ABA Standards for Criminal Justice
Special Functions of the Trial Judge
Third Edition
Dedication

This publication is dedicated to Charles R. English who served as Standards Committee Chair during the Committee's consideration of these Standards. Charlie's success in melding the diverse views of the Committee members into a product enthusiastically and unanimously supported by the Committee as a whole is a tribute to his intelligence, sense of fairness, infectious wit and a deep respect for the law and the standards process. Even after his term expired and as his health was failing, he worked tirelessly to ensure that the standards that emerged from the lengthy approval process would be worthy of the expertise and dedication they represented. He died in July 1999.
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INTRODUCTION

These standards detail the basic responsibilities of the trial judge in administering the criminal trial process. While these standards are intended to govern the function of the trial judge in a criminal case, a trial judge presiding over a criminal case should also be aware of the duties laid out in other chapters of the ABA Criminal Justice Standards, as well as in the general ABA standards which govern judicial conduct in all cases, such as the ABA Code of Judicial Conduct and the ABA Standards on Judicial Administration.

This body of standards emphasizes the trial judge's responsibility to maintain the dignity, order, and fairness of criminal proceedings. The trial judge must remain the neutral arbiter of the criminal process, independent of the interests and actions of the parties. The trial judge controls the process, and through his or her rulings, orders, and example, sets the tone for the proceedings. By remaining sensitive to the interests of the participants, the trial judge can ensure both the reality and appearance of fairness which are essential to our criminal process.

The volume's reference to the "special" functions of the trial judge means these special responsibilities that flow with presiding over a criminal trial rather than a civil case.

The Third Edition of these standards retains the essential organization of the previous edition. Five new standards have been adopted, along with several new subsections. The new subsections either reflect an expanded role or obligation of the trial judge within the particular standard or recognize a change in the law since the second edition standards were approved in 1978. The new standards deal with cultural and professional developments that have taken place in the more than twenty years since the publication of the second edition. Importantly, these additions allow the trial judge to play a greater role in the community (new Standard 6-1.2 allows the trial judge to move beyond the

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2. This term was added to the Second Edition when the standards were substantially rewritten to eliminate duplication with other substantive chapters of the ABA Criminal Justice Standards.
courtroom to educate the community about the general operation of the criminal justice process); and address the effect of technological advances on the trial process (new Standard 6-1.8 addresses the increasing use of electronic procedures in the criminal process, and in particular addresses electronic recording or transmission of proceedings, expressing a basic policy preference for live proceedings conducted in court with all parties physically present). Other new standards recognize the role of the trial judge in assuring the jury’s needs are met (new Standard 6-2.6), in maintaining the physical security of the courtroom (new Standard 6-3.2), and in imposing sanctions (new Standard 6-4.2).
SPECIAL FUNCTIONS OF THE
TRIAL JUDGE STANDARDS:
BLACK LETTER

PART I.

BASIC DUTIES

Standard 6-1.1. General responsibility of the trial judge

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(b) The trial judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. The trial judge should give each case individual treatment; and the judge’s decisions should be based on the particular facts of that case. The trial judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The trial judge should be sensitive to the functions of the prosecutor, defense counsel, witnesses, and jury, and the interests of the defendant, victim and public; and the judge’s conduct toward them should manifest professional respect, courtesy, and fairness.
Standard 6-1.2. Community relations

(a) The trial judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.

(b) The trial judge should not discuss pending or impending cases, and should avoid responding to personal criticism or complaints about particular decisions, other than to correct a factual misrepresentation in the reporting of the ruling.

Standard 6-1.3. Adherence to standards

The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the ethical rules effective in the particular jurisdiction applicable to the legal profession, and standards concerning the proper administration of criminal justice.

Standard 6-1.4. Appearance, demeanor, and statements of the judge

The trial judge's appearance, demeanor, and statements should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.

Standard 6-1.5. Obligation to use court time effectively and fairly

(a) The trial judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the trial judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.

(b) The trial judge should respect the personal and professional demands on the lives of counsel, the defendant, jurors, witnesses, and victims, and should schedule and utilize court time remaining sensitive to these needs.
Standard 6-1.6. Duty to maintain impartiality

(a) The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow family, social, political or other relationships to influence judicial conduct or judgment.

(b) During the course of official proceedings, the trial judge should avoid contact or familiarity with the defendant, victims, witnesses, counsel, or members of the families of such persons which might give the appearance of bias or partiality.

(c) A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, disability, age, or sexual orientation.

(d) It is the responsibility of the trial judge to attempt to eliminate, both in chambers and in the courtroom, bias or prejudice due to race, sex, religion, national origin, disability, age, or sexual orientation. The judge should also avoid bias in hiring, and strive to achieve diversity in his or her staff.

(e) A judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.

Standard 6-1.7 Judge's duty concerning record of judicial proceedings

The trial judge has a duty to see that the reporter makes a true, complete, and accurate record of all proceedings. The judge should at all times respect the professional independence of the reporter, but may challenge the accuracy of the reporter's record of the proceedings. The trial judge should not change the transcript without notice to the prosecution, the defense, and the reporter, with opportunity to be heard. The trial judge should take steps to ensure that the reporter's obligation to furnish transcripts of court proceedings is promptly met.

Standard 6-1.8. Proceedings in and outside of the courtroom

(a) The trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present.
(b) All significant proceedings, whether or not public, should be on the record. Relevant decisions in proceedings not on the record should be reflected in the record.

(c) The trial judge should place or permit counsel to place any germane matter on the record which has not been previously recorded.

(d) When electronic procedures for transmission or recording are used, the proceedings transmitted or recorded should reflect the decorum of the courtroom. When the right to counsel applies, such procedures should not result in a situation where only the prosecution or defense counsel is physically present before the judge.

Standard 6-1.9. Obligation to perform and circumstances requiring recusal

(a) The trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned.

(b) Trial judges have an obligation to perform their judicial function and avoid recusal when not warranted.

Standard 6-1.10. Issuance or review of warrants or other ex parte orders

Whenever a trial judge is called upon to issue a warrant for arrest or search, to review the issuance of such a warrant or the execution thereof, or to issue or review other ex parte orders, the judge should carefully observe constitutional and statutory requirements and not permit these procedures to become mechanical or perfunctory. Where the trial court has supervisory jurisdiction over other judicial officers who perform these functions, the court should ensure that this standard is observed.

Standard 6-1.11. Communications concerning prisoner status

(a) The trial judge should seek to ensure that the status of persons held in jail awaiting formal charge, trial, or sentence is monitored. The judge should take appropriate corrective action when required.
(b) The trial judge should respond promptly to specific inquiries from persons held in custody and, if warranted, should make inquiries or take other action.

PART II.

GENERAL RELATIONS WITH COUNSEL AND WITNESSES

Standard 6-2.1. Ex parte discussions of a pending case

The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties or when authorized by law or in accordance with approved practice. The judge should ensure that all such ex parte communications are subsequently noted on the record.

Standard 6-2.2. Duty to witnesses

The trial judge should permit full and proper examination and cross-examination of witnesses, but should require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses.

Standard 6-2.3. Duty to control length and scope of examination

The trial judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry.

Standard 6-2.4. Duty of judge on counsel's objections and requests for rulings

The trial judge should respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request
rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel should be permitted to state succinctly the grounds of his or her objections or requests; but the judge should nevertheless control the length, manner and timing of argument.

Standard 6-2.5. Duty of judge to respect privileges

The trial judge should respect the obligation of counsel to refrain from speaking on privileged matters, and should avoid putting counsel in a position where counsel’s adherence to the obligation, such as by a refusal to answer, may tend to prejudice the client. Unless the privilege is waived or is otherwise inapplicable, the trial judge should not request counsel to comment on evidence or other matters where counsel’s knowledge is likely to be gained from privileged communications.

Standard 6-2.6. Duty to juries

(a) The trial judge has the responsibility to treat the jury with dignity. This includes the responsibility both to inform the jury of anticipated scheduling and to assure that the jury has an opportunity to deliberate on a reasonable schedule. The trial judge should also endeavor to assure that the jury has comfortable surroundings.

(b) The trial judge should conduct the trial in such a way as to enhance the jury’s ability to understand the proceedings and to perform its fact-finding function.

PART III.

MAINTAINING THE DECORUM OF THE COURTROOM

Standard 6-3.1. Special rules for order in the courtroom

The trial judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to
conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

Standard 6-3.2. Security in court facilities

The trial judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum of the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact.

Standard 6-3.3. Colloquy between counsel

The trial judge should make known before trial that, when court is in session, no colloquy, argument, or discussion directly between opposing counsel in the presence of the judge or jury will be permitted on matters relating to the case, except that, if a brief conference between counsel might tend to expedite the trial, the judge will grant them leave to confer.

Standard 6-3.4. Courtroom demeanor

(a) The trial judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, jurors, witnesses, victims, lawyers, and others with whom the judge deals in an official capacity. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.

(b) The trial judge should require similar conduct of staff, court officials and others subject to the judge's direction and control.

Standard 6-3.5. Judge's use of powers to maintain order

(a) A trial judge should maintain order and decorum in judicial proceedings. The trial judge has the obligation to use his or her
judicial power to prevent distractions from and disruptions of the trial.

(b) When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so outside the presence of the jury, if possible. Any such comment should be in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Standard 6-3.6. The defendant's election to represent himself or herself at trial

(a) A defendant should be permitted, at the defendant's election, to proceed in the trial of his or her case without the assistance of counsel after the trial judge makes thorough inquiry and is satisfied that the defendant:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

Standard 6-3.7. Standby counsel for pro se defendant

(a) When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in trials expected to be long or complicated or in which there are multiple defendants, and in any case in which a severe sentence might be imposed.

