whether to take on a client's defense in the first instance and is free, where the client consents after consultation, to limit the objectives of the representation, ordinarily counsel should not, in the absence of prior agreement with the client, refuse to take steps otherwise in the client's interest, such as refusing to communicate plea offers from the government to

1. See Standard 4-1.6 Commentary; ABA Model Rule of Professional Conduct 6.2 Comment.
2. See Standard 4-3.1 Commentary; ABA Model Rule of Professional Conduct 1.2(c).
the accused or refusing to continue representation if the client cooperates with the government.\(^3\)

The natural desire for personal achievement, or for personal success, or simply to be in the forefront in developing new legal concepts or theories also never justifies a lawyer compromising his or her professional judgment about a client's best interests. A lawyer's risking his or her client's conviction and a severe sentence in order to make "new law" or headlines, for example, is never justifiable where a lesser plea can be negotiated and probation secured, particularly if the prospects of a guilty verdict are strong. The correct role of defense counsel is to strive not for "courtroom victories" or media or public attention but for results that best serve the client's long-range interests. The total "war" is not won by transitory victories in interlocutory battles. An appellate "victory" on a technical point may be a Pyrrhic victory if it is followed by a new trial in which the prosecution repairs technical infirmities and makes a stronger case against the defendant.

**Disclosure of Conflict of Interest**

The obligation of an attorney to fully disclose to a potential or current client any relationship to other parties, the subject matter of the case, or any other matter that might undermine or draw into question the attorney's ability to guard the client's confidences and zealously pursue the client's interests governs members of the bar in all aspects of their professional activity.\(^4\) The potential risks of a conflict of interest must not be understated or minimized; rather, the facts relevant to the conflict must be communicated clearly to the client and in such a way that the client's appreciation of the magnitude of such risks is assured.

In a criminal case, this responsibility of full disclosure rests particularly heavily on the lawyer because the circumstances of the lawyer's contact with the client are likely to render the client less sensitive to such considerations or less capable of understanding them. In most instances, the client's confrontation with the criminal law will loom so large that the client will be eager to obtain any representation as soon

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3. See Standard 4-1.2 Commentary; Standard 4-3.8; Standard 4-6.2. Defense counsel may properly withdraw from representation, however, "if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . [the] client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." ABA Model Rule of Professional Conduct 1.16(b)(3).

4. See ABA Model Rules of Professional Conduct 1.7 and 1.9; ABA Code of Professional Responsibility DR 5-101(A).
as possible and thus will not be particularly cautious in evaluating a conflict or potential conflict even when it has been disclosed.

While the obligation to disclose a conflicting interest is most apparent when the lawyer has other loyalties that might cause a diminution in zeal of representation, there is a more subtle type of conflict that must also be avoided. Counsel may see in a criminal case an opportunity to further personal or general social interests that are not those of the client. The lawyer who takes a criminal case because of anticipated publicity is in danger of taking action that furthers the interest of the lawyer's publicity at the expense of reaching a quieter disposition more favorable to the client. Another possibility for conflict exists when counsel wishes to test the constitutionality of a law under which the accused is charged although a plea to a minor offense is available. The decision how to proceed must, however, be made strictly on the basis of the client's best interests, uninfluenced by the lawyer's self-interest in being identified with a 'landmark case.'

Another subtle type of conflict may arise when a lawyer habitually appears before a certain court or negotiates with a particular prosecutor. The lawyer, in pressing a particular client's case zealously, may risk antagonizing the judge or prosecutor in a way that might prove harmful in later relations with them in other cases. The basic rule that must guide every lawyer is that the lawyer's total loyalty is due each client in each case; the lawyer must never permit the pressing of one point or one case to be guided or influenced by the demands of another case. The risk of jeopardizing other cases, if it in fact exists, presents a conflict that must be resolved in such a way that the immediate responsibility is faithfully discharged.

Representation of Codefendants

Normally, joint representation of codefendants in criminal cases should not occur, except for preliminary matters such as initial hearings or bail proceedings. Where joint representation does take place, it should be preceded by a "careful investigation" from which it is determined "either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants" and, in either case, informed consents are obtained and made a part of the record.
Criminal defendants have a constitutional right to conflict-free counsel. This Standard is based upon the belief that conflicts of interest are either present or potentially present in the great majority of criminal cases where codefendants are represented by the same lawyer or law firm, but that there are instances when such common representation is either not likely to create a conflict or when common representation is, indeed, potentially advantageous to each codefendant as part of a "common defense." Whenever there are multiple defendants, frequently there are factual differences in the prosecutor's case against them or in their defense to the charges or, at the very least, differences in their backgrounds and social history that may be relevant at sentencing. Where the differences are patent, separate counsel are obviously essential. If, for example, defendant X states that defendant Y committed the offense, and vice versa, the same attorney clearly cannot represent both parties.

Frequently, however, the differences or conflicts are more subtle but still make counsel's effective, zealous representation of all defendants difficult, if not impossible. During the plea negotiation stage, for example, a lawyer cannot urge identically favorable plea agreements for all of the defendants unless all are identically situated. The presence of even slight differences in the backgrounds of defendants or in their cases (e.g., one defendant held a gun while the other served as a lookout) means that strong advocacy to the prosecutor on behalf of one codefendant necessarily undermines, by comparison, the position of other defendants. Similar problems are experienced by counsel during trial, whether the issue is deciding what questions to ask on direct examination or cross-examination, which witnesses will testify, or what evidence to introduce. Questions, testimony, or evidence that are particularly beneficial to one defendant may indirectly reflect adversely upon other defendants. The difficulty for an attorney is especially acute when it comes to arguing the cases of multiple defendants to the fact finder.


6. If a single lawyer has a disqualifying conflict of interest, his or her whole law firm shares the conflict vicariously. See ABA Model Rule of Professional Conduct 1.10; ABA Model Code of Professional Responsibility DR 5-105(D).

7. "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting).
Unless the prosecutor's evidence against the defendants and their defenses is identical, attempts by counsel to exploit weaknesses in evidence against one defendant necessarily make the case against other defendants appear stronger.

Moreover, the fact of multiple representation means that the statements of the accused to the lawyer are not given in full confidence. Defense counsel must confront each defendant with any conflicting statements made by others in the course of planning the defense of the cases. In this situation, the lawyer may have to "judge" the clients to determine which one is telling the truth, and the lawyer's role as advocate is thereby undermined for one, if not all, of the defendants.

If defense counsel does somehow manage to survive the pretrial, trial, and plea stages without confronting either an implicit or explicit conflict in the representation of multiple defendants, conflict problems are still likely to be encountered at sentencing. Since the backgrounds of codefendants invariably differ to some degree, an attorney for multiple defendants must be exceedingly careful in arguments related to sentencing, lest it appear that the attorney is favoring one defendant for leniency in contrast to others. At sentencing, just as at all other stages of criminal proceedings, a defendant is entitled to a lawyer who will aggressively advocate his or her own cause and who is able to do so without concern for the effects of that representation on any other codefendants.

There are, of course, some situations in which codefendants desire the same attorney and have consistent defenses and similar backgrounds, and shared representation would spare them the expense of higher legal fees incident to separate counsel. Existing ethics codes (and the Sixth Amendment) permit simultaneous representation of codefendants when informed consents are obtained from each codefendant after consultation by defense counsel, including a full disclosure of all potential risks of such potentially or actually conflictive behavior. 8

Former Representation

The duty not to reveal information relating to representation of a client does not end; it continues after the client-lawyer relationship has terminated. Hence, defense counsel who formerly represented a client in a matter must not put himself or herself in a position where that confi-

8. See ABA Model Rule of Professional Conduct 1.7(b); ABA Model Code of Professional Responsibility DR 5-105(C); Holloway v. Arkansas, 435 U.S. 475, 482 (1978).
dentity is threatened. Confidential information must not be used or revealed to the disadvantage of the former client in the absence of compliance with a lawful court order or an appropriate exception to the confidentiality requirement expressly contained in the applicable jurisdiction’s ethics code. However, the fact that a lawyer has once served a client does not preclude the lawyer per se from using generally known information about that client when later representing another client.

A former client previously represented by defense counsel in a criminal prosecution may be legitimately concerned about defense counsel’s present representation of another criminal defendant who is seeking or may seek to escape guilt by incriminating the former client (e.g., “they were his drugs, not mine”). Aside from a natural concern about being incriminated in this fashion, the former client might also fear (accurately or not) that defense counsel will impeach his or her credibility through the use of information previously obtained in the client-lawyer relationship. Accordingly, defense counsel should not represent a client in the same or a substantially related matter where such representation is materially adverse to the interests of the former client.9 However, such disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer’s intended role on behalf of the new client.

Payment by Nonclients

There are other situations in which a conflict may arise. For example, counsel is commonly employed in criminal cases by a relative, friend, employer, or codefendant of the defendant. This Standard requires disclosure to the client of the fact that a third party is offering compensation for employment; no such compensation may be accepted by counsel unless the client gives his or her full and informed consent.

In cases involving the payment of fees by nonclients, the possibility also exists that conflicting allegiances will develop. This possibility is especially aggravated if the person paying fees of counsel is a codefendant or a witness to the alleged offense, as is sometimes the case where an employer pays for a lawyer for an employee when both the employer and the employee are indicted. It is also especially problematic where the person paying the fees faces possible criminal or civil liability based

9. See ABA Model Rule of Professional Conduct 1.9(a).
upon the content of the client's testimony or the nature of the client's
defense. There are inherent risks in both situations that the person
paying the fees may regard himself or herself as the principal to whom
counsel's primary loyalty is due.10

A lawyer for an accused must give his or her complete loyalty to the
accused, including full respect to the duty of confidentiality, without
regard to the source of fees. Payment of fees and costs by a person other
than the accused can never be allowed to dilute or influence the undi-
vided loyalty of counsel to the accused or confer on the fee payer any
control of the litigation inconsistent with the best interests of the
accused.11 Defense counsel is well advised to explain these points to a
nonclient paying fees both orally and in writing.

Prosecutors and Their Partners as Defense Counsel

Lawyers who are associated in the practice of law should not appear
on both sides of the same case. The principal rationale for this prohibi-
tion, of course, is the avoidance of any possibility of division or dilu-
tion of loyalties. Relationships between lawyers who are associated in
practice are so close and the potential for conflict is so great that, given
the lack of any strong reason for permitting such representation, a flat
prohibition is warranted against lawyers from the same firm or office
appearing as prosecutor and defense counsel.

Similarly, it would not be sound to permit one who regularly serves
as a prosecutor to appear as defense counsel in the same jurisdiction,
opposing someone who ordinarily is his or her associate in the prose-
cution office. There is no good reason, however, to discourage or
disqualify defense counsel from serving as prosecutor for one day or as
a special prosecutor or, for that matter, as a judge, special or otherwise,
or master in the same jurisdiction, in the absence of some specific conflict
of interest.

There are, indeed, advantages to the operation of an adversary system
in which lawyers can avoid being stereotyped in their roles. In our
system of institutionalized prosecution offices, it is difficult, if not
impossible, however, for prosecutors to simultaneously appear in a
defense role. But it is feasible to have experienced defense counsel
appointed as special prosecutors from time to time. The long-range

11. See ABA Model Rules of Professional Conduct 1.8(f) and 5.4(c); ABA Model Code
of Professional Responsibility DR 5-107(B).
benefits of such interchange, however, are such that lawyers who have been trained in prosecution offices should be encouraged to devote some period of their professional careers in defense work, whether privately or as public defenders, after they have left prosecution offices. Correspondingly, public defender staff members should be encouraged to move into prosecution offices.

**Former Prosecutors**

Lawyers should not be able to exploit public office for the subsequent advantage of a private client. Hence, a former prosecutor who participated personally and substantially in a prosecution should never thereafter be permitted as private counsel to represent a private client in the same or a substantially related matter. Given the importance of assuring public confidence in the administration of criminal justice, such a lifetime bar on successive representation in the same or a substantially related matter should be imposed without the possibility of exception based upon the government’s consent.

Similarly, unfair advantage could accrue to a private client by reason of a former prosecutor’s access to confidential government information that was obtainable only through the lawyer’s former government service. Hence, defense counsel who was formerly a prosecutor should not use or reveal such confidential information obtained from his or her former employment relating to any person in the representation of a present client whose interests are adverse to that person.

**Defense Counsel Who Is Related to Prosecutor**

An attorney’s familial interests can be the source of a conflict of interest with a client just as much as any competing professional loyalty. Section (i) prohibits defense counsel from participating in a criminal matter where the prosecution is represented by counsel’s parent, child, sibling, or spouse. Given the importance of assuring public confidence in the administration of criminal justice, this prohibition should be imposed without the possibility of exception based upon the government’s consent. However, such a conflict should not be imposed vicariously upon other lawyers in defense counsel’s law firm. Nor is this prohibition intended to apply when counsel’s familial relationship is

12. Statutes in many jurisdictions establish similar or identical prohibitions. See, e.g., 18 U.S.C. § 207.
13. See ABA Model Rules of Professional Conduct 1.8(i) and 1.10(a).
with a prosecutor not directly involved in the particular prosecution in question.

Where counsel has a significant, albeit nonfamilial, personal or financial relationship with a prosecutor on the other side of a matter, a conflict of interest may also exist. Counsel should either decline or withdraw from representation in such an instance or should obtain his or her client's informed consent before proceeding.