(b) The trial judge should clearly notify both the defendant and standby counsel of their respective roles and duties.
(c) When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

Standard 6-3.8. The disruptive defendant

A defendant may be removed from the courtroom during trial when the defendant's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. The removed defendant ordinarily should be required to be present in the court building while the trial is in progress. The removed defendant should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed defendant who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

Standard 6-3.9. Misconduct of pro se defendant

If a defendant who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive, including disobeying or failing to respond to judicial orders or rulings, that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the defendant. When appropriate, the trial should be recessed to allow counsel to make the necessary preparations to go forward with the trial.

Standard 6-3.10. Misconduct of spectators and others

(a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such con-
duct is intentional, may be punished for contempt. Any person whose conduct in a criminal proceeding tends to menace a defendant, an attorney, a victim, a witness, a juror, a court officer, the judge, or a member of the defendant's or victim's family may be removed from the courtroom.

(b) When a victim or a member of a victim's or a defendant's family is removed from the courtroom during trial, he or she should ordinarily be allowed to return upon assurance of good behavior.

Standard 6-3.11. Attorneys from other jurisdictions

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge should grant such permission if the attorney is admitted to practice and in good standing in another jurisdiction. The judge may:

(a) grant such permission on condition that:

(i) the petitioning attorney associate with him or her as co-counsel a local attorney admitted to practice in the jurisdiction;

(ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his or her duties; and

(iii) the defendant consents to the foregoing conditions; or

(b) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that the attorney has engaged in courtroom misconduct sufficient to warrant disciplinary action.

PART IV.
USE OF SANCTIONS

Standard 6-4.1. Power to impose sanctions

The court has the inherent power to protect the integrity and fair administration of the criminal justice process by imposing sanctions. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in the judge's presence in open court, willfully obstructs the course of criminal proceedings.
Standard 6-4.2. Imposition of sanctions

If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition and should do so outside the presence of the jury, if possible. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction or the time of its imposition.

Standard 6-4.3. The sanction of contempt

The sanction of contempt should not be imposed by the trial judge unless:

(a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contem­ptuous; or

(b) the conduct warranting the sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Standard 6-4.4. Notice of intent to use contempt power; postponement of adjudication

(a) The trial judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intention to institute such proceedings.

(b) The trial judge should consider deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney, or a wit­ness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

Standard 6-4.5. Notice of nature of the conduct and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument rele­vant to guilt or punishment.
Standard 6-4.6. Imposition of sanctions and referral to another judge

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge whenever the presiding judge has any doubt about his or her ability to preside over the matter impartially, or if the presiding judge's objectivity can reasonably be questioned.
PART I.

BASIC DUTIES

Standard 6-1.1. General responsibility of the trial judge

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(b) The trial judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. The trial judge should give each case individual treatment; and the judge’s decisions should be based on the particular facts of that case. The trial judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The trial judge should be sensitive to the functions of the prosecutor, defense counsel, witnesses, and jury, and the interests of the defendant, victim and public; and the judge’s conduct toward them should manifest professional respect, courtesy, and fairness.
History of Standard

Subsections (a) and (b) are unchanged from the second edition. In addition to a minor stylistic change to subsection (c), a reference to other participants in the criminal process has been added to reflect that the responsibilities of the trial judge extend to them as well as to the attorneys involved in the case.

Related Standards

ABA, MODEL CODE OF JUDICIAL CONDUCT 3B(3)-(4) (2000)
ABA, STANDARDS RELATING TO TRIAL COURTS 2.31 (1992)
NDAA, NATIONAL PROSECUTION STANDARDS 23.4 (2d ed. 1991)

Commentary

This standard recognizes that it is ultimately the responsibility of the trial judge to maintain the atmosphere appropriate for a fair and rational determination of the issues and to govern the conduct of all persons in the courtroom, including the attorneys.

Standard 6-1.1(a)

In our criminal justice system, the adversary process is the preferred procedure for obtaining justice. Within that process, it is the proper role and function of a trial judge to exercise his or her judicial powers to ensure that the jury has the opportunity to decide a case free from irrelevant issues and appeals to passion and prejudice. When it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. After consulting with counsel, the judge may, for example, give interim explanations to the jury of the procedure of the trial, give limiting instructions, or state applicable principles of law. These are a few examples that illustrate the balance a judge may strike to promote justice in a case, while avoiding a partisan role. The judge should be aware that there may be a greater risk of prejudice from over-intervention than from under-intervention. The trial judge may interfere with counsel's strategy by questioning witnesses, and in addition the jury may give

undue weight to the judge's questions. Although a trial judge may question a witness to clarify aspects of the testimony and to assist the jury, this right should be exercised sparingly, and the judge should studiously avoid giving the impression of favoring one side or the other. A judge should not press a witness to change testimony, intimidate a witness, or threaten prosecution for perjury in front of a jury. One state Supreme Court has observed:

[I]t is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness's testimony or the merits of the case, they almost invariably follow them.

While the judge should not hesitate to exercise authority when necessary, the judge should avoid trying the case for the lawyers.

The trial judge should also remain aware that the adversary process functions differently in the criminal process than it does in civil litigation. Although fact-finding and truth-seeking are important goals of all legal proceedings, the foundation of a criminal prosecution is the requirement that the state prove the guilt of the defendant beyond a reasonable doubt. Consequently, trial judges should not take an active role in developing the facts at trial so as not to affect this constitutional balance.

**Standard 6-1.1(b)**

One of the most frequently criticized aspects of the administration of criminal justice is the hectic and undignified atmosphere in which proceedings are often conducted. This problem is particularly common in misdemeanor and traffic courts, but may also be true at certain stages of felony prosecutions, such as the initial appearance. The atmosphere may leave the impression that the criminal process is

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5. Johnson v. State, 722 A.2d 873 (Md. 1999) (defendant's right to a fair trial was denied where the trial judge "sustained" objections never made by the state and frequently interrupted defense counsel's examination, substituting the judge's own questions); United States v. Wilensky, 757 F.2d 594 (3d Cir. 1985).
mechanical and that there is no individual justice. Serious damage can be done both to the requirements of justice in an individual case and to the general public's confidence in the judicial process. While the judge may be unable to improve the physical setting offered for the court's proceedings, the judge can nevertheless control the tone and general atmosphere of the proceedings. Much can be accomplished simply by prohibiting overcrowding of the courtroom. A babble of conversations, official or private, should not be tolerated.

Moreover, the trial judge should avoid formalistic pronouncements whose meanings are obscure either because of the voice in which they are recited or because of the technical language in which they are phrased. Such statements do not adequately inform the defendant and the public of the nature of the proceedings. Likewise, it is essential to provide an interpreter when a defendant or witness has an inadequate grasp of English which prevents comprehension of the courtroom process. This latter problem is addressed in Standard 2.45 of the ABA Trial Courts Standards. The court should ensure that any interpreter provided is qualified to competently and fairly translate testimony or the proceedings.

A criticism that has been directed at the legal profession in general is the lack of civility among lawyers in their treatment of one another. Since it is the function of the trial judge to ensure that the proceedings are conducted with dignity, the judge should do everything within his or her power to require that the lawyers treat each other with courtesy and respect. Although the trial judge cannot be expected to monitor

7. But cf. new Standards 6-2.6(a) and 6-3.2; ABA, Standards Relating to Trial Courts, Standard 2.46 (1992).
10. See also, 28 U.S.C. § 1827; FLA. STAT. ANN. § 90.606 (West 1995); VA. CODE ANN. § 19.2-164 (Michie 1996).
11. See, for example, FR Evid 604 which provides:

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.
the behavior of attorneys outside his or her presence, inquiry and admonition are warranted when complaints are made.

**Standard 6-1.1(c)**

The trial judge should remain sensitive to the various functions and interests of all involved in the criminal justice system. Of utmost importance, of course, are the constitutional rights of the defendant, and the roles constitutionally assigned to the prosecution and to defense counsel. For example, the defendant has the right to effective assistance of counsel. It is the responsibility of the defense attorney to "render effective, quality representation" and to ensure that the prosecution meets its burden of proving guilt beyond a reasonable doubt. The trial judge should be sensitive to the defense attorney's duty to protect the defendant's rights. The trial judge must also protect the rights of the defendant by, for example, ensuring an adequate opportunity to present and confront witnesses.

Similarly, the prosecutor has a duty to seek justice, "to guard the rights of the accused as well as to enforce the rights of the public." The prosecutor has duties to the defendant (for example, Brady obligations) and may have obligations to the "victim" as well. The judge should be mindful of the attorneys' duties and should treat them with courtesy, fairness, and respect. This accords with Canon 3B(4) of the ABA Model Code of Judicial Conduct.

Likewise, the judge should be polite, courteous, and considerate to witnesses and jurors, as well as other participants in the criminal trial process. The right of the public to view and be informed of the

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16. In this regard, the statement in In re Abse, 251 A.2d 655 (D.C. 1969), that an attorney should have an opportunity to respond on the record when the attorney has been accused of unprofessional conduct by the trial judge during the trial is endorsed.
Special Functions of the Trial Judge

proceedings also must be protected. The standard’s reference to “victims” is not intended to suggest that a crime has necessarily been committed or that a particular defendant has committed it. It is rather a general reference to the rights of putative victims. This is true throughout these standards where a reference is made to “victims.”

The trial judge should also be mindful of the competing time demands on all of the participants in the criminal justice process and should schedule trial proceedings with those interests in mind.

Standard 6-1.2. Community relations

(a) The trial judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.

(b) The trial judge should not discuss pending or impending cases, and should avoid responding to personal criticism or complaints about particular decisions, other than to correct a factual misrepresentation in the reporting of the ruling.

History of Standard

The standard is new for the Third Edition.