**Lawyer as Surety on Bond**

In some jurisdictions, lawyers are restricted by rule of court or otherwise from acting as sureties on bonds. It is particularly important that a lawyer not act as surety with respect to a client or another accused in the same or a related case. This limitation enables the lawyer to avoid identification and involvement with the client or codefendants that goes beyond the lawyer's role as advocate and that might undermine the detachment that an advocate should possess.

Nonetheless, it is not improper for defense counsel to act as a surety for nonclients not involved with or connected to a client's case. Moreover, it is always permissible for defense counsel to act as surety for his or her family members.

**Negotiating to Employ Prosecutors**

Because of the improper appearance such negotiations might create, defense counsel should not seek to employ a prosecutor or a government employee, e.g., an investigator, who is significantly involved in a matter in which defense counsel is presently participating both personally and substantively. This prohibition is inapplicable, however, to individuals without significant substantive involvement in the matter, e.g., clerical personnel.

**Standard 4-3.6 Prompt Action to Protect the Accused**

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving
to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

**History of Standard**

The text of this Standard was section (a) in the second edition. Revisions that have been made are stylistic and clarifying-language changes only. Former section (b) has been moved, as revised, to Standard 4-3.5(j).

**Related Standards**

ABA Model Rules of Professional Conduct 1.3; 1.4 (1983)

**Commentary**

Many of the rights that the law guarantees to an accused person can be vindicated only by prompt action. One of the lawyer's most significant tasks is to inform the client of the nature, extent, and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropriate responses to be made to a lineup, interrogation, or problems relating to statements to news media. Many cases require that special steps be taken to preserve existing evidence under the control of others or that prompt ballistics tests, handwriting tests, or medical examinations of the accused be made.

One of the most vital of the accused's rights is the right to be released from custody pending trial. Not only is prompt action upon this right essential to the accused's immediate freedom, continuation of employment, and associations with family and friends, but it is also directly related to a favorable disposition of the case. In many cases, the accused, if not confined, can personally assist counsel by identifying and locating material witnesses or securing evidence vital to the defense. Moreover, if the defendant is able to continue employment, the groundwork may be laid for a strong showing for probation in the event of a guilty finding.¹

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¹ See ABA Standards for Criminal Justice, Pretrial Release Standard 10-1.1 and Commentary (2d ed. 1980).
The particular procedural steps that should be taken to protect the rights of the accused will vary greatly from case to case. These Standards reject the notion, however, that a lawyer is obligated to take every step the accused demands. Instead, the lawyer's professional judgment that a particular step can be appropriately invoked to the client's advantage should ordinarily govern. Among the obvious steps to be considered at the outset are motions for pretrial release, for continuance of the preliminary hearing if that will benefit the accused, for suppression of evidence if grounds exist, for change of venue if that will benefit the accused, or for pretrial psychiatric examination if any reason for such examination appears. At an early stage, defense counsel may have to move for access, depending on the nature of the case, to such matters in the possession or control of the prosecution as ballistic test reports, autopsy reports, or other scientific evaluations of evidentiary matter that may be used at trial.

Counsel must also promptly undertake whatever legal research is necessary to assure vindication of his or her client's rights. Moreover, counsel's role at the pretrial stage is not limited to formal legal steps that should be taken in the accused's behalf. The accused often needs assistance with personal relationships that have been disrupted because the accused has been charged with a crime. This may require advising the accused concerning relationships with an employer, landlord, or creditors, or even direct efforts by the lawyer to persuade them to defer adverse action until final disposition of the case.

Standard 4-3.7 Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defen-

2. Standard 4-5.2.
3. See Standard 4-3.1 Commentary.
dant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

History of Standard

Sections (a) and (c) have been revised stylistically. Section (b) has also been revised stylistically and the last clause ("but defense counsel may discuss the legal consequences of any proposed course of conduct with a client") has been added. Section (d) has been totally revised to reflect the approach taken in ABA Model Rule of Professional Conduct 1.6(a) and (b)(1).

Related Standards

ABA Model Code of Professional Responsibility DR 4-101(C)(3); DR 7-102(A)(7); EC 7-4 to EC 7-6 (1969)
ABA Model Rules of Professional Conduct 1.2(d), (e); 1.6; 2.1; 3.1; 3.3(a)(1), (4); 3.4(a), (b); 4.1 (1983)
ABA Standards for Criminal Justice 4-8.6(d) (3d ed. 1993)

Commentary

Advising Compliance with Law

Since the system of justice cannot function if the professional participants—the advocates—do not comply with standards of honesty and integrity, the bar is firmly committed to the proposition that the lawyer's function must at every stage be performed within the law. Each of the contending advocates is assigned a different role or function, but each is an indispensable component of the system of justice and bound by its rules. While the justice system demands that defense counsel protect
the confidences of the client, it also demands that counsel's duties be performed pursuant to the traditions and standards of professional conduct and in accordance with the law. When defense counsel realizes that a client expects assistance in violation of these requirements, he or she should consult with the client regarding the relevant limitations on counsel's conduct.

Defense counsel is entitled to seek withdrawal from a case at any stage if the client states an intent to violate the law.

**Advising Unlawful Conduct**

It is fundamental that the lawyer's function be performed within the law. The lawyer's professional capacity does not immunize him or her from responsibility if the lawyer aids and abets the commission of a crime.\(^1\)

Of course, clients are nonetheless entitled to advice concerning the legality of prospective conduct. Defense counsel properly may give a candid opinion on the interpretation that may be given to any provision of law, for example, as well as an opinion on its validity. Thus, a lawyer consulted by a person or organization contemplating a test of the constitutionality of a law, as in a civil rights case, is not obliged to counsel against conduct that would provoke prosecution. Similarly, a corporation seeking to determine whether its proposed course of action would violate the antitrust laws can properly be advised by counsel of the applicability of those laws to the proposed conduct.

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. Hence, a lawyer is required to give an honest and candid opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in such criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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Representation in Future Criminal Cases

An agreement, whether express or implied, to defend criminal prosecutions arising out of contemplated criminal acts is an incentive to the commission of crime. Thus, it is improper for a lawyer to knowingly enter into an arrangement with those engaged in organized crime to provide representation on a regular basis to the participants. The lawyer who agrees to represent a person against future charges of prostitution, gambling, narcotics violations, and the like, in violation of state or federal laws, is similarly encouraging illegal activity by his or her willingness to defend.

These situations should be distinguished from that of the lawyer who is under a general retainer for legal services to a lawful enterprise or who regularly represents a client engaged in legitimate activity and who is expected to defend criminal charges should they ever be brought against the client. Persons engaged in legitimate business activity may be exposed to possible violation of criminal laws, such as those regulating safety or business economics. The scope of the law may be uncertain and the managers of such enterprises are entitled to counsel. Regular employment or a retainer that contemplates the defense of a criminal charge, if one is brought in these circumstances, does not operate as an encouragement of law violation, provided that the lawyer fulfills the duty to advise compliance with the law.

A lawyer may properly agree in advance to defend a client who has stated an intention to violate a criminal statute when the violation is for the express purpose of testing in good faith the validity or scope of the law and the lawyer had advised the client that the law is open to question on such grounds.

Limits on Reporting of Threatened Crime

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Furthermore, the observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client; it also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regu-
lations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

The confidentiality rule is subject, however, to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. To the extent a lawyer is required or permitted to disclose a client's purposes even in such circumstances the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. In general, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Nonetheless, where defense counsel reasonably believes that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, it is in the public interest that counsel have professional discretion to reveal information necessary to prevent such consequences. Section (d), following the ABA Model Rules of Professional Conduct, takes this position. A lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer "reasonably believes" is intended by a client. The lawyer need not "know" such a result is intended. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

Defense counsel's exercise of discretion in this regard requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. Defense counsel's decision not to take preventive action permitted by section (d) does not violate this Standard.

Standard 4-3.8 Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense

and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

History of Standard

Section (a) was the entire text of this Standard in the second edition. It has been revised stylistically and to include the final clause ("and should promptly comply with reasonable requests for information"). Section (b) is new to this Standard.

Related Standards

ABA Model Code of Professional Responsibility EC 7-8; EC 9-2 (1969)
ABA Standards for Criminal Justice 4-3.1; 4-6.2 (3d ed. 1993)

Commentary

Duty to Inform

A common complaint of laypersons is that lawyers, whether acting in civil or criminal cases, fail to keep their clients adequately informed. Unfortunately, this sometimes occurs even when the lawyer is preoccupied with performing essential tasks for the client. At best, it is difficult for a lawyer to establish and maintain a relationship of confidence and trust with an anxious client in a criminal case, especially one in custody, and this task is made more difficult if the client is not kept reasonably informed. A lawyer must remember that the case is the defendant's case, and the defendant is entitled to know of the progress of the lawyer's work.

The lawyer's duty in this respect is the same whether the lawyer has been retained or assigned. The busy lawyer performing services in many cases at a personal sacrifice may regard the burden of reporting to the client as an added imposition, but it is important to keep the client aware that the lawyer is actively attending to the client's interests.

1. See Standard 4-1.2(h).
Extent of Explanation

The client should be given sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer who receives a prof ered plea bargain should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in plea negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.

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

Standard 4-3.9 Obligations of Hybrid and Standby Counsel

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on

2. See Standard 4-6.2(b).
all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

History of Standard
This Standard is new to this edition.

Related Standards
ABA Model Rules of Professional Conduct 3.1; 4.4 (1983)
ABA Standards for Criminal Justice 4-5.2 (3d ed. 1993)
ABA Standards for Criminal Justice 6-3.7 (2d ed. 1980)

Commentary
Ordinarily, decisions relating to the objectives of representation are for the client to make, while strategic and tactical decisions, decisions relating to the means by which such objectives are to be pursued, are for the lawyer to make (after consultation with the client). However, in the extraordinary situation in which the client is representing himself or herself pro se, these ordinary rules do not apply. Since the client has made the purposeful decision to invoke his or her constitutional right to forego representation by a lawyer, it stands to reason that he or she has, by that decision, also chosen not to delegate the right to make strategic or tactical decisions relating to the litigation to a lawyer who may be appointed to participate in the proceedings on a standby or hybrid (i.e., in essence as co-counsel) basis.

Defense counsel appointed on such a basis should make every effort to play a limited role in the proceedings and must scrupulously respect the pro se defendant's right to develop and to present his or her own

1. See Standard 4-5.2; Standard 4-3.1 Commentary. See also ABA Model Rule of Professional Conduct 1.2(a). See also, e.g., Jones v. Barnes, 463 U.S. 745 (1983).

2. In all other respects, the standby or hybrid lawyer must comply with applicable ethics rules.
defense. Nonetheless, it is permissible for counsel to bring matters to the pro se defendant's attention or otherwise offer assistance, but counsel must not do so in a way that undermines or interferes unduly with the pro se defendant's right to make his or her own litigation decisions.

PART IV.
INVESTIGATION AND PREPARATION

Standard 4-4.1 Duty to Investigate

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

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

History of Standard

Stylistic changes were made in the first and last sentences of section (a), which was the full text of this Standard in the last edition. In the second sentence, the word "always" was deleted after the phrase "The investigation should" as such an effort is not always necessary (e.g., when defense counsel already possesses such information).

Section (b) is new to this edition.

Related Standards

ABA Model Code of Professional Responsibility EC 4-1 (1969)
ABA Standards for Criminal Justice 3-3.1(a); 4-4.2; 4-4.3(a); 4-4.6; 4-6.1(b) (3d ed. 1993)

Commentary

The Importance of Prompt Investigation

Facts form the basis of effective representation. Effective representation consists of much more than the advocate's courtroom function per se. Indeed, adequate investigation may avert the need for court-
room confrontation. Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others. The resources of scientific laboratories may be required to evaluate certain kinds of evidence: analyses of fingerprints or handwriting, clothing, hair, or blood samples, or ballistics tests may be necessary. Neglect of any of these steps may preclude the presentation of an effective defense.

The prosecutor and law enforcement agencies are important sources of information often needed by the defense lawyer. Apart from any formal processes of discovery that are available, prosecutors and law enforcement officers may have in their possession facts that defense counsel must know. Prosecutors will often reveal facts freely in the hope of inducing a guilty plea. If defense counsel can secure the information known to the prosecutor, it will obviously facilitate investigation. Defense counsel should urge the prosecutor to disclose facts even though defense counsel must then proceed to verify them. Overtures to the prosecution are not an indication of weakness, and experienced defense counsel routinely approach the prosecutor at an early stage of their own investigations.

The lawyer's duty to investigate is not discharged by the accused's admission of guilt to the lawyer or by the accused's stated desire to enter a guilty plea. The accused's belief that he or she is guilty in fact may often not coincide with the elements that must be proved in order to establish guilt in law. In many criminal cases, the real issue is not whether the defendant performed the act in question but whether the defendant had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to intent in determining criminal responsibility. Similarly, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities will be determined by the lawyer's factual investigation for which the accused's own conclusions are not a substitute.

The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense. An accused may feel a sense of guilt, but the accused's subjective or emotional evaluation is not relevant; an essential function of the advocate is to make a detached professional appraisal independent of the client's belief that he or she is or is not guilty.
The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.

Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If there were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate’s role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.1

**Acquisition of Physical Evidence**

Defense counsel’s duties and obligations when he or she comes into possession of physical evidence of crime are discussed elsewhere in these Standards.2 Section (b) deals only with the acquisition of such physical evidence. While it is essential that defense counsel engage in a prompt investigation and while it is perfectly appropriate to use the services of investigators for these purposes, it is inappropriate and, indeed, may even be criminal conduct in some jurisdictions for defense attorneys to seek to acquire physical evidence personally or through the use of investigators solely for the purpose of obstructing access to such evidence by law enforcement or other government officials. Where physical evidence is acquired by counsel for an appropriate purpose, e.g., for

2. See Standard 4-4.6.
testing, examination, use, or inspection as part of counsel's representation of his or her client, this section is inapplicable.