Related Standards

ABA, Model Code of Judicial Conduct 3B(2), (9), 4B, 4C, H(1) (1992)

Commentary

Standard 6-1.2(a)

Because the trial judge is ultimately responsible for the fairness of the criminal process, the trial judge is afforded great respect within our system. The prestige and neutrality of the trial judge provide an excellent basis for educating the community about how the criminal process


18. See also, Standard 6-1.5.
functions, in both its public and not so public venues. Thus, the new standard allows the trial judge to use various opportunities to educate the public. For example, the judge could sponsor and organize programs on the operation of the criminal justice system or could otherwise give talks to civic organizations or participate in community-based programs about the criminal process.

In engaging in such educational efforts, the trial judge should avoid associating with an organization or group which represents a particular side of an issue, which practices or espouses discrimination, or which is engaged in proceedings that might come before the judge or the jurisdiction of the court of which the judge is a member. Such concerns necessarily would not prevent the judge from participating in the affairs or programs of educational, religious, charitable, fraternal or civic organizations even if an organization incidentally happens to be identified with a particular side of an issue. Much must be left to the good judgment of the trial judge in performing the function suggested by this standard. Factors to consider include both the nature of the organization involved, and the issues or topics to be discussed.

**Standard 6-1.2(b)**

A judge cannot maintain the necessary neutrality or appearance of neutrality if he or she discusses actual or potential cases within his or her jurisdiction. A judge should also refrain from making a comment on a pending or impending case in another jurisdiction if the comment might reasonably be expected to affect the outcome or impair the fairness of the proceedings. Comments by a judge could reveal his or her predilections for future rulings; such comments might also influence the live controversy before another judge. Finally, a judge’s comments could affect public perception of the case, especially since jurisdictional

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2. See Adam C. Grant, Jr., One Way to Change Public Perception is to ... Bring the Court to the People, 34 Judges’ J. 31 (1995) (referring to “Meet the Judges Forums” and other public outreach and educational programs, and detailing their success in a North Carolina community).


boundaries are not always self-evident to the public. Timing is important here, and commentary and analysis, especially scholarly analysis, of cases not pending or impending is not prohibited.

A judge cannot function independently without occasionally drawing criticism of his or her rulings, and references of a personal nature will increase the urge to respond. However difficult it may be, the judge must resist any urge to respond to personal or professional criticisms. Such a response may undermine the dignity and professionalism of the judicial office, and, even worse, may appear to turn the judge into a participant in the dispute rather than a neutral arbiter. Although correcting the accuracy of news reports of an official ruling is permissible, the trial judge should be careful not to allow this limited exception to negate the duty to abstain from comment. Additionally, when comment is appropriate, it may be preferable for the chief or supervisory judge in the district to make such comment, rather than the judge whose conduct has been criticized.

**Standard 6-1.3. Adherence to standards**

The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the ethical rules effective in the particular jurisdiction applicable to the legal profession, and standards concerning the proper administration of criminal justice.

**History of Standard**

This is former Standard 6-1.2. The reference to the code of professional responsibility has been replaced with a more generic reference to ethical rules to reflect the fact that jurisdictions have adopted different rules of professional conduct, e.g., the Model Rules of Professional Conduct.

**Related Standards**

NAC, COMMUNITY CRIME PREVENTION 10.1

**Commentary**

In addition to knowledge of substantive and procedural law, the proper conduct of a criminal trial requires that the judge be familiar
with all applicable judicial codes and the specific ethics rules and cases that govern the conduct of the judiciary and the legal profession in the particular jurisdiction. The trial judge should also be aware of professional standards, such as this volume, that relate to the judge's role and the issues before him or her.

Finally, there is a substantial history and experience to guide the practice and art of judging. Much of this history is reflected in the Model Code of Judicial Conduct, but there is also an extensive body of helpful literature reflecting on the judicial experience.¹ The trial judge is encouraged to stay familiar with this material as a source of information and knowledge.

**Standard 6-1.4. Appearance, demeanor and statements of the judge**

The trial judge's appearance, demeanor, and statements should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.

**History of Standard**

This is former Standard 6-1.3. A reference to the trial judge's "statements" has been added to the Third Edition.

**Related Standards**


**Commentary**

The trial judge's behavior should always encourage respect for the dignity of the position, and foster the sense that his or her rulings and

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actions are fair and impartial. The professionalism and formality of the office lend credibility to the criminal justice process. Consequently, the judge should carefully avoid any words or actions that could undermine the dignity of the proceedings. The judge should remain aware that he or she is constantly being observed, and must always be attentive to the proceedings and to the appearance of his or her own actions. A party, witness or observer will leave the courtroom with an understanding of the process derived from the judge’s statements, demeanor, and actions. The parties deserve the judge’s full attention and should always feel fairly treated.

The judge should be particularly careful by his or her demeanor not to convey unintended messages to the jury or to the participants in the trial process. Even the matter of facial expression may be misinterpreted. Jurors may read in the judge’s face either belief or disbelief as the judge listens to witnesses’ testimony or to arguments of counsel. Facial expressions and gestures by the judge do not appear on the transcribed record of the proceedings, and the damage that these signals may do to the trial process cannot usually be corrected on appeal. This heightens the responsibility of the trial judge to control his or her demeanor.

The standards encourage judges to wear a robe while in the courtroom. Although it is the more common practice in American courtrooms for a judge to wear a robe, there are divergent practices throughout the country with regard to this matter. By statute or rule, sixteen states require judges to wear robes in open court; one state leaves it to the discretion of the judge; and in the remaining states there is no formal rule or uniform practice.

1. People v. Mays, 544 N.E.2d 1264 (Ill. 1989) (trial judge’s actions and facial gestures during defense counsel’s cross-examination of prosecution witness entitled defendant to new trial); State v. Gentile, 515 N.W.2d 16 (Ia. 1994) (trial judge should not telegraph to jury, by purposeful exclamations, gestures, or facial expressions, judge’s approval or disapproval, belief or disbelief, in testimony of witnesses or arguments of counsel).

All justices and judges, while actually sitting as a justice or judge in formal judicial proceeding, should wear a suitable black judicial robe...
Many experienced judges insist that the robe is an important symbol of the judicial office, evidencing the judge's commitment to impartiality. The black garb reminds all who look at the judge—and it reminds the judge, too—that justice is the prime concern of the court. It also adds dignity to the courtroom. Indeed, the robe emphasizes the democratic ideal of impartial and equal treatment of all persons who come before the court by reminding the judge and those who view the judge in the courtroom that the judge serves as an agent of justice. The robe also symbolizes power and authority of the office. It is not surprising that a survey in a state in which some of the judges robe and others do not produced a consensus that the wearing of robes "was an important aspect of raising the level of respect for the judge and justice." But the robe is merely one aspect of the judge's appearance. No manner of attire can achieve dignity and win respect for a person whose conduct, mode of address, and general demeanor fail to reflect a sense of the importance of the judicial role as central to the promotion of justice.

Although encouraging the use of the robe "in the courtroom," the standard allows for some flexibility in demeanor and dress depending on the particular judicial proceeding involved.

**Standard 6-1.5. Obligation to use court time effectively and fairly**

(a) The trial judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the trial judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.

**Comment**

It is highly desirable for judges to wear a suitable black judicial robe while actually sitting in a formal judicial proceeding. However, the court chose the word "should" as opposed to the word "shall."


(b) The trial judge should respect the personal and professional demands on the lives of counsel, the defendant, jurors, witnesses, and victims, and should schedule and utilize court time remaining sensitive to these needs.

History of Standard

This is former Standard 6-1.4. The change in the title of the standard is both stylistic and intended to reflect the substance of new subsection (b).

Related Standards

ABA, Court Organization 1.60 (1990)
ABA, Standards Relating to Trial Courts 2.30, 2.31 (1992)
NAC, Courts 4.12, 4.15
NDAA, National Prosecution Standards 64.1 (2d ed. 1991)

Commentary

Standard 6-1.5(a)

This standard recognizes the trial judge's personal responsibility for ensuring that the work of the court is completed expeditiously.¹ Judges should observe a business-like working schedule, confine vacations and other days away from court within authorized limits, and promptly and resolutely dispose of matters under submission to them, giving the highest priority to hearing and determining the merits of cases. Allow-

¹. This standard is based on Canon 3A of the ABA Model Code of Judicial Conduct (2000), which directs a judge to give priority to the duties of office over all other activities, and Canon 3B(8) which requires a judge to "dispose of all judicial matters promptly, efficiently, and fairly." For a discussion of the corresponding duties of lawyers in accomplishing the work of the courts expeditiously, see ABA, Standards Relating to Trial Courts, Standard 2.31 (1992), commentary at 42:

Lawyers have a corresponding duty to manage their schedules and prepare promptly and adequately for appearances, hearings, and trials to avoid unwarranted delays. Lawyers should make sure that they have efficient procedures for managing their case inventories and for transferring responsibility for a case when the lawyer having charge of it cannot comply with court scheduling rules.
ing cases or motions to linger on the court docket not only wastes judicial resources, but may also create expense and inconvenience to the parties, counsel, and witnesses. Moreover, judges should adjust their working habits to the requirements of the court as a whole, coordinating efforts with other judges and with auxiliary court staff.

The judge must be a manager of the business of the judicial office. Although most judges are not trained in management skills, it is essential that the judge assume this role, focusing on the need to channel the business of the office efficiently and effectively. Administrative staff can help perform this essential function, but it remains the primary responsibility of the judge to assure that cases are moving as expeditiously as possible through the system, and to closely supervise court staff to promote administrative efficiency. Overall supervisory responsibility for managing the court staff should be placed in a presiding judge.\(^2\)

Effective management of time and calendars is especially critical in the criminal justice system due to speedy trial rules that require giving priority to criminal adjudication to protect the interest of the defendant in a quick resolution of the charges against him or her and society’s interest in timely justice. It is the obligation of the trial judge to see that these rules are satisfied. At the same time, the trial judge must be careful to allow sufficient time for the prosecution and defense to properly prepare their case.\(^3\) The judge should also be mindful that by the time a trial schedule is being considered, the prosecution has already investigated the crime, analyzed the facts and law, and prepared an indictment. The defense may have had no similar opportunity to learn the facts and prepare its case. This discrepancy in the ability to prepare must be taken into account in moving the case forward.