Standard 4-4.2 Illegal Investigation

Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

History of Standard

There is a stylistic change only.

Related Standards

ABA Model Rules of Professional Conduct 3.3(a)(1), (3), (4); 3.4(a), (b); 4.4; 8.4(b), (c), (d), (e), (f) (1983)
ABA Standards for Criminal Justice 3-3.1(c); 4-4.1(b); 4-4.3(a); 4-4.6 (3d ed. 1993)

Commentary

The use by investigators of wiretaps, electronic surveillance devices, and other prohibited means of investigation is common. Such practices are a serious threat to personal privacy. Lawyers who use the services of private investigators are in a strategic position to control the means by which investigation is conducted. Lawyers have a special responsibility to act within the bounds of the law and to see that those they employ do so also. Lawyers must also forbid the use of oppressive methods of securing information, as by threats or intimidation.\footnote{See also Standard 4-4.3(a).}

Standard 4-4.3 Relations With Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining
evidence that violate the legal rights of such a person.

(b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

History of Standard

Section (a) is new to this Standard. All of the remaining sections have been relettered sequentially and have been revised stylistically.

Related Standards

ABA Model Code of Professional Responsibility DR 5-101(B); DR 5-102; DR 7-102(A)(1); DR 7-106(C)(2); DR 7-108(D), (E); DR 7-109(C) (1969)
ABA Model Rules of Professional Conduct 1.2; 3.4(b), (f); 3.7; 4.3; 4.4 (1983)
ABA Standards for Criminal Justice 3-3.1(d), (g); 3-3.2(a), (b); 4-4.1(b); 4-4.2 (3d ed. 1993)
ABA Standards for Criminal Justice 11-3.3; 11-4.1 (2d ed. 1980)
Commentary

Respect for Rights of Third Persons

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. 1

Compensation of Witnesses

Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony, though they may be paid ordinary witness fees. However, it is well accepted that the prohibition against paying for testimony does not forbid reimbursement of witnesses for their actual expenses and reasonable payment for loss of income. 2

Self-Incrimination of Witnesses

Occasionally, a prospective witness gives a statement to the defense that is helpful to the client on whose behalf the statement is obtained but at the cost of possibly incriminating the prospective witness. The lawyer’s paramount loyalty to his or her own client must govern in this situation; accordingly, these Standards declare that “[i]t is not necessary for defense counselor defense counsel’s investigator . . . to caution the witness concerning possible self-incrimination and the need for counsel.”

Obstructing Communications Between Witnesses and the Prosecution

Prospective witnesses should not be treated as partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not “belong” to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel.

It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a

1. See ABA Model Rule of Professional Conduct 3.4 Comment; ABA Model Code of Professional Responsibility DR 7-109(C)(3). See also, e.g., Person v. Association of Bar of City of New York, 554 F.2d 534 (2d Cir.), cert. denied, 434 U.S. 924 (1977).
2. See ABA Model Rule of Professional Conduct 3.4, Comment; ABA Model Code of Professional Responsibility DR 7-109(C); ABA Committee on Professional Ethics, Informal Opinion No. 847 (1965).
defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that there is no legal obligation to submit to an interview. It is proper, however, and may be the duty of both counsel in most cases to interview all persons who may be witnesses and it is in the interest of justice that the witnesses be available for interview by counsel.

It is proper for defense counsel to tell a witness that he or she may contact counsel prior to talking to the prosecutor. Counsel may also properly request an opportunity to be present at the prosecutor’s interview of a witness, but may not make his or her presence a condition of the interview. It is also proper to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person. In the event that a written statement is signed or otherwise acknowledged by the witness as a correct representation of facts known to the witness, a copy of the statement should be furnished the witness upon request.

*Interviews by the Lawyer Personally*

Two possible problems can arise in relation to the impeachment of witnesses. The first may arise out of defense counsel's interview with a “friendly” witness, for example, an alibi witness. The friendly witness is likely to be cooperative in giving and signing a statement, but the problem of impeaching the witness may arise if, unexpectedly, the witness’s testimony varies from the pretrial statement and takes counsel by surprise.

The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what the witness stated to defense counsel before trial. In such situations, it is necessary to conduct interviews of witnesses with a third person present, particularly since prosecution witnesses do not often sign written statements for defense counsel. The availability of a third person is virtually the only effective means of impeaching an adverse witness. Defense counsel is in an exceedingly difficult situation in seeking leave to withdraw and to substitute other counsel in order to take the stand to relate what the adverse witness previously said to the lawyer. Although a lawyer is sometimes permitted to withdraw in order to testify, this is largely a matter entrusted to the court’s discretion, and the court will undoubtedly be influenced by the importance of the testimony, whether other
counsel is available to try the case, or whether a mistrial must be declared. It is normally not appropriate for a lawyer to offer impeachment testimony and also remain in the case as counsel for the defendant.3

After counsel secures written statements from investigators, it is proper, and indeed wise, for counsel to interview such witnesses personally, not only to verify the investigators’ reports, but to become familiar with the personality of each witness in order to anticipate how the witness will react on the stand. Again, a third person should be present.

Standard 4-4.4 Relations With Expert Witnesses

(a) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert’s opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) Defense counsel should not pay an excessive fee for the purpose of influencing an expert’s testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

History of Standard

There are stylistic changes only.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(6); DR 7-109(C); EC 7-28 (1969)
ABA Model Rules of Professional Conduct 1.2(d); 3.4(b) (1983)
ABA Standards for Criminal Justice 3-3.3 (3d ed. 1993)

3. See ABA Model Rule of Professional Conduct 3.7(a); ABA Model Code of Professional Responsibility DRs 5-101(B) and 5-102(A).
Commentary

Advising the Expert Witness

Statements made by physicians, psychiatrists, and other experts about their experiences as witnesses in criminal cases indicate the need for circumspection on the part of lawyers who engage experts. Nothing should be done by a lawyer to cast suspicion on the process of justice by suggesting that the expert color an opinion to favor the interests of the client the lawyer represents. Depending on the extent of the expert's experience with courtroom procedure, the lawyer should explain the workings of the adversary system and the expert witness's role within it as an independent and impartial expert. The lawyer should also explain that the expert is to testify in accordance with the standards of the expert's discipline without regard to the wishes of the accused or the lawyer.

Fees to Experts

It is important that the fee paid to an expert not serve to influence the substance of the expert's testimony. To avoid both the existence and the appearance of influence, the fee should not be made contingent on a favorable opinion or result in the case, and the amount of the fee should be reasonable.¹

Standard 4-4.5  Compliance With Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

¹ See also Standard 4-4.2; ABA Model Rule of Professional Conduct 4.4; ABA Model Code of Professional Responsibility DRs 7-101(A)(1) and 7-102(A)(1).
4-4.6 Criminal Justice Prosecution Function and Defense Function Standards

History of Standard

The text of this Standard is new and reflects language contained in ABA Model Rule of Professional Conduct 3.4(d).

Related Standards

ABA Model Code of Professional Responsibility DR 7-106(C)(7) (1969)
ABA Model Rules of Professional Conduct 3.4(d); 3.8(d) (1983)
ABA Standards for Criminal Justice 3-3.11(b) (3d ed. 1993)

Commentary

The development of discovery procedures in criminal cases entails obligations on defense counsel to seek diligently and in good faith to make the procedures function effectively. Defense counsel should not compel the prosecution to resort to a court order for discovery in order to harass the prosecution, make it more costly, or obstruct the flow of information when defense counsel knows the information is discoverable. Guidelines concerning discovery in criminal cases are contained in the ABA Standards for Criminal Justice on Discovery and Procedure Before Trial (2d ed. 1980).

Standard 4-4.6 Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

1. See also Standard 4-4.6 Commentary.
(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

History of Standard

This Standard is new to this edition.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(3), (6), (7); DR 7-109(A) (1969)
ABA Model Rules of Professional Conduct 3.3(a)(2); 3.4(a) (1983)
ABA Standards for Criminal Justice 3-2.8(f); 4-4.1(b) (3d ed. 1993)
Commentary

Disclosure Required by Law or Court Order

As discussed elsewhere in these Standards, client confidences must be protected from disclosure both to ensure the full development of facts essential to proper representation and to encourage people to seek legal assistance. A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to client representation.

Counsel should, accordingly, resist and oppose attempts by the prosecution or by a tribunal to inappropriately threaten client-lawyer confidentiality. Counsel should not hesitate to raise this issue in judicial proceedings whenever and wherever it is appropriate, e.g., in an effort to test the validity of a subpoena served on counsel requesting production of a client's documents. However, if counsel has raised this issue unsuccessfully, counsel must thereafter comply with the law, including following final orders of a court or tribunal of competent jurisdiction requiring the disclosure of the location of physical evidence or the delivery of such evidence to the court, to the prosecution, or to law enforcement authorities.

Fair procedure in our adversary system contemplates that the law, court rules, and court orders will be followed both by defense counsel and by the prosecution. Documents and other items of physical evidence are often essential elements of the prosecution's attempted proof of criminal charges or disproof of proffered defenses in criminal cases. While defense counsel has no obligation to assist the prosecution in obtaining such physical evidence, conversely, counsel has no right to obstruct the prosecution in its lawful pursuit of such evidence. Attorneys should not be depositories for criminal evidence. Subject to evidentiary privileges, the right of the prosecution to obtain evidence through lawful use of prescribed discovery procedures, subpoena, or search warrant is both an important procedural (and sometimes constitutional) right and essential to insuring the fairness of adversary proceedings. It is, accordingly, improper and may even be criminal conduct for a defense attorney to alter, conceal, or destroy relevant items of physical evidence that are the lawful subject of such legal process.

1. See Standards 4-3.1, 4-3.2, and 4-3.7 Commentary.
Obligation to Return Physical Evidence to Source

Where defense counsel has not been ordered or otherwise required by law to disclose the location of or to produce physical evidence in his or her possession, counsel's obligations are different. If counsel were required to promptly turn over all physical evidence received from a client or some other source relating to an investigation or pending criminal charges, counsel would refrain both from receiving any such evidence or searching for it, whether or not it might help his or her client. Such a policy of restraint would unduly hamper defense counsel's obligation to undertake as full a factual investigation as possible. Indeed, to assure effective representation, defense counsel must be encouraged to acquire physical evidence if he or she believes the client's defense might genuinely be enhanced thereby.

Moreover, the client must be able to trust his or her attorney. It is doubtful that a client would continue to trust defense counsel who "betrayed" that trust by disclosing incriminating evidence to law enforcement authorities, whether or not the source of the evidence was the client.

Defense counsel must scrupulously preserve the confidentiality of information discovered as a result of the client-lawyer relationship. Accordingly, it is ordinarily improper for counsel to turn over evidence discovered in the course of that relationship to the prosecution, to the tribunal, or to law enforcement authorities on a sua sponte basis. The failure to disclose or deliver such evidence is neither unfair nor unlawful where there has been no lawful request or other legal compulsion to produce it. However, it is also ordinarily improper for attorneys simply to receive and to retain such evidence. As mentioned, law offices must not become depositories for physical evidence.

The appropriate general rule for defense counsel coming into possession of an item of physical evidence where disclosure or production is not already required by law, therefore, is for counsel to return that item to the source from whom or from which defense counsel received or obtained it. In essence, this rule preserves the "status quo," thus avoiding the possibility that defense counsel will make the task of law enforcement more difficult. If the evidence is returned to its source, conceivably law enforcement authorities may later obtain it through

2. See Standard 4-4.1.
lawful investigation. A return to the source, moreover, means that the receipt of evidence is treated no differently from the situation in which counsel is given confidential information relating to the location of such evidence. If a client tells counsel where evidence is hidden, counsel may advise his or her client about the legal consequences of destruction or concealment of such evidence but may not ordinarily disclose its location to the authorities. This rule of return to the source applies whether the source is the client, a third party, or a physical location.

In returning an item of physical evidence to its source where the source is a person, counsel should advise the source of the legal consequences pertaining to the possession or destruction of the item by that person or by others. Ordinarily, this will mean that the source should be advised to retain the evidence intact and not to engage in conduct that might be deemed a violation of criminal statutes relating to evidence. As discussed elsewhere in these Standards, a lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's course of conduct. The fact that the client subsequently uses such advice in a course of action that is criminal or fraudulent does not, of itself, make the lawyer who has offered such advice party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

For purposes of memorializing these events given the possibility of subsequent inquiry into counsel's conduct, counsel should prepare a written and dated record for his or her file of what has transpired as soon thereafter as is reasonably feasible. It is advisable to have this document witnessed by someone who is also bound by the confidentiality rules, e.g., another attorney in the law firm. Counsel should not, however, provide the source or the client a copy of this written recordation as such a record could subsequently become a secondary piece of physical evidence that might itself either compromise the client's interests or create future ethical problems for counsel.

4. See Standard 4-3.7(d).
5. See Standard 4-3.7(b) and Commentary.
Temporary Possession of Physical Evidence

Notwithstanding the general rule of return to the source, evidence given to defense counsel during legal consultation for information purposes and used by counsel in preparing the defense of his or her client's case, whether or not the case ever goes to trial, can be retained for a reasonable period of time. Furthermore, although defense counsel generally should promptly return an item of physical evidence to the source from which it was obtained, there are some situations in which such a rule of return is either not feasible or sensible. It is, accordingly, permissible under this Standard for counsel to receive and retain an item of physical evidence for a limited period of time when counsel: intends soon to return the item to its owner, reasonably fears that return will result in the item's destruction (e.g., the source has told counsel that he or she will destroy it), reasonably fears that return will result in physical harm to someone (e.g., the item is an explosive device), intends to test, examine, inspect, or use the item in some fashion as part of the representation of the client (e.g., a ballistics test may be useful to determine if the weapon turned over to counsel has recently been fired), or cannot return it to the source (e.g., the source has died). After the item has been temporarily possessed for a reasonable period of time, e.g., for testing, it should then be returned to the source as soon as it is reasonably feasible unless there is reason to believe that the source will alter, destroy, or use it to harm another person, or return is otherwise impossible (e.g., the source has since died).

During the period that defense counsel remains in possession of an item of relevant physical evidence, he or she should keep it in his or her law office when that is possible. Because counsel has no right to retain such evidence in the face of a court order or other lawful legal process, e.g., a search warrant directed at seizure of the item, counsel has no right to obstruct the prosecution's or other law enforcement authorities' ability to secure such evidence in a lawful manner. Hence, in the interests of uniformity of expectation and in order to minimize the chances of loss or unavailability, counsel should keep such item in his or her law office and, further, must not retain it in any manner that would significantly impede the ability of law enforcement officers to obtain it in a lawful fashion.

Destruction of Contraband

Defense counsel may sometimes be placed in the position of receiving contraband, e.g., marijuana or cocaine. Although there may be no
pending case or investigation relating to these particular items at the
time at which they are received, counsel might nonetheless be loathe
to return such items to their source, as is the general rule when physical
evidence is received. Return of narcotics to their possessor obviously
raises the possibility, if not probability, of their illegal sale, transfer, or
use, and the certainty of their continued illegal possession, if only for
the period of time during which their possessor walks away from the
lawyer’s office. It is proper in such circumstances, in jurisdictions where
there is no contrary legal or statutory authority, for counsel to suggest
that the client destroy such contraband, e.g., by flushing it down the
toilet. The social benefit accomplished by the destruction and discon­
tinued circulation of such items outweighs any hypothetical social costs
stemming from the fact that these items have been rendered unavail­
able to serve as evidence in future criminal investigations or
prosecutions.

Disclosure or Delivery of Evidence to Prosecution

When counsel receives contraband evidence and its destruction is not
lawful, defense counsel should disclose its location to law enforcement
authorities or simply deliver the item to such authorities. Similarly, when
counsel has received an item of physical evidence, whether or not it is
contraband but which counsel does not believe he or she can retain in
a manner that does not pose an unreasonable risk of physical harm to
someone, counsel should disclose the location of such evidence to law
enforcement authorities or deliver it to them.

Even in such circumstances of disclosure or delivery by counsel or
when disclosure or delivery is made to the owner of the item under
section (c)(1), the confidentiality inherent in the client-lawyer relation­
ship must be fully respected by defense counsel. Counsel may not reveal,
absent client consent, the client’s actions or words leading either to
discovery of the evidence or to its surrender to counsel. Counsel should
steadfastly argue that the prosecution not mention in front of the fact
finder in any subsequent judicial proceeding that counsel was the source
of the evidence.

Disclosure or delivery should also be made in such a way that the
client’s interests are protected. It is proper, for example, for such disclo­
sure by counsel to be made anonymously or through the offices of a
third party, e.g., through the bar association or bar disciplinary counsel.
Where any such disclosure or delivery of physical evidence is made by
defense counsel, however, the source of the evidence should be notified.
PART V.
CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1 Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally 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.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

History of Standard

There are stylistic changes only.

Related Standards

ABA Model Code of Professional Responsibility EC 7-3; EC 7-8 (1969)
ABA Standards for Criminal Justice 4-4.1(a); 4-5.2(a) (3d ed. 1993)
ABA Standards for Criminal Justice 14-1.3; 14-3.2 (2d ed. 1980)

Commentary

Advice on the Plea

The duty of the lawyer to investigate the facts of the case, regardless of the anticipated plea, is discussed elsewhere.1 The lawyer's duty to be informed on the law is equally important; although the client may sometimes be capable of assisting in the fact investigation, the client is

1. See Standard 4-4.1(a).
not likely to be educated in or familiar with the controlling law. The lawyer's responsibility to know the law is a challenging one, given the rapid pace of change in many areas of criminal law and procedure.

The decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices. Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision. However, defense counsel should recognize and should make clear to the client that he or she has the right to put the prosecution to its proof and that the decision whether or not to enter a guilty plea is ultimately for the client—not defense counsel—to make.  

A lawyer's advice to a defendant to plead guilty merely because the defendant has admitted guilt to the lawyer, without exploring relevant facts or attempting to determine whether the prosecution can establish guilt, is improper. Because of the elements of uncertainty that surround any estimate of probable outcome, the lawyer who has fulfilled the duties of investigation and analysis should not be faulted when subsequent events show that the lawyer's prediction was incorrect.

The matters on which the defendant needs advice before entering a plea go beyond appraisal of the likelihood of conviction or acquittal. Counsel should inform the defendant of the maximum and minimum sentences that can be imposed, but counsel should also be aware of the actual sentencing practices of the court and advise the defendant, when that is possible, what sentence is likely.  

If a decision is made to enter a plea, counsel should carefully review with the defendant the various subjects on which the court is likely to question the defendant when the plea is offered.

**Misrepresenting the Risks, Hazards, or Prospects**

Misrepresenting the prospects of the case to a client considering a plea for any reason, including counsel's desire to obtain employment or to charge a larger fee, is highly improper and prohibited by these Standards. Considerations related to counsel's fee, moreover, should never influence a lawyer's decisions or advice.

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2. See Standard 4-5.2(a).
Cautioning the Client

It is improper for a lawyer to communicate in any way with jurors before and during trial or with prospective jurors about the trial or any other subject, no matter how trivial, and, of course, it is equally improper for the client to do so. Since the accused may be unaware that even casual communication with a juror is an impropriety, the accused should be so cautioned in order to avoid even the appearance of impropriety.

The client’s relations with witnesses can pose complex problems. Often persons to be called as witnesses are relatives, friends, or fellow workers with whom normal communication cannot be avoided. The defendant’s familiarity with witnesses and their whereabouts may require the defendant’s participation in locating them, and the defendant’s aid may be needed in securing their willingness to discuss the case with defense counsel and their appearance at trial. Contact by the accused with witnesses involves the risk that something may be said that could later give rise to embarrassment or misunderstanding. The lawyer should caution the defendant to avoid contact or communication with alleged victims or witnesses where this is feasible (it may not be in cases involving family members, for example) unless the lawyer has been consulted and has given approval.

Obviously, just as it is the lawyer’s duty to tell all witnesses to tell the truth under all circumstances, so it is the lawyer’s duty to admonish the client to so advise any witnesses the client may contact. Counsel should make clear to the client that any conduct of the client’s that has even the appearance of an effort to influence or color the testimony of a witness may provide ammunition that the prosecution can use at trial to suggest a consciousness of guilt. Such conduct may also be used to impeach the credibility of the witness. At worst, improper conduct by the client could lead to a charge of obstructing justice or suborning perjury.

Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

4. See Standard 4-7.3(a).
4-5.2 Criminal Justice Prosecution Function and Defense Function Standards

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive jury trial;
(iv) whether to testify in his or her own behalf; and
(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

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

History of Standard

Section (a) has been revised to replace the word "are" with the word "include" in the second sentence in order to make it clear that this list is not deemed to be exclusive. Moreover, subsections (ii) and (v) are new to this edition; the remaining subsections have been renumbered accordingly. Section (b) has been revised stylistically, and changes parallel to those made in section (a) have been made to make clear that the list of decisions is not intended to be exclusive. The language "where feasible and appropriate" was added in section (b) to reflect the fact that sometimes consultation is virtually impossible, e.g., in the middle of cross-examination. The decision as to "what evidence should be introduced" was also added to the list contained in section (b). Section (c) has been revised stylistically.

Related Standards

ABA Model Code of Professional Responsibility EC 5-12; EC 7-7 (1969)
ABA Model Rules of Professional Conduct 1.2(a) (1983)
ABA Standards for Criminal Justice 4-8.3(d)(3d ed. 1993)
ABA Standards for Criminal Justice 14-1.3; 14-3.2; 15-1.2; 15-1.3 (2d ed. 1980)

Commentary

Allocation of Decision-making Power

Certain basic decisions have come to belong to the client while others fall within the province of the lawyer.¹ The requirement that the defendant personally enter a guilty plea and that it be voluntary and informed carries the implication that it is the defendant who must make the choice as to the plea to be entered and, concomitantly, whether to accept a proffered plea agreement. Similarly, the decisions whether to waive a jury trial or whether to take an appeal have long been considered to belong to the defendant.² With respect to the decision whether the defendant should testify, the lawyer should give his or her client the benefit of his or her advice and experience, but the ultimate decision must be made by the defendant, and the defendant alone.³ In making each of these decisions—whether to plead guilty, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal—the accused should have the full and careful advice of counsel. Although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence,⁴ counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself.

Strategy and Tactics

In general, the power of decision in matters of trial strategy and tactics rests with the lawyer, after consultation with the client when such consultation is, in the lawyer's judgment, both feasible and appropriate. The lawyer should determine which witnesses should be called on behalf of the defendant. Similarly, the lawyer should decide what evidence

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¹ See ABA Model Rule of Professional Conduct 1.2(a).
⁴ See Standard 4-5.1(b) (counsel should not exert undue influence on the accused's decision as to his or her plea).
should be introduced, whether to object to the admission of evidence, whether and how a witness should be cross-examined, and whether to stipulate to certain facts.

Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile. Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge’s charge while the client “plucks at the attorney’s sleeve” offering gratuitous suggestions. Some decisions, especially those involving which witnesses to call, can be anticipated sufficiently so that counsel can ordinarily consult with the client concerning them. Because these decisions require the skill, training, and experience of the advocate, the power of decision on them should rest with the lawyer. The lawyer should seek to maintain a professional relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case.

It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury.

Record of Advice

A disagreement between counsel and the accused on a significant decision to be made before or during the trial may be the subject of postconviction proceedings questioning the effectiveness of the lawyer’s performance. Rather than leave the matter to be determined on the strength of the memories of the lawyer and client, which are invariably in conflict if the issue arises, some record should be made. This may be accomplished by a memorialization of the nature of the disagreement as to such significant decision, the advice given, and the action taken.
PART VI.
DISPOSITION WITHOUT TRIAL

Standard 4-6.1 Duty to Explore Disposition Without Trial

(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.

(b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

History of Standard

Section (a) has been revised stylistically and the word “law” added in recognition of the fact that such diversion may not be lawful in every case in every jurisdiction. In section (b), the clause at the end of the first sentence in the previous edition was deleted (“although ordinarily the client’s consent to engage in such discussions should be obtained in advance”). Further, the word “appropriate” in the second sentence was substituted for the phrase “a full.”

Related Standards

ABA Standards for Criminal Justice 3-4.1; 4-4.1(a) (3d ed. 1993)
ABA Standards for Criminal Justice 11-5.2; 14-3.2 (2d ed. 1980)

Commentary

Exploring Early Diversion

The criminal process is only one of a number of methods society uses to deal with antisocial conduct. But in many cases involving law violations, it may not be in the best interests of either society or the accused to pursue criminal prosecution. Prosecutors long have exercised their
discretion to informally defer prosecution when they have concluded that an offender, particularly a first offender, ought not be subjected to full-scale criminal prosecution—for example, when an offender is seeking psychiatric or other expert assistance. The existence of diversionary procedures or the willingness occasionally to work out a specialized form of diversion from the criminal process emphasizes the need for defense counsel to be aware both of the prosecutor's attitudes in appropriate cases and of the need to outline to the prosecutor an appropriate course of action outside the criminal process.

*Participating in Plea Discussions*

Most cases are disposed of not by trial but as the result of a plea of guilty. In large measure, this reflects the fulfillment by prosecutors of their screening function and their obligation not to press charges unless a conviction is likely. The disposition by plea satisfies a variety of interests of the administration of justice as a whole as well as of the defendant. To the defendant, it affords the opportunity of avoiding the ordeal of trial, mitigating the penalties, and of having a sentence determined without the sentencing court hearing all of the adverse testimony that would be produced at trial. To the prosecutor, it offers the certainty of conviction with the least drain on prosecutorial resources and in an atmosphere free of the tensions of conflict. To the administration of justice as a whole, disposition by plea represents substantial savings to the public in terms of prosecutorial and judicial time, and also a greater confidence in the certainty of the guilt of the accused. Moreover, assuming an adequate record will be made of the factual basis for the plea at the time of plea and sentence, the problems of postconviction attacks are lessened.

Since disposition by plea is mutually advantageous in many circumstances, involvement in plea discussions is a significant part of the duty of defense counsel. Courts and prosecutors have developed criteria that guide the exercise of their discretion. These standards and rules of thumb are not to be found in codes, case reports, and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the effective defense lawyer. Ignorance of the prevailing practices and attitudes of the prosecutor and the court as to plea discussions may be as much a handicap to effective representation as is unfamiliarity with the facts or law related to the case; hence, it is imperative that the defense lawyer be or become aware of them. If defense counsel lacks sufficient personal experience, he or she should consult experi-
enced colleagues. The staff of defender offices also serves as a repository of such information to which all members of the bar may and should turn.