Public respect for the courts is particularly susceptible of being diminished by the inefficient use of courtroom time. When dockets are crowded and prompt justice is jeopardized, public support for reasonable requests for additional judges can be seriously eroded by the failure of sitting judges to meet ordinary standards of promptness and efficiency.

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2. ABA, Standards Relating to Trial Courts, Standard 2.30 (1992), commentary at 41.
3. See United States v. Santos, 201 F.3d 953 (7th Cir. 2000) (concluding that refusal to grant continuance and requiring trial to proceed forcing attorney to withdraw because of scheduling conflict constituted abuse of discretion).
Standard 6-1.5(b)

Subsection (b) makes clear, at the same time, that the judge should respect the legitimate engagements of counsel in other matters, and should remain cognizant of the demands on the lives of the other participants outside the context of the proceedings. This requires both avoiding an excess of zeal in the unreasonable extension of court hours and maintaining some flexibility in scheduling when other personal or professional demands take precedence over the trial. Whenever unforeseen or unavoidable circumstances compel delay or postponement, the trial judge should explain to parties, counsel, and the jurors the general nature of the difficulty, as appropriate, and estimate the probable duration of the resulting delay. In doing so, the judge should not suggest to the jury that the delay is the fault of one party or one party’s counsel.

Standard 6-1.6. Duty to maintain impartiality

(a) The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow family, social, political or other relationships to influence judicial conduct or judgment.

(b) During the course of official proceedings, the trial judge should avoid contact or familiarity with the defendant, victims, witnesses, counsel, or members of the families of such persons which might give the appearance of bias or partiality.

(c) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, disability, age, or sexual orientation.

(d) It is the responsibility of the trial judge to attempt to eliminate, both in chambers and in the courtroom, bias or prejudice due to race, sex, religion, national origin, disability, age, or sexual orientation. The judge should also avoid bias in hiring, and strive to achieve diversity in his or her staff.

(e) A judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.

History of Standard

This is former Standard 6-1.5. “Political” has been added to subsection (a) to make it consistent with ABA, Model Code of Judicial Con
duct, Canon 2B (2000). Otherwise, the standard has been substantially expanded with the addition of subsections (b)—(e) to provide more specificity to what would be considered improper behavior or might create the appearance of impropriety.

**Related Standards**

NAC, Community Crime Prevention 10.1
NDAA, National Prosecution Standards 23.4 (2d ed. 1991)

**Commentary**

This is one of the most important of the Trial Judge Standards and one the judge must consider critical in governing his or her behavior, since fairness and the appearance of fairness and impartiality are the backbone of our justice system.

*Standard 6-1.6(a)*

The judge must be aware that his or her activities are under scrutiny at all times. Of course, the judge will have personal relationships both before and after coming to the bench and cannot be expected to desert or avoid them, but he or she must be careful how they are conducted and must carefully evaluate his or her activities both inside and outside of these relationships. The trial judge should remain alert as to how relationships or activities can create either bias or the appearance of partiality, and must adjust his or her behavior accordingly.

Whenever there could be an appearance of partiality caused by certain relationships or activities, full disclosure is the best policy. In some cases, it may be sufficient to disclose the relationship and explain to the parties why the judge’s decisions will not be affected. In others, the judge can explain the potential conflict to the parties and let them decide whether to seek the judge’s recusal. If the judge feels unsure of his or her ability to act impartially, however, recusal is the only alternative.¹ When a friendship is particularly close, it may be necessary for

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¹ For a detailed discussion of disqualification or recusal of judges, see Standard 6-1.9.
the judge to disqualify himself or herself from all cases in which that friend is involved. This is especially true when the close friend was previously a partner or co-worker. On the other hand, no rule can suggest all the nuances that should be weighed in a judge's exercise of discretion in these matters. Physical or space arrangements that could suggest partiality or unfairness should be avoided altogether. Thus, judges should not share court facilities, such as lunch or shower rooms, with prosecutors when defense attorneys are not also able to use those facilities. Any appearance of a special relationship between either the district attorney's office or defense counsel and the judiciary is certain to create doubts concerning the impartial administration of justice.

Elections present a particular problem. Special care should be taken not to apply even indirect pressure for contributions to attorneys and others who may appear before the court. In fact, many state codes of judicial ethics prevent a candidate for judge from directly being involved in fund-raising.2

Standard 6-1.6(b)

Similar considerations apply with respect to the other participants in the proceedings with whom the judge must deal. The judge may know a witness, victim, or defendant. The judge should remain vigilant that over-familiarity with such persons or their family members could give the impression of bias or could affect the credibility the jury gives a witness.3 The judge must exercise good judgment when interacting with people the judge knows or has known previously.4 Of course, all of the rules on ex parte contact apply with respect to the various relationships the judge may have with participants in the litigation.

A trial judge should not be concerned about a possible appearance of partiality merely because his or her rulings favor one side or the other. The function of the judge is to remain neutral and to decide each

2. See, e.g., ALABAMA CANONS OF JUDICIAL ETHICS § 7(B)(4)(a); FLORIDA CODE OF JUDICIAL CONDUCT § 7(B)(1); LOUISIANA CODE OF JUDICIAL CONDUCT § 7(D)(1); MICHIGAN CODE OF CONDUCT § 7(B)(2)(a).
issue as it arises, not to keep a tally of rulings for either side.\(^5\) It is not bias for the trial judge to exercise judgment in judicial rulings and decisions, even if most may be more favorable to one side than the other.\(^6\)

**Standard 6-1.6(c)**

Subsection (c) is based on Canon 2C of the ABA’s Model Code of Judicial Conduct but adds “disability, age, or sexual orientation” as additional classifications which might be subject to discriminatory practices. The commentary to Canon 2C of the Judicial Code is applicable here. A couple of things, however, deserve emphasizing. First, invidious discrimination by an organization is not always easy to detect. The judge should remain sensitive to the membership practices of the organization and the values of its members, avoiding those organizations that practice de facto discrimination even if they do not have expressly discriminatory policies. Second, the judge’s use of a facility owned by an organization that practices invidious discrimination could give the appearance of impropriety and would violate this standard.

Subsections (a)—(c) track the policy of Canon 2 of the Model Code of Judicial Conduct. There are other sources from which a judge may obtain useful guidance for reflecting on the propriety of the judge’s range of activities and affiliations. Articles and commentary frequently amplify canons of judicial ethics.\(^7\) Moreover, a comprehensive ethics code for public officials and public employees is included in an NAC standard.\(^8\)

**Standard 6-1.6(d)**

Subsection (d) goes further than Canon 2 of the Model Code of Judicial Conduct by placing an affirmative obligation on the trial judge to look beyond his or her own behavior and monitor the conduct of others in

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his charge. The judge should not permit participants in the criminal process or employees to exhibit or engage in discriminatory conduct.9 The trial judge should be neither under-sensitive nor over-sensitive in performing this function. While the judge, for example, should not allow an attorney to intimidate or embarrass a witness based on race or sexual orientation, the judge must allow questioning related to legitimate issues in the case.10 Likewise, while the judge cannot dictate good moral character, clear discriminatory conduct by the court staff cannot be tolerated.

This subsection also places responsibility on the trial judge to take all appropriate steps to achieve diversity in his or her staff. Such diversity is especially important in communities where many defendants or witnesses may be members of minority groups. In doing so, the judge must remain cognizant of equal opportunity laws and judicial rulings on equal protection. Such sensitivity should include making special efforts to recruit and to hire members of under-represented groups.

**Standard 6-1.6(e)**

While Standard 6-1.2(b) instructs the trial judge not to respond to personal criticism or complaints, Standard 6-1.6(e), more importantly, cautions the judge not to allow his or her judgment or analysis to be influenced by public reaction. Concern about media coverage and public response is not consistent with impartiality and the rule of law. Even though some judges are elected, they are not representatives of the people. The judiciary is independent of the other branches of government and should not be responsive to public pressure. It is the obligation of

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9. At the ABA annual meeting in August, 1998, the House of Delegates voted to amend the commentary to Rule 8.4 (d) of the **MODEL RULES OF PROFESSIONAL CONDUCT**, which provides that, "[i]t is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice," by adding:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, religion, national origin, disability, age, sexual preference or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that pre­emptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

the trial judge to divorce him or herself from political or other public pressure, proceeding in a principled and impartial manner, with a willingness to make unpopular rulings if necessary.

This standard stresses judicial independence not only from public pressure, but from pressure by other governmental officials as well. The judge must be aware that unpopular rulings will occasionally have to be made, and that criticism is part of the judicial process.\footnote{See Standard 6-1.2(b). In many states, the bar association has a formalized process to respond to unfair criticism of judges or judicial rulings. See, e.g., 35 AZ Attorney 40 (1999) (Committee); Ohio Code of Prof. Resp., CANON 8, EC 8-6 (2000); 46 RI Bar J. 3 (1996) (policy statement); SC St.Bar Rules of Conduct, Rule 8.2 and Comment (2000).}

**Standard 6-1.7. Judge's duty concerning record of judicial proceedings**

The trial judge has a duty to see that the reporter makes a true, complete, and accurate record of all proceedings. The judge should at all times respect the professional independence of the reporter, but may challenge the accuracy of the reporter's record of the proceedings. The trial judge should not change the transcript without notice to the prosecution, the defense, and the reporter, with opportunity to be heard. The trial judge should take steps to ensure that the reporter's obligation to furnish transcripts of court proceedings is promptly met.

**History of Standard**

This is former Standard 6-1.6. There are no changes.