A corollary to the obligation to explore the possibility of disposition by plea when a lawyer concludes that conviction of some kind is likely is the duty to try to seek dismissal of charges if the lawyer concludes that the accused is not guilty or ought not be convicted. The lawyer's investigation may have disclosed an erroneous identification, a misconception by the prosecutor as to the scope of a statute, or other basis for pressing for a dismissal of the charge. Although no accused person has any burden to prove that he or she is not guilty, if the accused can do so, it is to the accused's advantage, ordinarily, to try to avoid undergoing the burden of a trial. In such circumstances, the lawyer should consider whether to present the exculpatory facts to the prosecutor in order to secure a dismissal. Even an accused who has violated the law may be able to present to the prosecutor facts in extenuation that can lead to dismissal of charges. For example, in the case of an employee who has embezzled funds of an employer, the lawyer may be able to work out an acceptable means of restitution. With the employer's acquiescence, many prosecutors are likely to drop or suspend further proceedings.

Plea discussions should be considered the norm and failure to seek such discussions an exception unless defense counsel concludes that sound reasons exist for not doing so. In many cases, it will be appropriate to make an early contact with the prosecutor to secure information concerning the charge. In the course of this contact, the possibility of reducing the charge or making a plea may arise and counsel may have an opportunity to advance the client's interest without making any disclosures concerning the defense. The client's consent ordinarily need not be sought and obtained before any approaches are made, as there will be occasions when some discussion, perhaps only of a very tentative and preliminary nature, will occur before an opportunity arises to obtain the defendant's consent. However, defense counsel should keep the client apprised of all significant developments arising out of plea discussions.\footnote{1. See Standard 4-6.2(a).} Especially when good professional relations exist between the lawyer and the prosecutor, even the most casual and informal discussion of the case can produce information useful to the

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defense. It is not the function of the advocate to make a moral judgment as to the guilt of the accused.

**Standard 4-6.2 Plea Discussions**

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

**History of Standard**

The title of this Standard, which was "Conduct of Discussions" in the previous edition, was revised to more appropriately describe its contents. Section (a) was revised stylistically and closing language was deleted ("at all times and all proposals made by the prosecutor should be communicated promptly to the accused") as the subject matter is covered in new section (b). Section (b) is new to this Standard. Sections (c) and (d) have been relettered to reflect the addition of new section (b) and have also been revised stylistically. Section (d) was also revised to focus only on clients in separate matters; new section (e) applies to cases involving codefendants. The phrase "or accept" following the word "seek" in section (d) (section (c) in the previous edition) was deleted as it is the client who has the power to accept or reject plea agreements, not defense counsel. Section (e) is new to this edition and incorporates language taken from ABA Model Rule of Professional Conduct 1.8(g).
Related Standards

ABA Model Code of Professional Responsibility DR 1-102(A)(4); DR 5-106; DR 7-102(A)(5); EC 5-1 (1969)
ABA Model Rules of Professional Conduct 1.4; 1.8(g); 3.3(a)(1), (4); 3.4(b); 4.1; 8.4(c) (1983)
ABA Standards for Criminal Justice 3-4.1; 3-4.2; 4-3.1; 4-3.5; 4-3.8 (3d ed. 1993)
ABA Standards for Criminal Justice 14-3.1 (2d ed. 1980)

Commentary

Informing the Client of Progress of Plea Discussions

Plea discussion is inherently a "two-way street." Settlement negotiations in a civil suit for personal injury usually begin with an assumption, however tentative, of the defendant's liability. In a criminal case, unless advised to the contrary by his or her client, defense counsel may ordinarily proceed on the assumption, for purposes of discussion with the prosecution only, that the defendant may be willing to enter a plea of guilty to some charge. This does not mean that the lawyer should ever yield on the position that the accused can and will, if the accused desires, put the prosecution to its proof.

Although statements made during plea discussions by counsel cannot be used against the accused in the event of trial, admissions made directly by the accused may be admissible against the accused in some jurisdictions. This is one reason, among others, why it may be undesirable for the accused to be present during plea discussions. If the accused is present either because the accused insists or because counsel considers it advantageous, the accused should be cautioned by counsel against making any statements that have not been carefully explored in advance with counsel.

Apart from the risk of admissions, the presence of the client during plea discussions may be a hindrance in other ways. The discussions are best conducted on a level of mutual professional respect that may be undermined by the presence of the accused, or 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.
Explanation of Plea Proposals

Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. As discussed elsewhere in these Standards, the client should be given sufficient information to participate intelligently in the decision whether to accept or reject a plea proposal. It is important that the accused be informed both of the existence and the content of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide whether to accept or reject a prosecution proposal, even when the proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor. Ordinarily, the information to be provided by counsel is that appropriate for a client who is a comprehending and responsible adult.

It is also important that the accused be informed that the action of the sentencing judge cannot be definitely predicted. Sometimes an accused who has consented to a particular plea on the basis of discussions between the prosecutor and defense counsel has the misimpression either that the judge is a party to the arrangement or that estimates made by the lawyer are guarantees of what the sentence will be. This situation should be anticipated by defense counsel. If the lawyer has any doubt about the defendant's complete understanding of the alternatives, the lawyer should seek to clarify the situation, for example, by calling in a relative of the accused or a trusted friend with the defendant's permission.

It cannot be emphasized too much that a crucial factor in plea discussions is the duty of counsel to explain fully to the accused the consequences of a guilty plea in terms of the range of sentences the court can and may impose. Special care must be exercised to distinguish between what a particular judge may do or usually does from what the judge is authorized to do by law. An accused under tension, whether incarcerated or at large, will sometimes not easily distinguish among or remember matters that are clear to the lawyer. Moreover, the "jailhouse lawyer" with whom the accused confers may leave him or her confused.

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1. See Standard 4-3.8 Commentary.
2. Where the client is not a comprehending and responsible adult, see Standard 4-3.1 Commentary; Standard 4-3.8 Commentary.
by the difference between what is heard in the cellblock and what the defense lawyer says. The need for the accused to understand the range of possible penalties is obvious; without such understanding, a truly intelligent and voluntary choice is not possible.

*Misrepresentation by Defense Counsel to Prosecutor*

Disciplinary sanctions may be imposed against a lawyer who intentionally deceives opposing counsel.⁴ Although defense counsel is under no obligation to reveal any evidence to the prosecution in the course of plea discussions—indeed, counsel must preserve the client's confidences unless granted consent to make disclosures for this purpose—truth is required in the presentation to the prosecutor of facts relating to the case or any mitigating facts. Not only does misrepresentation reflect poorly upon the integrity of counsel, but it severely handicaps counsel's usefulness to the accused and to future clients since the prosecutor will understandably be reluctant to negotiate with a lawyer who, experience has shown, cannot be trusted.

*Trading the Interests of One Client for That of Another*

The fear has sometimes been expressed that lawyers may be tempted to compromise the interests of one client in return for the receipt of advantages for another. The lawyer may have pending other cases that the prosecutor is eager to dispose of without trial, and defense counsel may volunteer the suggestion or be offered the possibility of a more favorable disposition of the case at hand if defense counsel will "cooperate" in the disposition of some other case. Regardless of the motivation for the proposal and whether it originates with the defense attorney or the prosecutor, such conduct plainly violates the lawyer's fundamental duty of undivided loyalty to each present or former client.⁵

Moreover, in order to assuage the fears of a codefendant that his or her interests are being treated as subservient to those of another codefendant represented by the same defense counsel, counsel must fully explain the complete agreement, including pleas offered to other codefendants, where an aggregate plea agreement has been proposed by the prosecutor. Defense counsel must never propose a plea agreement that compromises the interests of one codefendant in order to gain advantages for another codefendant.

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⁴ See ABA Model Rule of Professional Conduct 4.1; ABA Model Code of Professional Responsibility DR 7-102(A)(5).
⁵ See Standard 4-3.5.
PART VII.

TRIAL

Standard 4-7.1 Courtroom Professionalism

(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(c) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.

(d) Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.

(e) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

History of Standard

Section (a) has been revised stylistically; the phrase "the rules of decorum" in the previous edition has been changed to the more inclusive phrase "codes of professionalism," and the phrase "an attitude of professional respect" in the previous edition has been changed to "a professional attitude." Section (b) is new to this edition; section (c) has been relettered from section (b) in the previous edition to reflect this addition. The phrase "on all matters" in new section (c) replaces the phrase "any matter" in the previous edition to conform that section to a parallel provision in the Prosecution Function Standards. Section (c) in the previous edition ("It is unprofessional conduct for a lawyer to engage in behavior or tactics purposefully calculated to irritate or annoy
the court or the prosecutor.”) has been deleted as the language used therein was deemed to be inappropriately broad. Sections (d) and (e) have been revised stylistically; the term “professionalism” in section (e) replaces the phrase “decorum and professional etiquette” used in the previous edition.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-106(A), (C)(5), (6), (7); DR 7-110(B); EC 7-35 (1969)
ABA Model Rules of Professional Conduct 1.2(d); 1.3; 3.4(c), (d); 3.5(a), (b), (c) (1983)
ABA Standards for Criminal Justice 3-2.8(b), (c); 3-5.2; 4-7.6 (3d ed. 1993)

**Commentary**

**Professionalism and the Dignity of Judicial Proceedings**

Codes of professional conduct are needed to ensure that contending advocates work in harmony for what should be their common cause: the fair administration of justice. Counsel must not allow themselves to be diverted from this pursuit by irrelevant or extraneous factors or disruptive behavior. Basic to an efficient and fair functioning of our adversary system of justice is an atmosphere of mutual respect by all participants for all of the other participants. This can be achieved only by strict adherence to codes of professionalism that should be adopted and adhered to in every jurisdiction.

Judicial proceedings are no place and no occasion for rudeness or overbearing, oppressive conduct.\(^1\) Opposing counsel must act as professionals in every sense of that word. At the very minimum, they must refrain from inappropriate, intemperate, or contemptuous behavior and should be courteous and polite to all participants. Ultimately, the presiding judge has the responsibility to govern the conduct of all persons in the courtroom and especially the conduct of the advocates who, as officers of the court, are subject to the court’s control.

The obligation of the lawyer to maintain a respectful attitude toward the court is necessary to give due recognition to the position held by the judge in the administration of the law. The lawyer's attitude communicates to the layperson in the courtroom the professional relation that exists between judge and lawyer. The appropriate way to challenge the judge's decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by seeking to impress the client by a show of belligerency that exceeds the need to make a record of what the lawyer believes is error in the case. Moreover, a restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, is a mechanism that depends upon evidence and the rule of law, not upon vituperation or personality conflicts. Nonetheless, it is also important to the proper functioning of our adversary system that no artificial standards of courtroom conduct impede lawyers from rendering vigorous advocacy on behalf of their clients.

Public respect for law derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must also be the appearance of justice. The law is a great teacher not only in its substantive principles but also in the example it sets of dispassionate and rational methods for the resolution of conflicts. An important aspect of the image of justice is the relations that are seen to exist in the courtroom among the lawyer-participants: defense counsel, prosecutor, and judge.

The same considerations that call for professional attitudes on the part of advocates similarly require that judges maintain scrupulously neutral and fair attitudes. Deviations from standards of appropriate judicial conduct should be made part of the record so as to be brought to the attention of reviewing courts or judicial conduct review boards.

*Ex Parte Discussions with Judge*

There are, of necessity, occasions when a judge must discuss problems relating to the administration of the court's business with counsel or counsel's staff. The need for such appropriate discussions with a judge in chambers or in the courtroom should not be permitted, however, to give rise to ex parte discussions concerning a particular case that is or may come before the court. Inappropriate ex parte contacts of whatever nature erode public confidence in the fairness of the administration of justice, the very cement by which the system holds together.
If such ex parte discussions do take place in some extraordinary circumstance, counsel should thereafter fully apprise the prosecutor of the fact and content of the communication, except insofar as such disclosure may inappropriately reveal the contents of a client's confidential communication to counsel.

**Exchanges Between Lawyers**

A breach of courtroom professionalism occurs when lawyers address each other directly rather than through the court. Such exchanges may begin with innocent purpose relating to the trial and escalate because of the natural tensions of the courtroom. In the courtroom, as in legislative bodies or where other formal proceedings occur, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. A challenge to a statement of opposing counsel should be made in the form of an objection or a request to the judge rather than to opposing counsel directly. Both the formality of the request and the intermediary role it imposes upon the judge serve to temper the exchange and to provide an insulation that reduces the risk of friction. The need to curb direct exchanges between counsel is greatest when a jury is present, since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers.

**Compliance with Court Orders**

The relationship between court and counsel is most severely put to the test on those occasions when the judge issues a direct command to counsel, for example, instructing counsel to cease interrogation of a witness or to desist from a particular line of argument. As the Supreme Court has instructed:

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. . . . But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.²

Corresponding to the lawyer's obligation to accede respectfully to the court's command is the duty of the court to permit an adequate record to be made of the court's order and the circumstances under which it was made as seen by counsel.

Codes of Professionalism

The particular formalities observed in American courts differ from place to place. A lawyer is entitled to know precisely what standards of conduct are expected in a particular court, especially with regard to such matters as the use of conventional forms of address, when the lawyer is required to stand, and where he or she is allowed to be in the courtroom during trial. To avoid misunderstanding between court and lawyer concerning such formalities, achieve greater uniformity within jurisdictions, and generally improve the dignity of courtroom proceedings, lawyers should take the lead in developing written codes governing these matters.