**Related Standards**

ABA, STANDARDS RELATING TO TRIAL COURTS, STANDARD 2.42 (1992)
NAC, COURTS, 6.1

**Commentary**

It is essential that the record of court proceedings be both complete and accurate. The purpose of using a court reporter is to provide a true record of the judicial proceedings. While the attorneys make the record,
the reporter *keeps* the record. The gravity of this responsibility should not be underestimated. Any lack of confidence in the record serves to undermine the judicial process and the right of appeal. The trial judge has the duty of supervising the record of the proceeding until an appeal is filed. The judge should be impartial with respect to the reporter’s record.\(^1\) The judge’s duty with regard to the record is no less in those courts where audio recording equipment is used in place of a reporter. Indeed, even with recordings, it appears that there are problems of completeness or accuracy which may require the attention of the judge.\(^2\) Where reporters are employed, their independence must be both apparent and genuine.

The trial judge has the same right as the other participants in the trial to challenge the accuracy of the record. While the certification of the reporter indicates that the record is complete and accurate so far as the reporter’s notes and recollection are concerned, the judge, when determining the record, has the right and duty to go beyond the reporter’s certification. The final determination of the record is the function of the trial judge.\(^3\) Before the trial judge changes the record, however, this standard makes clear that notice should be given to all parties, including the court reporter, and that the parties should be given an opportunity to be heard regarding the judge’s changes. A record should also be made of that hearing.

Computerized transcription allows rapid, if not simultaneous, production of trial transcripts. This not only has the obvious advantage of making transcripts immediately available following the proceedings, but also permits, where the technology is available, access to the existing transcript during the trial itself. It also allows review of the transcript while recollections of the proceedings are fresh. Immediate access to the record created by this technology can facilitate accuracy in argument, rulings and fact-finding. Computerization of the courtroom can also facilitate the introduction and use of documents and exhibits. The electronic courtroom probably lies in the future of the trial process, and

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3. See United States v. Gallo, 763 F.2d 1504 (6th Cir. 1985) (requirements of *Court Reporter Act* that court reporter record verbatim all proceedings in criminal cases had in open court are mandatory, and it is the duty of the court, not the attorney, to see that Act’s provisions are complied with).
trial judges are encouraged, where resources are available, to experiment with the implementation of this technology in trial practice. In so doing, however, the trial judge must ensure that all parties have equal access and ability to use the equipment.

Electronic recording systems, however, also can be invasive of privacy or could capture confidential communications. Similarly, leaving electronic equipment operative and unmonitored when court is not in public session or following adjournment creates the potential for misunderstanding and misuse by both the judge and interested third parties, such as the media. The trial judge should guard against any such potential abuse.

The standard also instructs the trial judge to ensure that trial transcripts are promptly available. This can be undertaken by closely supervising the work of the court reporter or other transcription process or by establishing a systematized mechanism for the production of transcripts. This is an especially important feature of the standard because delay in transcript availability slows the review and appellate process.

**Standard 6-1.8. Proceedings in and outside of the courtroom**

(a) The trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present.

(b) All significant proceedings, whether or not public, should be on the record. Relevant decisions in proceedings not on the record should be reflected in the record.

(c) The trial judge should place or permit counsel to place any germane matter on the record which has not been previously recorded.

(d) When electronic procedures for transmission or recording are used, the proceedings transmitted or recorded should reflect the decorum of the courtroom. When the right to counsel applies, such procedures should not result in a situation where only the prosecuting or defense counsel is physically present before the judge.

**History of Standard**

The standard is new for the Third Edition.

Related Standards

None

Commentary

This new standard generally deals with the public and formal nature of criminal proceedings.

Standard 6-1.8(a)

Subsection (a) expresses a preference for open, public proceedings with all parties physically present before the trial judge. Two thoughts are incorporated here. First is the principle of openness, consistent with the Sixth Amendment right to a public trial. Although limited matters may be conducted in chambers, public exposure to the criminal process both fosters the appearance of fairness and impartiality and facilitates the deterrent impact of the criminal justice system.\(^1\) Witnessing the serious nature of the proceedings, as well as the imposition of sentence when warranted, emphasizes the price of engaging in antisocial behavior.

The second sentiment expressed in subsection (a) is caution in the use of electronic procedures to streamline the process. The use of techniques such as current experimentations with video arraignments\(^2\) has the potential to undermine the fairness and formality of the process and the concomitant socializing effect of the criminal law on both the defendant and the public. Such procedures may leave a defendant with the impression that the case against him will be handled informally and summarily without an opportunity for impartial justice to function. Reducing the defendant to an electronic image can also dehumanize him or her in the eyes of the judge. Moreover, in practice, the use of these procedures in some circumstances can raise actual or perceived

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2. For example, see CAL. PENAL CODE § 977.2 (authorizing the Department of Corrections to establish a three-year pilot project permitting initial court appearances and arraignments for new charges against defendants incarcerated in a state prison to be conducted by two-way audio/video communication without defendant’s consent).
due process concerns, for example, the possibility that counsel for the government or for the defense has physical access to the judge that is effectively denied to the other side. Although there certainly are uses for technology in the criminal justice system (see the discussion in the commentary to Standard 1.7 regarding the making and use of computerized transcripts), there is a real risk that technological advancements can undermine the Sixth Amendment interests in open and public proceedings. Subsection (a) consequently states a "preference for live public proceedings in the courtroom with all parties physically present."

**Standard 6-1.8(b)**

This standard instructs the trial judge to ensure that a complete record is made of all significant proceedings, whether conducted in the courtroom or elsewhere. In the limited situations in which a trial may be closed to the public, as in the case of a very young witness, a full record must be maintained. Similarly, except for non-substantive matters, discussions in the judge’s chambers should also be recorded. When it is impracticable to record proceedings taking place in chambers, any significant matters discussed or decisions issued in such proceedings should be placed on the record thereafter at the earliest opportunity.

**Standard 6-1.8(c)**

Even when recording is not mandated, the trial judge should permit counsel to place any germane matter on the record which was not otherwise recorded, whether occurring in court or not. Examples of such germane matters might be the fact that a juror was asleep, that the judge was openly critical in court of a witness, or that the judge discussed in camera an inclination to grant a mistrial sua sponte. Additionally, in some situations, such as a sleeping defense attorney or the judge’s receipt of a
letter from the defendant, a witness or juror, the judge should place the matter on the record without being asked to do so by one of the attorneys. The right to ensure an adequate record also applies to defendants appearing pro se.

Standard 6-1.8(d)

Some jurisdictions will occasionally use electronic procedures to cover certain stages in the process. In such circumstances, this subsection instructs the trial judge to ensure that the surroundings from which the transmission takes place reflect the formality and ceremoniousness of the courtroom. There is a real danger that in an effort to expedite matters, such as a video arraignment from a regional jail, a stark interview room or office will be used. This can give the impression of backroom justice and an accelerated disposition in which fairness will suffer. Consequently, there is the potential to foster disrespect for the criminal justice process.

The second sentence of subsection (d) likewise cautions the trial judge to avoid electronic procedures where only one of the parties is physically represented before the judge. When the rules of the jurisdiction provide for the right to have counsel present, for example at the initial appearance, the logistical reality of electronic transmission is that the defense attorney will be with the client, and the prosecutor, whose office is likely to be in close proximity to that of the judge, will be in the presence of the judge. This raises fairness and perhaps even due process concerns based on the appearance of undue influence. If defense counsel is not physically present in the courtroom due to the use of electronic transmission procedures, the prosecutor should not be permitted to be physically present. Instead, where feasible, the prosecutor should appear before the court in the same fashion as defense counsel, that is, through electronic means.

Standard 6-1.9. Obligation to perform and circumstances requiring recusal

(a) The trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned.

7. See, e.g., CAL. PENAL CODE § 977(a)(1).
(b) Trial judges have an obligation to perform their judicial function and avoid recusal when not warranted.

History of Standard

This is former Standard 6-1.7. Changes are stylistic, except for the addition of new subsection (b).

Related Standards

ABA, Standards Relating to Trial Courts, Standard 2.32 (1992)
NAC, Community Crime Prevention 10.1
NAC, Courts 9.2(2)
NCCUSL, Uniform Rules of Criminal Procedure 741(a)-(c)

Commentary

Standard 6-1.9(a)

The thrust of this standard is that trial judges have an obligation to recuse themselves when necessary to protect the right of the accused and the right of the public to an impartial trial and a corresponding obligation to decide a case where recusal is not warranted.¹

Subsection (a) provides that judges should recuse themselves when they have an interest in a case or bias (or the appearance of bias) toward one of the litigants. Some situations requiring recusal are obvious, such as when the judge is related by blood or marriage to the accused, the complainant, or other key witnesses in a trial.² Likewise, newly appointed judges who are former prosecutors should disqualify themselves from cases in which they had any prosecutorial role, including in the investigative or pretrial stage.³ Even in those cases where a prior

³ Ex parte Vivier, 699 S.W.2d 862 (Tex. 1985). But see Muench v. Israel, 524 F. Supp. 1115 (E.D. Wis. 1981), in which it was held that a judge need not recuse himself or herself because of a former position as a state attorney when that position was purely pro forma and the judge did not participate as counsel.
prosecutorial role may not warrant recusal, the judge should disclose to the parties his or her former position.

More subtle and more difficult to resolve are those cases in which the connection between the judge and other participants is more remote. Even if the judge is convinced of his or her own impartiality, it is also important in such cases to consider the public impression created by the circumstances. If there is a genuine risk of the appearance of bias or prejudice, a trial judge should recuse himself or herself, as such an appearance can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. In all circumstances, disclosure to the parties is essential so that the judge may weigh the parties’ views in his or her decision.

When a trial judge's decision has been reversed on appeal, the judge should be cognizant of the possibility that he or she may no longer be unbiased. It may even be desirable, in districts where feasible, to adopt a general rule that cases reversed on appeal after trial should be tried before a new judge unless both parties request the original trial judge to preside again.