Standard 4-7.2 Selection of Jurors

(a) Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel should not intentionally use the voir dire to present factual matter which defense counsel knows will not be admissible at trial or to argue counsel's case to the jury.

History of Standard

There are stylistic revisions only.
4-7.3 Criminal Justice Prosecution Function and Defense Function Standards

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-106(C)(1), (2); DR 7-108(E) (1969)
ABA Model Rules of Professional Conduct 3.4(e); 3.5(a), (b); 4.4 (1983)
ABA Standards for Criminal Justice 3-5.3 (3d ed. 1993)
ABA Standards for Criminal Justice 15-2.4 (2d ed. 1980)

**Commentary**

**Preparation for Jury Selection**

The selection of a jury is an important phase of the trial and requires the alert attention of the lawyer. As elsewhere in the trial, in the selection of the jury the advocate's decisions must be made under time pressure. They can be made wisely only if the lawyer has prepared adequately before trial.

**Pretrial Investigation of Jurors**

Pretrial investigation of jurors may permit a more informed exercise of challenges than reliance solely upon voir dire affords. The practice of conducting out-of-court investigations of jurors presents serious problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. To minimize these risks, counsel should be careful to conduct investigations of jurors in a manner that scrupulously avoids invasions of privacy. Except in unusual circumstances of necessity, counsel should limit the inquiry to records already in existence rather than, for example, questioning contemporaneously a potential juror's neighbors.

**Standard 4-7.3 Relations With Jury**

(a) Defense counsel should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during the trial. Defense counsel should avoid the reality or appearance of any such communications.

(b) Defense counsel should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
(c) After discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

**History of Standard**

Section (a) has been revised stylistically and by addition of the word "intentionally" to exclude unintentional conversations with jurors. Section (a) has also been revised by deleting the phrase "concerning the case," which appeared in the previous edition after the word "jurors" in the first sentence, and deleting the word "improper," which also appeared in the previous edition before the word "communications" in the second sentence. These deletions reflect the view that counsel should not talk on any subject to people he or she knows are jurors before or during the trial.

Sections (b) and (c) have been revised stylistically.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-108(A), (B), (C), (D); EC 7-36 (1969)
ABA Model Rules of Professional Conduct 3.5(a), (b); 4.4 (1983)
ABA Standards for Criminal Justice 3-5.4 (3d ed. 1993)
ABA Standards for Criminal Justice 15-4.7 (2d ed. 1980)

**Commentary**

**Communication with Jurors Before or During Trial**

Discussing the case privately with a juror before verdict is a gross impropriety, and may also be criminal conduct. Moreover, it is improper for counsel knowingly to engage in any conversation with a jury member, however innocent in purpose or trivial in content, since the

1. See also ABA Model Rule of Professional Conduct 3.4(e); ABA Model Code of Professional Responsibility DR 7-106(C)(1).
mere fact that counsel is seen conversing with a juror may raise the question of whether the juror reached the verdict solely on the evidence. Defense counsel’s legitimate communication must be with the jury as an entity—not with jurors individually. For obvious reasons, these strictures apply as well to communications with persons summoned for jury duty who may or may not be impaneled as jurors in a particular case.

**Attitude Toward Jury**

Counsel should avoid undue solicitude for the comfort or convenience of the judge or jury and should avoid any other conduct calculated to gain special or unfair consideration. Counsel should not address jurors individually by name, for example. Just as respect for the position of the judge requires that the judge be addressed formally as “your honor,” the jury’s symbolic position as representatives of the community in the courtroom requires that a degree of formality be observed in addressing the jury. A typical form of address is, of course, “ladies and gentlemen of the jury” or “members of the jury.”

**Posttrial interrogation**

Since it is vital to the proper functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict. Where prevailing law permits such inquiries, a lawyer may discuss a case with former jurors for the purpose of ascertaining the existence of juror misconduct. However, the lawyer must carefully avoid any harassment of the jurors in the course of such inquiries. Finally, it is not improper, in states where the law and ethical codes so permit, for counsel to communicate in an informal manner for the purpose of self-education with former jurors who are willing to talk about their jury service.

**Standard 4-7.4 Opening Statement**

Defense counsel’s opening statement should be confined to a statement of the issues in the case and the evidence defense counsel believes in good faith will be available and admissible. Defense counsel should not allude to any evidence unless there is a good faith
and reasonable basis for believing such evidence will be tendered and admitted in evidence.

**History of Standard**

This Standard has been revised substantively and stylistically. The word "brief" which appeared before the word "statement" in the first sentence in the previous edition has been deleted as there is no ethical obligation to be brief in every case. In addition, the phrase "intends to offer which the lawyer," which appeared before the word "believes" in the first sentence in the previous edition, has been deleted as defense counsel may comment on available and admissible evidence he or she believes in good faith that another attorney intends to offer.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-106(C)(1); EC 7-25 (1969)
ABA Model Rules of Professional Conduct 3.1; 3.4(e) (1983)
ABA Standards for Criminal Justice 3-5.5; 4-7.7 (3d ed. 1993)

**Commentary**

The primary purpose of the opening statement is to give counsel an opportunity to outline the issues and matters counsel believes can and will be supported by competent and admissible evidence introduced during the trial. In that statement, the lawyer should scrupulously avoid any utterance that he or she believes cannot and will not later actually be supported with such evidence.¹ If, through honest inadvertence, the proof actually offered at trial falls significantly short of points made in the opening statement, the court should be asked to give a clarifying instruction to avoid either advantage or penalty. In other respects, the opening statement is governed by the standards for closing argument.²

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². See Standard 4-7.7.
Standard 4-7.5  Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

(b) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

History of Standard

Section (a) was revised stylistically and to substitute the phrase “take reasonable remedial measures,” taken from ABA Model Rule of Professional Conduct 3.3(a)(4). This phrase replaced the wording “seek withdrawal thereof,” which appeared in the previous edition.

Sections (b), (c), and (d) were revised stylistically only.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(4); DR 7-106(C)(1), (7); EC 7-25 (1969)

ABA Model Rules of Professional Conduct 3.3; 3.4(b), (c), (e); 4.1 (1983)

ABA Standards for Criminal Justice 3-5.6 (3d ed. 1993)
**Commentary**

*Use of False Evidence*

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

The advocate's proper course with respect to reasonable remedial measures, ordinarily, is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.¹

Counsel's duty to rectify the presentation of false evidence continues only until the conclusion of the proceeding at which the evidence was offered.²

*Presenting Inadmissible Evidence*

The rules of evidence determine what can properly be presented to the trier of fact, whether judge or jury, and the procedures by which it must be presented. These rules operate to keep from the judge or jury incompetent, irrelevant, and unreliable evidence and thus to limit the kinds of evidence that may be considered in deciding a case. The mere offer of inadmissible evidence or asking an improper question may be sufficient to communicate the precise fact that the rules of evidence are

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¹ A separate standard relating to defense counsel's obligations when his or her client proposes to testify or testifies perjuriously was considered for inclusion in these Standards but was not adopted for lack of consensus as to the appropriate approach. Counsel should pay close attention to the ethics code rules adopted on this subject in his or her jurisdiction. See also ABA Model Rule of Professional Conduct 3.3; ABA Model Code of Professional Responsibility DR 7-102(A)(4); Nix v. Whiteside, 475 U.S. 157 (1986); ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-353 (1987).

² See ABA Model Rule of Professional Conduct 3.3(b).
designed to keep from the fact finder. Moreover, the damage may be emphasized if it is challenged by an objection so that the mere offer of inadmissible matter may leave the opposing party with no effective remedy.

Yet this is a common offense on the part of many who would resent the imputation of unfair practices, and not little ingenuity is often employed to draw out statements that are promptly stricken out. . . . [H]e who resorts to such methods places himself on the plane of the shyster and the pettifogger.3

These practices and the similar tactic of arguing to the bench or making comments on or off the record in a manner calculated to influence the jury are improper. These tactics are particularly pernicious because the mere fact that evidence is ruled inadmissible, a question is deemed improper by the court, or an argument is addressed to the court on a question of admissibility may tend to arouse the curiosity of the jury. When counsel is honestly uncertain about whether a particular question or item of evidence is subject to objection, counsel should be permitted to inquire of the court, out of the presence of the jury, regarding the propriety of the proposed action and to secure a ruling.

Display and Tender of Tangible Evidence

The rationale underlying section (b), as explained above, applies as well to sections (c) and (d). Tangible evidence requires special treatment because such evidence is immediately subject to scrutiny once it is brought into the courtroom. As in section (b), dealing with testimonial evidence, the purpose of sections (c) and (d) is to prevent tangible evidence from coming to the attention of the trier of fact unless and until it is offered. The premature display of a tangible article of evidence in the courtroom may be unduly inflammatory even though it is later admitted. Hence, such an article should not be exposed to view until it is formally offered for admission in evidence.

Moreover, the offer must be made in good faith. If there is any doubt as to the admissibility of the article, the display and tender should be made outside the presence of the jury.

Standard 4-7.6 Examination of Witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.

(c) Defense counsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify.

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

History of Standard

The last sentence in section (a) in the prior edition ("Proper cross-examination can be conducted without violating rules of decorum.") has been deleted as unnecessary. Section (b) has been revised stylistically and the last clause in the prior edition ("but should, if possible, be taken into consideration by counsel in conducting the cross-examination") has been deleted as inappropriate. Section (c) has been revised stylistically and by substitution of the phrase "in the presence of the jury" for the clause that appeared at the end of this sentence in the prior edition ("for the purpose of impressing upon the jury the fact of the claim of privilege"). Section (d) has been revised stylistically.

Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(5); DR 7-106(C)(1), (2) (1969)
ABA Model Rules of Professional Conduct 3.3(a)(1); 3.4(e); 3.5(c); 4.1; 4.4 (1983)
ABA Standards for Criminal Justice 3-5.7; 4-7.1 (3d ed. 1993)

Commentary

Direct and Cross-Examination

The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined
Criminal Justice Prosecution Function and Defense Function Standards

beyond those contained in rules of evidence. Witnesses should not be subjected to degrading, demeaning, or otherwise invasive or insulting questioning unless counsel honestly believes that such questioning may prove beneficial to his or her client's case. Nor should counsel be abusive or inconsiderate in his or her interrogation of a witness. As with all courtroom behavior, counsel should strive to act professionally and should not adopt an unwarranted or unnecessary combative demeanor in direct or cross-examination. While counsel should not harass a witness without just cause, this caveat does not preclude otherwise vigorous cross-examination.

**Undermining a Truthful Witness**

United States Supreme Court Justice White, in a 1967 Supreme Court opinion, addressed the sometimes professional obligation of defense counsel to impeach truthful witnesses:

>[A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances

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1. See also Standard 4-7.1 Commentary.
has little, if any, relation to the search for truth.  

There unquestionably are many cases in which defense counsel cannot provide the accused with a defense at all if counsel is precluded from engaging in vigorous cross-examination of witnesses either believed or known to have testified truthfully. For example, where the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution’s witnesses is essential. Indeed, were counsel in this circumstance to forgo vigorous cross-examination of the prosecution’s witnesses, counsel would violate the clear duty of zealous representation that is owed the client.

Nonetheless, the mere fact that defense counsel can, by use of impeachment, impair or destroy the credibility of an adverse witness does not impose upon counsel a duty to do so. Such impeachment is not always in the client’s best interests. A prosecution witness, for example, may testify in a manner that confirms what counsel believes are the most important parts of the client’s story. Another example of a situation in which restraint may be called for is where a witness whose testimony the lawyer believes to be truthful is subject to impeachment by revealing to the jury that the witness was convicted of a crime many years earlier. In deciding whether to use such impeachment, counsel undoubtedly will want to consider the tactical implications of such use, since the jury may perceive undue humiliation of the witness and thus react adversely to the lawyer and his or her client.

**Forcing Claim of Privilege Before the Jury**

Although the situation arises more frequently for the prosecutor than it does for defense counsel, it is equally unprofessional for either to call a witness he or she knows will assert a claim of privilege. Such a tactic might be used in order to encourage the jury to draw a negative inference from the fact that the witness is claiming a privilege or it may be used for other reasons. Whatever the tactical or strategic rationale, such conduct is inappropriate. If there is genuine doubt whether the witness will claim the privilege or whether the validity of the privilege will be recognized, the matter should be resolved out of the presence of the jury.

Unfounded Questions

It is an improper tactic for either the prosecutor or defense counsel to attempt to communicate impressions by innuendo through questions directed to a witness that would be advantageous to have answered in the negative—for example, “Have you ever been convicted of the crime of robbery?” or “Weren’t you a member of the Communist party?” or “Did you tell Mr. X that . . .” when the questioner has no evidence to support the innuendo. Generally, a question may be asked on cross-examination if, however, as set out in section (d), a “good faith belief” in the factual predicate implied in the question is present.

Standard 4-7.7 Argument to the Jury

(a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) Defense counsel should not express a personal belief or opinion in his or her client’s innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

(c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.