A detailed statement of grounds for recusal is included in Canon 3E(1) of the ABA’s Model Code of Judicial Conduct, and that canon should be consulted for specific circumstances under which recusal is warranted. That canon is also adopted by reference as the standard for recusal under Standard 2.32 of the Standards Relating to Trial Courts. Procedurally, the latter provides that “[a] judge against whom a motion to disqualify for cause is made may be authorized to determine whether it is legally sufficient on its face, but factual issues raised by the motion should be heard and resolved by another judge.”

**Standard 6-1.9(b)**

While recusal is essential when warranted by the facts, new subsection (b) reminds trial judges that they also have an important counter-
vailing duty not to abdicate their judicial function by using recusal as a way of avoiding difficult cases. This temptation is especially acute for elected judges who may face difficult and politically charged issues. In such cases, the judge must remain forthright and perform his or her judicial function fairly and impartially.

**Standard 6-1.10. Issuance or review of warrants or other ex parte orders**

Whenever a trial judge is called upon to issue a warrant for arrest or search, to review the issuance of such a warrant or the execution thereof, or to issue or review other ex parte orders, the judge should carefully observe constitutional and statutory requirements and not permit these procedures to become mechanical or perfunctory. Where the trial court has supervisory jurisdiction over other judicial officers who perform these functions, the court should ensure that this standard is observed.

**History of Standard**

This is former Standard 6-1.8. The changes are both stylistic and designed to be more inclusive.

**Related Standards**

ABA, Standards for Criminal Justice, Urban Police Function, Standard 1-8.1(b) (2d ed. 1980)

**Commentary**

Truly “detached scrutiny by a neutral magistrate”’ is essential to our constitutional framework. This standard emphasizes that a trial should treat every motion or application, whether procedural or substantive, on its own merits and should not allow its constitutional review process to become rote or mechanized in any manner. In addition to the judge’s own decision-making and processes, the judge must set an example for others in the system (for example, court personnel, prosecutors,

and police). If the trial judge fails to treat each case with the care, consideration and impartiality required by the constitution, it will be even more difficult to assure that others conscientiously perform their constitutional duties. By carefully scrutinizing applications for search or arrest warrants, or protective or restraining orders, and by insisting on compliance with all applicable legal requirements, the judge serves as an exemplar for others involved in the process. Laxity in these matters invites abuse of civil rights, breeds disrespect for the judicial process, and can taint the prosecution's case against an accused.²

Standard 6-1.11. Communications concerning prisoner status

(a) The trial judge should seek to ensure that the status of persons held in jail awaiting formal charge, trial, or sentence is monitored. The judge should take appropriate corrective action when required.
(b) The trial judge should respond promptly to specific inquiries from persons held in custody and, if warranted, should make inquiries or take other action.

History of Standard

This is former Standard 6-1.9. Subsection (a) has been modified to make clear that judges may rely on other appropriate government officials to monitor the status of incarcerated individuals. Subsection (b) is new.

Related Standards

ABA, Standards for Criminal Justice, Speedy Trial, Standards 12-1.1(b), 12-1.2 (2d ed. 1980)

Commentary

The former standard, which is now subsection (a), imposed an affirmative duty on the appropriate trial judge to inquire periodically con-

cerning persons being held in jail. The standard was changed to make clear that the judge does not have to do this personally. Rather, the trial judge must ensure that a system is in place that can effectively monitor the status of detainees so that they do not remain in jail unjustly or fall through cracks in the process. Responsibility for the system might be handled, for example, through the probation office or the sheriff’s department. If a problem with a detainee’s status is detected, the “appropriate corrective action” mentioned generally means contacting counsel for the detainee. The NAC standard imposes no similar obligation on the judge, but does provide for the detainee to seek periodic judicial review of his or her detention and the conditions thereof.1 Although not specifically stated, the trial judge should also take steps to ensure that detainees awaiting a hearing are brought to court promptly, avoiding the uncertainty and anxiety of unnecessarily delayed appearances.

In several states there is a statutory requirement that periodic lists of jail prisoners be prepared. These statutes require that the list be delivered to a court or judge. Whether or not such a statute exists, the court has inherent jurisdiction to require similar reports for all persons held awaiting trial or confined on court-issued process. Such reporting tends to prevent unauthorized or protracted confinement. A report should indicate the cause of the confinement, the date it commenced, and why the person has not been released. The judge receiving a report should make such further inquiries as are likely to prevent abuse. Appropriate sanctions may follow the denial of speedy trial, as set forth in Standards 12-2.1, 12-4.1, and 12-4.2.

New subsection (b) requires the judge to respond to specific inquiries from persons being held in custody and take action if warranted. The trial judge is not a supervisor of the jail. However, when a complaint is presented to the judge concerning the detention or treatment of a prisoner, the judge should take those steps necessary to have the matter investigated. If the facts indicate that there is abusive treatment or neglect, the judge should see that remedial action is taken. Again, the judge’s duties generally are satisfied by contacting counsel for the detainee. It is also important that the judge promptly acknowledge receipt of communications from or regarding a prisoner.

1. NAC, Corrections 4.5.
PART II.

GENERAL RELATIONS WITH COUNSEL
AND WITNESSES

Standard 6-2.1  Ex parte discussions of a pending case

The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties or when authorized by law or in accordance with approved practice. The judge should ensure that all ex parte communications are subsequently noted on the record.

History of Standard

The last sentence is new. Other changes are stylistic only.

Related Standards

ABA, MODEL CODE OF JUDICIAL CONDUCT, CANON 3B(7) (2000)

Commentary

Ex parte discussions of pending cases should be strictly avoided.1 Additionally, regular contacts between the trial judge and either the prosecutor or defense attorney should be kept to a minimum. While it may be necessary for prosecutors (or defenders) to be in regular contact with a judge regarding scheduling or caseload matters, the judge should ensure that the contacts do not involve any discussion of pending matters and also should be sensitive to the appearance of over-familiarity with one side or the other. The judge should keep these meetings isolated from contexts that might easily be misconstrued. Practices such as

1. See ABA, Model Code of Judicial Conduct, Canon 3B(7) (2000). The matter of prohibition of ex parte discussions is also dealt with elsewhere in these standards. See ABA, Standards for Criminal Justice, Prosecution Function, Standard 3-2.8(c), and Defense Function, Standard 4-7.1(b) and commentary (3d ed. 1993).
having prosecutors and judges share a private dining area are discour-aged, as indicated in the commentary to Standard 6-1.6.

If an ex parte communication involving a procedural or substantive matter in a pending case does occur, including a matter involving scheduling, administrative matters or emergencies, all other parties should be notified of the substance of the ex parte communication and offered an opportunity to respond. The substance of the ex parte communication and any response should be noted on the record, which may be sealed if appropriate. Such inclusion in the record will reduce both the likelihood and appearance that the communication had any influence on the proceedings.

Standard 6-2.2. Duty to witnesses

The trial judge should permit full and proper examination and cross-examination of witnesses, but should require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses.

History of Standard

The phrase “and without seeking to unnecessarily intimidate or humiliate them” has been deleted from subsection (a). Subsection (b) has been deleted.

Related Standards

ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, STANDARD 3-5.7, AND DEFENSE FUNCTION, STANDARD 4-7.6 (3d ed. 1993)
NDAA, NATIONAL PROSECUTION STANDARDS 77.1–77.6 (2d ed. 1991)

Commentary

The trial judge has the responsibility to control the behavior of the attorneys in his or her courtroom. This standard, together with Standard 6-2.3, makes clear that the judge should allow full cross-examination, and thus should not cut counsel off during an appropriate cross-examination. At the same time, the judge has a duty to each witness to ensure that he or she is not subject to unfair tactics or to an unfair invasion of his or her privacy. The trial judge “should require the inter-
rogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witness." A further reference to avoiding unnecessary intimidation or humiliation of witnesses was deleted as redundant and does not signify a policy change. The proper scope of a prosecutor's and defense attorney's examination of witnesses is discussed in detail in Standards 3-5.7 and 4-7.6 governing the prosecution and defense functions. The line between legitimate vigorous cross-examination and the abuse of witnesses may sometimes be a thin one, but abusive conduct is usually identifiable in the context of actual examination. The trial judge has the obligation not to permit such abuse.¹ NDAA standards are in accord.²

Former subsection (b), which had instructed the trial judge not to permit examination of witnesses at the witness stand, requiring instead that the examination take place from counsel table or a lectern, was deleted in recognition of the range of practices used in various jurisdictions. Although an attorney can sometimes use his or her physical presence to contribute to the harassment of a witness, the standard provides the trial judge with sufficient discretion and control to put an end to such conduct, if abusive or unduly intimidating.

**Standard 6-2.3. Duty to control length and scope of examination**

The trial judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry.

**History of Standard**

"Improper" was added to the Third Edition.

**Related Standards**

ABA, Standards for Criminal Justice, Prosecution Function, Standard 3-5.7, and Defense Function, Standard 4-7.6 (3d ed. 1993)

NAC, Courts 4.15

² NDAA, National Prosecution Standards (2d ed. 1991) 77.1-77.6.
**Commentary**

This standard recognizes the right and duty of the trial judge to exercise reasonable control over the examination and cross-examination of witnesses. Preventing excessively repetitious or irrelevant questions ensures the economical use of court time, protects witnesses from harassment, and avoids irrelevancies that may obfuscate the issues and mislead the jurors. Reasonable latitude should be given to counsel, but examination of witnesses must be kept within legitimate bounds. A reference to "improper" questioning was added to the third edition because some lines of inquiry, although marginally relevant, could be offensive or abusive, and therefore should not be permitted.

**Standard 6-2.4. Duty of judge on counsel's objections and requests for rulings**

The trial judge should respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel should be permitted to state succinctly the grounds of his or her objections or requests; but the judge should nevertheless control the length, manner and timing of argument.

**History of Standard**

A reference to the "timing" of argument was added to the second sentence in the Third Edition.