(d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

History of Standard

This Standard was numbered Standard 4-7.8 in the previous edition. All four sections have been revised stylistically. Sections (b), (c), and (d) have also been revised to more narrowly describe the forms of argument deemed to be ethically improper. Section (b) has been revised by deleting the last clause that appeared in the prior edition (“or to attribute the crime to another person unless such an inference is warranted by the evidence”). In section (c), the words “appeal to” were added to replace the phrase “inflame the passions or,” which appeared in the prior edition. In section (d), the final clause that appeared in the prior edition (“by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury’s verdict”) was deleted.
Related Standards

ABA Model Code of Professional Responsibility DR 7-102(A)(5); DR 7-106(C)(3), (4) (1969)
ABA Model Rules of Professional Conduct 3.3(a)(1); 3.4(e); 4.1 (1983)
ABA Standards for Criminal Justice 3-5.8; 4-7.4 (3d ed. 1993)

Commentary

Inferences Warranted by the Evidence

Because of the general unavailability of government appeals, courts rarely have occasion to pass judgment directly on the question of the limits of propriety of argument to the jury by defense counsel. The issue has been raised indirectly, however, in many cases in which the propriety of the prosecutor's summation has been questioned, where some courts have held that statements made by the prosecutor that would otherwise be improper would not lead to reversal because the statements were fairly responsive to impermissible arguments or questions made by defense counsel. It should be accepted that both prosecutor and defense counsel are subject to the same general limitations upon the scope of their arguments.

Defense counsel is no more entitled than the prosecutor to assert as fact that which has not been introduced in evidence. The rules of evidence cannot be subverted by putting to the jury, in argument or opening statements, matters not in the record. For example, where the defendant's willingness to take a lie detector test has been held inadmissible, defense counsel should not suggest that willingness in argument. On the other hand, attorneys are entitled to reasonable latitude in arguing inferences from the evidence.

There are often circumstances in which defense counsel may be entitled to argue to the jury that they should draw an inference adverse to the prosecution as the result of its failure to bring forth some particular item of evidence or to call as a witness someone who has a special relation to the facts of the case. But it is ordinarily a form of misrepresentation, and therefore improper, for counsel to argue such an inference when counsel knows that the evidence was not presented because it had been excluded by the court or is inadmissible. A lawyer who has successfully urged the court to exclude evidence should not be allowed

1. See also Standard 4-7.4 (Opening Statement).
to point to the absence of that evidence to create a false inference that it does not exist.

The obligation to avoid misrepresentation to the jury is broad. An argument to the jury that the accused has a "clean record" when counsel is aware of prior convictions, although the evidence is silent, is an affirmative misrepresentation of a fact. On the other hand, if the record shows that the accused has a long and stable work record, a family, and other ties to the community, for example, it is not improper to argue from this that the accused is a person whose credibility can be relied upon.

**Personal Belief**

Because a lawyer’s personal belief has and should have no real bearing upon the ultimate issues to be decided at trial, a lawyer should not assert his or her personal belief as to the guilt or innocence of the accused or the truth or falsity of testimony or other evidence. In addition, this prohibition is essential to the maintenance of the appropriate independence of the lawyer from identification with his or her client.

**Appeals to Prejudice**

Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, including defense counsel. There are many cases in which courts have reversed convictions as the result of inflammatory remarks made by the prosecutor containing references to the defendant's race, religion, or ethnic background. This duty is reciprocal and it is improper conduct for defense counsel to make arguments calculated to appeal to such prejudices. There are, of course, occasions when the matter of prejudice is itself an issue in a case. In such circumstances, reference to it in argument would be appropriate if restricted to the evidence and inferences derived therefrom.

**Digression from Evidence**

Defense counsel should not make arguments that encourage the jury to depart from its duty to decide the case on the evidence and the inferences reasonably derived therefrom. It is, however, proper for counsel to argue a defense of "jury nullification" to the jury in those jurisdictions permitting such argument.

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2. See also ABA Model Rules of Professional Conduct 3.3(a)(1) and 3.4(e); ABA Code of Professional Responsibility DR 7-102(A)(5) and DR 7-106(C)(1).
Counsel should not, moreover, use arguments that are, in essence, personal attacks on the prosecutor. Counsel should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

**Standard 4-7.8 Facts Outside the Record**

Defense counsel should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

**History of Standard**

This Standard was numbered Standard 4-7.9 in the previous edition. There are stylistic changes only.

**Related Standards**

ABA Model Code of Professional Responsibility DR 7-106(C)(1); EC 7-24 (1969)

ABA Model Rules of Professional Conduct 3.4(e) (1983)

ABA Standards for Criminal Justice 3-5.9; 4-8.4(c) (3d ed. 1993)

**Commentary**

The problem of digression from the record can arise at both the trial and the appellate levels. At the trial level, it is highly improper for a lawyer to refer in colloquy, argument, or any other setting to factual matter beyond the scope of the evidence or the range of judicial notice. This is true whether the case is being tried to a court or to a jury, but it is particularly offensive in a jury trial. It can involve the risk of serious prejudice, with a mistrial as a possible remedy. Ordinarily, a trial court should summarily exclude any reference to factual matter that is beyond the scope of the evidence in any significant way. The broad discretion a trial court has in such matters enables it to deal with them as they arise by allowing a party to reopen the case or to take other appropriate
steps to enlarge the record so as to provide an evidentiary basis for the matter the party wishes to argue but has for some reason failed to establish. At the appellate level it is also a violation of ethical standards to argue factual matters outside the record.¹

**Standard 4-7.9 Posttrial Motions**

Defense counsel's responsibility includes presenting appropriate posttrial motions to protect the defendant's rights.

**History of Standard**

This Standard was numbered Standard 4-7.10 in the previous edition. The language has been revised stylistically and the word "posttrial" was added to replace the clause "after verdict and before sentence" which appeared after the word "motions" in the previous edition. This revision was made in order to accommodate the vagaries of different jurisdictions' procedural rules as to when posttrial motions can or should be made.

**Related Standards**

ABA Standards for Criminal Justice 4-8.2(b) (3d ed. 1993)
ABA Standards for Criminal Justice 5-6.2 (3d ed. 1992)

**Commentary**

In many jurisdictions, the typical agreement for representation made by retained counsel in a criminal case provides for representation through trial, including posttrial motions. Consistent with this notion, these standards elsewhere provide that "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary," which includes the filing of any necessary posttrial motions.¹ Continuity of representation at the stage of posttrial motions contributes to the efficiency of judicial administration since the trial lawyer

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¹. See Standard 4-8.4(c).
². See ABA Standards for Criminal Justice 5-6.2 (3d ed. 1992) ("Duration of representation").
often can present motions without the delay and expense of the preparation of a transcript of the entire trial.

In a jurisdiction where it is unnecessary to raise an issue in posttrial motions in order to preserve it, it is proper for counsel to present the issue fully in the first instance in an appellate court.
PART VIII.

AFTER CONVICTION

Standard 4-8.1 Sentencing

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

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

(c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

(d) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal.
History of Standard

Section (a) has been substantially revised. The first two sentences replace the prior edition’s more general injunction (“The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion.”). Section (b) has been revised stylistically and the phrase “with the consent of the accused” has been added to the third sentence. Section (c) is new to this edition. Section (d) (which was section (c) in the previous edition) has been revised stylistically and the words “statement that” were added to replace the phrase “judicial confession in the course of allocution which” for the sake of increased clarity.

Related Standards

ABA Model Code of Professional Responsibility EC 7-8 (1969)
ABA Standards for Criminal Justice 3-6.1; 3-6.2 (3d ed. 1993)
ABA Standards for Criminal Justice 18-5.5(b); 18-6.3 (2d ed. 1980)

Commentary

Sentencing Alternatives and Practices

Counsel’s role in the sentencing stage of the criminal process is an extremely important part of the complete defense of his or her client. Indeed, the Supreme Court has even suggested that the need for counsel may be greater at sentencing than in the determination of guilt because “[t]here a judge usually moves within a large area of discretion and doubts. . . . Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge.”

To perform the defense role properly at this stage, defense counsel must, at the earliest possible time, determine the statutory alternatives and community and other facilities available to the judge in exercising discretion in sentencing for the particular offense involved. Counsel must also become familiar with the judge’s actual sentencing practices. But it is not enough for the lawyer to function as a check on the judge at

sentencing; the lawyer must serve also as counsel to the client. The lawyer should carefully explain to the defendant the sentencing alternatives available to the court and what they will mean for the defendant personally should any of them be selected. Where appropriate, counsel should also make every effort to assist his or her client in obtaining drug or alcohol counselling.

Preparation and Presentation of Sentencing Data

Sentencing normally takes place in a context in which neither judge nor counsel is personally acquainted with the defendant. Moreover, the prognosis for rehabilitation depends heavily upon the opportunities available to the defendant for gainful employment. This, in turn, may depend upon educational opportunities. The defendant may be in need of family counseling or mental health assistance. In most courts, these and other considerations are the subject of a presentence report prepared by a probation officer or other staff assistant to the court. Where the probation report is made available to the defense, counsel has a role to play in determining the accuracy of information on which the report is based and in evaluating the soundness of its conclusions. To do so, counsel will ordinarily need to make some independent investigation. Where there is no such report or it is not released to the defense, counsel will need to develop a defense equivalent to the report for presentation to the court if the client has no objection. But even when a presentence report on the defendant has been prepared by court personnel, counsel may still wish to file with the court, with the client's consent, written information concerning the defendant's background.

In presenting to the court facts bearing upon the sentence, defense counsel must often personally vouch for their accuracy since the formal processes of receiving testimony are not usually employed at the sentencing stage. Counsel may well advance the interest of the client best by demonstrating a measure of objectivity, but he or she should continue, as throughout the trial itself, to advance and protect the best interests of his or her client. Counsel's participation should be as objective and realistic as is consistent with illuminating the most favorable factors bearing upon the requested disposition.

In the trial stage, defense counsel is an advocate in a representative capacity, participating in an adversary proceeding. Termination of the trial does not terminate counsel's duties to the client, but the duties are not precisely the same as before. Counsel may not present facts that are known to be false in a manner that creates an inference that they are
true. Counsel may not, for example, present facts concerning the defendant’s character that would suggest to the judge that the defendant does not have a prior record of crime if it is known that the defendant has such a record and that fact has not been disclosed to the court.

**Statements to Presentence and Probation Personnel**

Counsel should explain to his or her client the importance to the judge’s sentencing decision of the presentence report. Counsel should also impress upon the client the significance of statements made by the client to court or administrative personnel involved in the preparation of this report. Ordinarily, when it is possible and otherwise permissible, counsel should attend such presentence interviews. The nature of the sentencing guidelines used in some jurisdictions may make counsel’s attendance at such interviews necessary to provide the client with a complete and effective defense.

**Allocution**

In the course of exercising the right of allocution, the defendant may sometimes freely admit the guilt that he or she has, up to the time of verdict, denied; the defendant, for example, may have taken the stand and controverted the evidence by a denial of any participation in the alleged offense. Most judges are not unduly surprised by this, but there are obvious risks involved. Some judges may impose a heavier sentence if they believe that the defendant committed perjury at trial. Even more serious perhaps is the fact that the defendant’s statement on allocution admitting guilt is part of the record and, if the conviction is appealed, that admission may compromise the appeal, especially if the appeal is based to any degree on insufficiency of the evidence.

The other side of the coin is that if the assumptions underlying the right of allocution are correct, the right is one not to be waived lightly. The more realistic view may be that an accused does not often influence the sentence by his or her own utterances. Nonetheless, because of the risks of a statement by a convicted defendant that might tend to increase the severity of a sentence or prejudice an appeal, defense counsel should be alert to the problem and would be well advised to recommend to the client that counsel make all statements in mitigation or that the client exercise the right of allocution with these hazards clearly in mind.
Standard 4-8.2 Appeal

(a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.

(b) Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.

History of Standard

There are stylistic changes only.

Related Standards

ABA Model Code of Professional Responsibility EC 2-31 (1969)
ABA Standards for Criminal Justice 5-6.2 (3d ed. 1992)
ABA Standards for Criminal Justice 21-2.2(b); 21-3.2(b)(i) (2d ed. 1980)

Commentary

Advising Defendant Concerning Appeal

A defendant needs effective representation and advice in the relatively short period immediately following conviction when the decision whether to appeal must be made. Yet it happens on occasion that no legal representation exists, sometimes for months, at this juncture. Lawyers, whether retained or assigned at trial, sometimes take the view that their responsibilities end with the final judgment of the trial court and communication between defendant and attorney frequently ceases. Whatever the cause, the effects are most undesirable. To make the right to counsel meaningful, representation must be continuous throughout the criminal process. Because of the intimate familiarity with the record of the trial proceedings, trial counsel is in the best position to advise the defendant concerning the factors to be weighed in reaching the decision whether to appeal.
Counsel’s first duty is to make sure the defendant understands the meaning and consequences of the judgment of the court. For example, if the defendant has been sentenced to a term of imprisonment, counsel should explain to the defendant the applicable provisions of law relating to parole and reduction of sentence for good behavior.

Of greater importance is the duty of counsel to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal. Careful exploration should be made of the possible errors that could be pressed on appeal, their relative strengths and weaknesses, and the probable outcome of an appeal. Counsel should also attempt to learn and evaluate the doubts that the defendant may have about the adjudication of the case. To make the defendant’s ultimate choice a meaningful one, counsel’s evaluation of the case must be communicated in a comprehensible manner. Possible disadvantages and risks involved in an appeal should also be explained to the defendant. The consequences of an appeal or failure to take an appeal may not be apparent to the defendant. In some circumstances, even a successful appeal followed by a new trial may offer little prospect other than postponement of the service of the sentence. On the other hand, the defendant may be unduly chastened by the adverse verdict. When it is appropriate to do so, the advantages of an appeal should be explained to the defendant. Whatever the defendant’s situation, the decision is a critical one since claims of trial error are ordinarily lost if they are not raised on appeal. Because of the importance of the decision, trial counsel should always consult promptly with the defendant after making a careful appraisal of the prospects of an appeal.

Protecting the Right of Appeal

There is often misunderstanding between lawyer and client concerning the action that will be taken by each after conviction. Rather than continue to face the problem in the form of petitions for relief from time limitations on filing appeals or of postconviction collateral attacks on the ground of inadequate representation, trial counsel’s obligation to protect the defendant’s right of appeal should be affirmed. Accordingly, section (b) provides that “[d]efense counsel should take whatever steps are necessary to protect the defendant’s rights of appeal.” Frequently, this may include perfecting the appeal itself, even though arrangements may have to be made for other counsel to represent the defendant before the appellate court.
Standard 4-8.3  Counsel on Appeal

(a) Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.

(b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(d) Appellate counsel has the ultimate authority to decide which arguments to make on appeal. When appellate counsel decides not to argue all of the issues that his or her client desires to be argued, appellate counsel should inform the client of his or her pro se briefing rights.

(e) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

History of Standard

Section (a) contains the full, unchanged text of Standard 4-8.3 as it appeared in the previous edition. Sections (b), (c), (d), and (e) are all new to this edition.
Related Standards

ABA Model Code of Professional Responsibility EC 2-31 (1969)
ABA Standards for Criminal Justice 20-2.2(c); 21-2.2(a), (b); 23-3.2(b), (d) (2d ed. 1980)

Commentary

Representation on Appeal

The responsibility of counsel assigned to represent a person unable to afford representation requires that the lawyer provide his or her client with effective, quality representation as an advocate.\(^1\) It is inappropriate for counsel to act simply as amicus curiae or as adviser to the court. Before the merits of an appeal are determined by an appellate court, the defendant is entitled to the zealous advocacy of a lawyer in fact as well as in name.\(^2\)

It is, moreover, inappropriate to expect appointed counsel to serve on appeal without compensation. Representation of indigents in criminal cases requires extensive expenditure of lawyers' time. Such attorneys should be paid at reasonable rates from public funds.\(^3\)

Inquiry and Advice on Appeal

Counsel should examine the whole case of the client represented, not only for purposes of the appeal, but also to take up, evaluate, and pursue any question that might affect the validity of the judgment of conviction and sentence. For example, issues may exist that can be raised only in a postconviction proceeding and that ought to be presented to the trial court before the pending direct appeal matures. It is in the client's interest to obtain a complete and final determination of the entire case as expeditiously as possible. That is also in the public interest. Therefore, counsel on appeal should not be confined merely to the prosecution of the appeal if there are other aspects of the case that ought to be explored first.

Moreover, as during pretrial and trial proceedings, counsel has a primary obligation to give the client sound professional advice on the matter for which the lawyer has been appointed or retained. If a

\(^1\) See Standard 4-1.2(b).
\(^3\) See ABA Standards for Criminal Justice 5-2.4 (3d ed. 1992); ABA Standards for Criminal Justice 21-3.2 (2d ed. 1980).
convicted defendant wants to appeal on entirely frivolous grounds, trial counsel should attempt to dissuade the defendant from so appealing and appellate counsel should seek to persuade the defendant to withdraw the appeal. Such advice should be given freely and forcefully. Assigned counsel has a special responsibility to develop a relationship of trust and confidence with the client so that the client will appreciate that the lawyer knows the case and has the client's best interests clearly in mind.

Counsel, however, should not conclude too quickly that an appeal is frivolous. A defendant is entitled to more than merely a reflexive or negative reaction to the supposed errors that the convicted defendant thinks are present in the case. The lawyer, whether retained or appointed, should closely examine and analyze the record. In some instances, even when the existing doctrine does not support a case for reversal on appeal, there may be a sound basis for arguing for an extension, modification, or reversal of existing law. In such a case, the appeal ground is not frivolous.

**Appeal Against Advice of Counsel**

While counsel has the professional duty to give to his or her client fully and forcefully a candid opinion concerning the case and its probable outcome on appeal, counsel's role, however, is only to advise. The decision whether to appeal must be made by the client. 4

When a client seeks to prosecute an appeal against the advice of counsel that there is no hope for success, counsel should present the case but cannot deceive or mislead the court on behalf of the client. Counsel should once again bear in mind that if the ground upon which the client seeks relief lacks any legal support or is contravened by existing law, counsel may nonetheless argue for extension, modification, or reversal of existing law.

**Arguments on Appeal**

In an appeal that is not entirely frivolous in counsel's estimate, the problem may arise of the appellant's insisting upon including in the appeal a particular point despite counsel's protest that it is frivolous or otherwise inappropriate or unwise to make such argument. In this situation, it is proper for the lawyer to brief and argue only the points he or she believes are supportable and tactically or strategically advisable.

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4. See Standards 4-5.2(a)(v), 4-8.2(a).
to make and to omit the others. However, the client should be promptly advised in advance of argument which points the client wanted to make that are not going to be included in counsel's presentations on appeal. The client should also be advised of his or her right to file a supplemental pro se brief raising such points, although counsel may attempt to dissuade the defendant from so filing if counsel believes that a pro se brief or the points to be made therein might or would prejudice the client's chances of success on appeal.

In any event, counsel must never knowingly argue an issue orally or in a brief which works against the interests of his or her client.

Continued Appeals

Once counsel has accepted appointment or has been retained to pursue a client's case on appeal, he or she should continue representation of the client until all direct appeal possibilities desired to be pursued by the client are exhausted, new counsel is substituted, or a court otherwise orders or permits counsel to withdraw.

Standard 4-8.4 Conduct of Appeal

(a) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts.

(b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.

(c) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

History of Standard

There are stylistic changes only.

6. See also Standard 4-8.5 (no obligation to continue representation in postconviction proceedings unless counsel has agreed to do so).
Related Standards

ABA Model Rules of Professional Conduct 1.3; 3.4(e) (1983)
ABA Standards for Criminal Justice 3-5.9; 4-1.3; 4-7.8 (3d ed. 1993)
ABA Standards for Criminal Justice 21-3.2(b) (2d ed. 1980)

Commentary

Diligence in Prosecuting Appeal

As at the pretrial and trial stages of a criminal case, it is the duty of the lawyer to avoid unnecessary delay in performing the various steps involved in the processing and submission of appeals to appellate courts. The various steps in the appellate process—for example, designation of the record, specification of errors, filing of briefs—are governed by rules prescribing time limits within which particular actions must be performed. Such rules are designed to expedite the orderly disposition of criminal appeals. The lawyer has a duty to comply with them and must not ask for additional time except for good cause fairly and honestly presented to the appellate court. Above all, counsel must not seek delay merely to accommodate the selfish interest of the client to postpone as long as possible the execution of the judgment under review. Dilatory tactics for that purpose constitute abuse of the right to appellate review, are demeaning to the lawyer, and are contrary to the lawyer’s duties as an officer of the court in the administration of criminal justice.

Accuracy in Brief and Oral Argument

In presenting the facts and issues to the appellate court in the brief and on oral argument, the lawyer must confine himself or herself to the record made in the trial court and carefully observe the distinction between recorded matter and argumentation. In reviewing the evidence and happenings at the trial, counsel’s statement must be objective, accurate, and free of distorting or argumentative coloration. Adverse as well as favorable evidence should be set forth. All evidence and other factual matter of record relevant to an issue on appeal should be presented fairly and accurately in the lawyer’s statement of the case.

1. See Standard 4-1.3(a) and (b).
2. See Standard 4-1.3(c)
3. See, e.g., Frausto v. Legal Aid Society, 563 F.2d 1324, 1327 (9th Cir. 1977); Loza v. State, 325 N.E.2d 173 (Ind. 1975).
Argumentative contentions concerning the import of testimony, inferences derived from the evidence, and rulings of the trial judge should be presented for what they are—the lawyer’s arguments in support of claims of reversible error at the trial. Counsel must not mislead the court by misrepresenting the record or by ignoring matters of record that are adverse to counsel’s contentions.

Similarly, it is the duty of the lawyer to be accurate in citing precedents that support the lawyer’s contentions. But having done so, the lawyer is free under the adversary system to challenge the soundness of such authority.

If the lawyer discovers that material matter has been omitted from the record on appeal, the proper course is to cure such omission by an appropriate motion. The lawyer should not undertake to deal with the matter on the hypothesis that it is already properly before the appellate court.

**Matter Not of Record**

Under no circumstances should counsel refer to or rely upon matter that is completely extraneous to the record made in the trial court and beyond the scope of the doctrine of judicial notice. This is improper for the same reason that deviation from the record would have been improper in closing arguments at trial. An appellate court’s function is limited to review of what took place in the trial court. In an appellate court, a lawyer must take the case as it was tried and on that record alone.

In cases where new counsel appears on appeal, review of the transcript sometimes leads to further inquiry, but matter discovered by such inquiry may not be used on the appeal. Means are provided for presenting newly discovered evidence in rules of court or statutes. Usually they require that leave be secured from the appellate court to file a motion in the trial court in relation to the newly discovered evidence.

**Standard 4-8.5 Post-conviction Remedies**

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-
conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post-conviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

**History of Standard**

There are no changes.

**Related Standards**

ABA Standards for Criminal Justice 4-3.1(a) (3d ed. 1993)
ABA Standards for Criminal Justice 22-4.3 (2d ed. 1980)

**Commentary**

*Advising the Defendant*

The situation of appellate counsel after an appeal has resulted in the affirmance of a conviction is fundamentally the same as that of trial counsel after a judgment of conviction. Counsel's first task is to evaluate the prospects of further relief to the client. One avenue of such relief may be further appellate review, if any is available, assuming the first appeal was in an intermediate appellate court. In many cases, however, the only course may be resort to a postconviction remedy. Of course, if there are contentions to be made arising out of facts not developed at the trial, a proceeding in which those facts can be alleged and proved will be the only appropriate method of relief.

*Assistance in Obtaining Counsel*

Both the nature of the lawyer's obligation to take steps to secure postconviction relief for a client the lawyer represented at an earlier stage of the proceedings and the lawyer's function in assisting the client in obtaining counsel if requested to do so are largely governed by the considerations set forth in the Commentary to Standard 4-8.2. Although

1. See Standard 4-3.5(a) and (b).
not obligated to continue representation of a client in postconviction proceedings, counsel should consider whether a meritorious claim may be made on behalf of the client in further proceedings and should base the decision whether or not to continue representation primarily upon an assessment of the answer to that question.

Conduct of Lawyers in Postconviction Proceedings

Since a postconviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation, preparation, and trial, the Standards governing lawyers in these tasks are essentially the same as those outlined in these Standards for the defense of a criminal case.

The recommendations in this Standard should not be read as suggesting that the lawyer has a duty to invoke postconviction remedies. To the contrary, if the lawyer believes that there is no basis for pursuing such a remedy, it is the duty of the lawyer to advise the client candidly of that judgment.

Standard 4-8.6 Challenges to the Effectiveness of Counsel

(a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.

(b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.
**History of Standard**

Sections (a) and (b) have been revised stylistically. Section (c) is new to this edition. Section (d) (which was section (c) in the previous edition) has been revised stylistically and the phrase "to the extent defense counsel reasonably believes necessary" was added to reflect the caution found in ABA Model Rule of Professional Conduct 1.6(b).

**Related Standards**

ABA Model Code of Professional Responsibility DR 1-103; DR 4-101(C)(4), (D) (1969)
ABA Model Rules of Professional Conduct 1.6(b)(2); 5.1(c); 8.3(a) (1983)
ABA Standards for Criminal Justice 4-3.7(d) (3d ed. 1993)

**Commentary**

*Raising the Ineffectiveness of Another Lawyer's Representation*

The traditional position of the bar that a lawyer must stand ready to challenge the conduct of a colleague when that is necessary to the protection of a client’s rights is essential to our system of justice. Nothing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose the inadequacy. Lawyers must be especially careful to avoid permitting their personal regard for a fellow lawyer to blind them to that lawyer's failure to provide the effective assistance to which every defendant is entitled as a matter of constitutional right. Of course, a lawyer owes it to the lawyer attacked, as he or she would to the person who is the object of any legal attack, not to proceed in a matter that is not grounded in fact and law and is merely vindictive and intended to harass the accused lawyer or the courts.

*Action When Prior Representation Was Effective*

The logical and fair corollary to the standard of section (a) is that if succeeding counsel, after full investigation, concludes that the claim of ineffective legal assistance is groundless, he or she must candidly say so to the client and decline to proceed further. Any other course would be unprofessional harassment of counsel and an imposition on the court.
Moreover, unjustified proceedings against former counsel would demean lawyers and reduce them to serving as alter egos for their clients—a role for defense counsel that is rejected in these Standards.

Counsel's Prior Ineffectiveness

Since counsel must zealously represent his or her client's interests at all times, where appellate counsel was also trial counsel, such posttrial representation should also include scrutiny of counsel's own representation of the client at trial. Where counsel concludes that his or her prior representation was ineffective, in the interests both of effective representation and avoidance of conflicts of interest, counsel should explain this conclusion to the client and seek permission from the court to withdraw from further representation on this basis.

Waiver of Confidentiality

Counsel may reveal confidential information in response to a claim of ineffectiveness or a charge relating to counsel's own conduct in a criminal case raised in some other civil, criminal, or professional disciplinary proceeding. However, counsel may only reveal that confidential information he or she reasonably believes to be necessary to reveal in order to shed light upon the particular matters at issue.

1. See Standard 4-8.2.
2. See ABA Model Rule of Professional Conduct 1.6(b)(2); ABA Model Code of Professional Responsibility DR 4-101(C)(4).