**Related Standards**


NDAA, National Prosecution Standards 83.1 - 83.5 (2d ed. 1991)

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2. See FR Evid 401

3. See FR Evid 403.
Commentary

This standard, which is similar to NDAA standards,1 is intended to encourage the trial judge to exercise self-restraint and fairness in permitting counsel for the prosecution and for the defense to perform their duties. When acting within the legitimate scope of their responsibilities, counsel should be free from judicial interference.2 Improper judicial obstruction or refusal to allow counsel to make a record can only diminish confidence in the impartiality of the court.3

The standard equally affirms the trial judge’s authority and obligation to prevent unduly extended, irrelevant, premature, dilatory or repetitive argument. While the standard affirms the right of counsel to object to rulings and to make known the grounds of an objection, it authorizes the trial judge not to permit argument that unnecessarily goes beyond these two basic purposes. A reference to the “timing” of argument was added to emphasize that certain things need immediate attention (for example, ruling on the permissibility of questioning) while other matters might be postponed (for example, ruling on a motion for a mistrial), and to highlight that certain things should be handled in front of the jury while others need not. The trial judge should also consider whether certain arguments can be scheduled, without adverse effect on the parties’ rights, so as not to inconvenience the jury in the case.4

The trial judge should allow counsel reasonable latitude in making the record of objections and offers of proof for appeal.

Standard 6-2.5. Duty of judge to respect privileges

The trial judge should respect the obligation of counsel to refrain from speaking on privileged matters, and should avoid putting counsel in a position where counsel’s adherence to the obligation, such as by a refusal to answer, may tend to prejudice the client. Unless the privilege is waived or is otherwise inapplicable, the trial judge should not request counsel to comment on evidence or other matters where counsel’s knowledge is likely to be gained from privileged communications.

1. NDAA, NATIONAL PROSECUTION STANDARDS 83.1-83.5 (2d ed. 1991)
2. See ABA, Standards for Criminal Justice, Prosecution Function, Standards 3-5.5 to 3-5.9, and Defense Function, Standards 4-7.4 to 4-7.9 (3d ed. 1993).
History of Standard

The phrase "or is otherwise inapplicable" was added to the third edition.

Related Standards

None

Commentary

The line between a lawyer's obligation to a client and the lawyer's duty of candor to the court is not always clear. In recognition of this ambiguity, the trial judge should endeavor to minimize the circumstances under which conflicts between these duties arise. The judge, as an officer of the court, should not take unfair advantage of the lawyer's obligations by asking for information that the lawyer has a duty not to disclose. When there is risk of a conflict, the best policy for the trial judge is to avoid the inquiry.

Standard 6-2.6. Duty to juries

(a) The trial judge has the responsibility to treat the jury with dignity. This includes the responsibility to both inform the jury of anticipated scheduling and assure that the jury has an opportunity to deliberate on a reasonable schedule. The trial judge should also endeavor to assure that the jury has comfortable surroundings.

(b) The trial judge should conduct the trial in such a way as to enhance the jury's ability to understand the proceedings and to perform its fact-finding function.

History of Standard

The standard is new for the Third Edition.

Related Standards


Commentary

This standard was added to the Third Edition in recognition of the importance of the jury in our criminal justice system. In decisions regarding scheduling and convenience, the interests of the jurors have often been ignored. The new standard encourages the trial judge to consider the demands on the jurors, in addition to the schedules of counsel and the court, in the interest of fairness and justice. Not only is the jury the ultimate decision-maker in a jury trial, but the jury is also the public’s principal contact with the court system. Jurors should be treated with this in mind.2

The trial judge should, of course, treat the jury courteously. He or she should ensure that the jurors are kept informed of anticipated recesses or delays, that they have the opportunity to conduct their deliberations within the bounds of a reasonable work schedule (while adhering to their wishes to continue their work), and that they are made as comfortable as possible within the constraints of the physical reality of the courthouse. Consideration of the demands of the process on the lives of the jury members is required.

Paragraph (b) instructs the trial judge to conduct the trial in such a way as to maximize the effectiveness of the jury’s role. Jurors generally will not be familiar with the court system or the progress of the proceedings. There are some very basic steps that the judge can take to ease stress on the jury and facilitate their work. For example, the trial judge should make sure that the jury can hear and understand the witnesses and can see the exhibits introduced. The judge should avoid long and unnecessary delays and continuances, especially on matters that can be handled before the jurors arrive for the day or after they leave. In complicated trials, the judge might confer with counsel regarding how exhibits are to be compiled for the jury, whether interim instructions might be appropriate, and whether note taking might be appropriate. The clearer the trial judge can make the proceedings for the jury, the greater the likelihood of efficient deliberations, and the higher the probability of accurate fact-finding and a just result. Jurisdictions have experimented with improving the jury function through such devices as

2. See James Kelley, Addressing Juror Stress: A Trial Judge’s Perspective, 43 DRAKE L. REV. 97 (1994) (discussing the trial judge’s responsibility to make jury duty as “painless” as possible, including the duty to recognize scheduling problems and psychological stress).
juror orientation programs, juror note-taking, permitting questioning of witnesses by jurors, and simplifying jury instructions. These standards do not endorse any specific practice in criminal trials, but rather encourage the judge to consider those steps that may be appropriate in particular cases.

In addition, where electronic technology is used in the courtroom, the judge should strive to make its use available to the jury. Some juries have already been given access to computer screens to monitor the evidence, and where permitted by local rules, to use computers to access the transcript. The technological courtroom is a rapidly developing phenomenon, and juries should not be left out of this process.


5. Id., Final Report; Thomas L. Hafemeister, Juror Stress, 41 ADVOC. 14 (March 1998); but see, ABA, Standards Relating to Juror Use and Management, Standard 16(c), commentary at 151 (1993) (jurors should not be encouraged to ask questions, but there should be well-defined procedure permitting juror questions to be posed).

PART III.
MAINTAINING THE DECORUM OF THE COURTROOM

Standard 6-3.1. Special rules for order in the courtroom

The trial judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Standards Relating to Trial Courts, Standards 2.00, 2.70 (1992)

Commentary

A statutory code of criminal procedure governs many, but not all, substantive and procedural matters that arise during the course of a criminal trial. Gaps may be filled in by local court rules and the trial judge's own rules. Because of the physical peculiarities of a particular courtroom, the problems of a particular case (for example, the number of defendants and defense counsel), or the lack of specificity in applicable codes and court rules regarding customs or acceptable practices, the judge can reduce the possibility of confusion and unnecessary friction by articulating the special rules to be followed in that courtroom either routinely or for a particular case.¹

¹. See United States v. Barcella, 432 F.2d 570, 572 (1st Cir. 1970).
Those who will be affected by such rules, of course, should be given timely notice of them. Counsel are expected to know the local rules of court but cannot be expected to know a trial judge's particular rules without some notification of them. There is always some danger that judicial criticism or correction, particularly in front of the jury, may have a prejudicial effect on a party. By notifying counsel before the proceedings, the judge may avoid the necessity of correcting the conduct of a participant in the course of a trial or hearing. Whether general in nature or designed for a particular case, the judge is best advised to reduce the court rules to writing, both to give clear notice and to avoid later confusion.

This standard is not intended to relieve attorneys from other jurisdictions of the primary obligation to acquaint themselves, through association with local counsel or otherwise, with those local procedures and ground rules that are familiar to the local bar. The purpose is to facilitate the trial of cases and to reduce the need for unnecessary admonitions to counsel as to counsel's conduct or courtroom practices. Compliance with the standard should minimize the risk of error that attaches to improperly reprimanding an attorney in the course of a trial.2

Standard 6-3.2. Security in court facilities

The trial judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum of the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact.

History of Standard

The standard is new for the Third Edition.

Related Standards


2. See Killilea v. United States, 287 F.2d 212 (1st Cir. 1961); see also cases in Rothblatt, Prejudicial Conduct of the Trial Judge in Criminal Cases, 2 CRIM. L. BULL. 3 (Sept. 1966).
Commentary

Occasionally, real risks of physical harm are present in a criminal courtroom. This standard concerns the trial judge’s duty to try to ensure the physical security of the courtroom; Standard 6-3.10 concerns the judge’s related power to deal with threatening conduct committed in the courtroom. Although some courthouses use magnetometers or x-ray machines to screen entrants for weapons, others do not, and in any event, such devices are not infallible. Thus, in certain cases, such as in the case of alleged organized criminal behavior, for example, gang activity, or where threats have been made, the trial judge should take steps to secure the courtroom. Precautions might include screening for weapons and posting armed security personnel.

In order to avoid any prejudice or adverse impact on the defendant, the trial judge should confer with those responsible for courthouse security, review the options available, and seek to use the least imposing means possible. If practical, jurors should be kept unaware of extra security precautions. Highly visible security of any kind can signal that trouble is expected, and can suggest that it is the defendant who is responsible. This has the potential to create bias against the accused. Witnesses could also be intimidated. Whatever security measures are used, all relevant parties (such as all counsel or all witnesses or all observers) should be subject to the same rules or procedures.

Where the local courtroom cannot adequately handle the necessary security, the trial judge should consider transferring the case to another facility. This could be accomplished by either a change of venue or by moving the case to a different facility.

Standard 6-3.3. Colloquy between counsel

The trial judge should make known before trial that, when court is in session, no colloquy, argument, or discussion directly between opposing counsel in the presence of the judge or jury will be permitted on matters relating to the case, except that, if a brief conference between counsel might tend to expedite the trial, the judge will grant them leave to confer.

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History of Standard
This is former Standard 6-3.2. There are stylistic changes only.

Related Standards
NDAA, National Prosecution Standards 6.5(b) (2d ed. 1991)

Commentary
The standards emphasize throughout the trial judge’s responsibility to maintain the dignity, order, and fairness of the criminal proceedings. One procedure that is essential to proper courtroom decorum is requiring that all requests and objections be first addressed to the judge. The judge can only remain in control of the trial proceedings if he or she is the arbiter of all matters, and if all argument and comment is directed to him or her. At the same time, the judge should recognize that direct exchanges between counsel, perhaps leading to stipulations or other salutary consequences, are sometimes consistent with the orderly dispatch of the court’s business. In such circumstances, however, the judge should require that counsel request permission from the court to confer with one another.

Standard 6-3.4. Courtroom demeanor
(a) The trial judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, jurors, witnesses, victims, lawyers, and others with whom the judge deals in an official capacity. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.
(b) The trial judge should require similar conduct of staff, court officials and others subject to the judge’s direction and control.
History of Standard

Language has been added, including paragraph (b), to conform the standard to Canon 3B(4) of the Model Code of Judicial Conduct. The last sentence of the former standard has been moved and added as subsection (b) of Standard 6-3.5. Other changes are stylistic only.

Related Standards

ABA, Model CODE OF JUDICIAL CONDUCT, CANON 3B(4) (2000)
NDAA, NATIONAL PROSECUTION STANDARDS 23.4 (2d ed. 1991)

Commentary

The conduct of the judge sets the tone of the proceedings. This standard states what may seem obvious, but which merits reiteration: the trial judge must guard against any conduct that is even questionably disrespectful to a participant or to the proceedings. Likewise, the judge should not demonstrate even a hint of partiality. Even when faced with trial disruption resulting from a deliberate tactic, the trial judge must continue to be an example of proper deportment and must respond reasonably and with composure. When a judge is being provoked, it may be particularly difficult to meet this standard; but it is precisely at such times that it is most important for the judge to maintain equanimity.

Criminal proceedings are often stressful, and a trial judge is susceptible to the full range of human emotions. Nevertheless, the judge, in his or her governing and leadership role, has the obligation to be patient with and courteous to all participants in the process. This may occasionally require extreme forbearance and the exercise of self-control, but when a judge decides to run for judicial office or to accept an appointment, he or she must realize that maintaining judicial decorum is essential to the dignity and respect for the criminal justice process. Nothing can undermine confidence in the system more quickly than a discourteous and ill-tempered judge.

1. See, e.g., United States v. Singer, 710 F.2d 431 (8th Cir. 1983) (trial judge continuously intervened throughout the trial and remarked on the evidence in a fashion designed to assist the prosecution with its case); United States v. Tilton, 714 R.2d 642 (6th Cir. 1983) (conduct of the trial judge in questioning witnesses went “beyond that generally expected of one who is to take on the role of a neutral arbiter” and was “far from desirable”).
2. See Standard 6-1.1(a) and commentary.
On occasion the remarks of counsel or others may invite response by the judge. The judge should resist the temptation to become embroiled in disputes, and should limit himself or herself to making such rulings as are proper. Similarly, the court should remain neutral with respect to the prosecution and defense, and should not exhibit any personal feelings or opinions.\(^3\)

Paragraph (b) has been added to maintain consistency with Canon 3B(4) of the Model Code of Judicial Conduct, and to emphasize the judge’s obligation to exercise control over court personnel to ensure that they follow the sentiments expressed in the standard.

**Standard 6-3.5. Judge’s use of powers to maintain order**

(a) A trial judge shall require order and decorum in judicial proceedings. The trial judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial.

(b) When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so outside the presence of the jury, if possible. Any such comment should be in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

**History of Standard**

As modified, this is former Standard 6-3.3. The last two sentences of former Standard 6-3.3 have been moved and added as new Standard 6-4.2. Subsection (b) is language taken from Standard 6-3.4, except for the language “outside the presence of the jury, if possible. Any such comment should be,” which is new.

**Related Standards**

ABA, MODEL CODE OF JUDICIAL CONDUCT, CANON 3B(3) (2000)

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Commentary

Judicial proceedings must be conducted with dignity and composure. Outbursts, disruption, and histrionics cannot be allowed to infect the proceedings and influence the fact-finder, thereby undermining respect for the criminal justice process. The trial judge must use his or her judicial authority to maintain control of the proceedings. Normally, the judge should use the least severe measures available to maintain order and decorum in the courtroom. Usually, order can be maintained by discussion, recess, or admonitions and warnings, if necessary. Judges are encouraged to use these devices instead of the more onerous sanctions of fines and contempt, which require a hearing, and which should be reserved for the truly serious cases.1 A contempt citation may prevent a future admission pro hac vice, as is indicated in Standard 6-3.11.

Subsection (b) is the former last sentence of Standard 6-3.4 which has been expanded into two sentences by adding and suggesting a preference that any judicial comment or reprimand take place outside the presence of the jury. The subsection also instructs the trial judge, when issuing reprimands or warnings, to avoid arguments with participants in the proceedings and to avoid unnecessary criticism of those who are before him or her. Especially when commenting on the conduct of witnesses or spectators who may be unfamiliar with courtroom procedures, a reprimand should be delivered in a courteous manner.2 When it becomes imperative, the judge is empowered to take further steps by use of the sanctions discussed in Part IV.

Standard 6-3.6. The defendant’s election to represent himself or herself at trial

(a) A defendant should be permitted, at the defendant’s election, to proceed in the trial of his or her case without the assistance of counsel after the trial judge makes thorough inquiry and is satisfied that the defendant:

1. See Louis E. Raveson, Advocacy and Contempt: Constitutional Limitations on the Contempt Power, 65 WASH. U. L. REV. 477 (1990) (suggesting that the contempt power should be used in only the most severe cases).

2. See Standard 6-3.10 and commentary.
(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
(ii) is capable of understanding the proceedings; and
(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

History of Standard

Subsections (a)(i)-(ii) have been amended to reflect decisions of the United States Supreme Court since the Second Edition.

Related Standards

ABA, Standards for Criminal Justice, Providing Defense Services, Standard 5-8.2 (3d ed. 1992)
ABA, Standards Relating to Trial Courts, Standard 2.23 (1992)
ALI, Model Code of Pre-Arraignment Procedure §§ 140.8(2), 310.1(5)
NAC, Courts 13.1
NCCUSL, Uniform Rules of Criminal Procedure 711

Commentary

Standard 6-3.6(a)

The right of a defendant to represent himself or herself was explicitly established by the United States Supreme Court in Faretta v. California,1 and is now recognized by federal law,2 the Federal Rules of Criminal Procedure,3 and many state constitutions.4 The right, however, is not absolute. A defendant’s Sixth Amendment right to assistance of counsel cannot be relinquished unless “competently and intelligently”

1. 422 U.S. 806 (1975).
3. FRCrP 44.
4. See, e.g., AZ Const. Art. 2, § 24; MO Const. Art. 1, § 18(a); PA Const. Art. 1, § 9; TX Const. Art. 1, § 10.
waived. Moreover, the interest of the public in an orderly, rational trial is entitled to consideration in determining a defendant's right to appear pro se. Nevertheless, if a defendant knowingly and voluntarily waives the right to counsel, the defendant must be permitted to proceed in his or her own defense, regardless of the severity of the offense charged.

In this latter regard, the standard has been amended to clearly incorporate the United States Supreme Court's decision in *Godinez v. Moran*, in which the Court rejected the notion that competence to waive the right to counsel must be measured by a higher or different standard than the test for competence to stand trial taken from *Dusky v. United States* (which requires a rational and factual understanding of the proceedings). However, "a determination that [the defendant] is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted." The Third Edition reflects the requirements of *Dusky* and *Moran*.

A defendant's rejection of the right to the assistance of counsel may be grounded on the defendant's belief that, with counsel, the defendant will be denied any opportunity to speak for himself or herself and that only through personal presentation of the case can the merits of the case really be made known. Further, a defendant may believe that no lawyer will faithfully represent the defendant at a fair fee, or that the judicial system is so inherently unjust that the only chance for a fair trial is for the defendant to represent himself or herself, or that an appointed attorney actually works for the government. Other motives may include the hope that the absence of counsel may afford a basis for reversal of a conviction regarded as inevitable, or the desire to vent hostility through the dramatic vehicle of a disorderly trial.

Whatever the motive behind a defendant's wish to appear pro se, a judge cannot disregard the long-term interest of the accused in having guilt or lack of guilt fairly determined. Except in the most unusual

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10. 509 U.S. at 402.
circumstances, a trial in which one side is unrepresented by counsel marginalizes the process and undermines confidence in the outcome. Thus, once a defendant has clearly and unequivocally declared his or her intention to appear pro se, the trial judge must conduct a thorough inquiry into the circumstances surrounding the assertion to assure that it is knowingly and voluntarily made. This inquiry should be incorporated into the trial record by recording colloquy with the accused and should include: advising the defendant of the right to counsel and the importance of having counsel; warning the defendant of the "dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'; and inquiring into the defendant's educational background, previous experience with criminal trials, and general competence. The trial judge should also make clear that the defendant will have to comply with all the rules of trial procedure and that the trial judge cannot be expected to conduct the defense. Although a defendant need not possess the skill and intelligence of a lawyer, the defendant must possess the mental competence to be capable of understanding the proceedings. A defendant should also be warned that cross-examination will not be avoided by, in effect, testifying directly to the jury. Rather, the defendant will be limited to traditional testimony (by taking the stand as a witness, if defendant so chooses). Before a trial judge accepts a defendant's waiver of the right to counsel, the judge should also require that the defendant consult with a lawyer.

12. The question of whether a defendant made a knowing and intelligent waiver of the right to counsel at trial is not answered by merely reviewing how well the defendant performed in the defense. State v. Northington, 667 S.W.2d 57 (Tenn. 1984).
13. See, e.g., United States v. Rylander, 714 F.2d 996 (9th Cir. 1983); Munkus v. Furlong, 170 F.3d 980 (10th Cir. 1999).
14. Id.
16. See e.g., Faretta v. California, 422 U.S. at 807.
17. Id.
18. Id. at 835.
19. The standard is no more stringent than that for competence to stand trial or waiver of other constitutional rights. See Godinez v. Moran, id. note 7.
A related NAC standard provides that defendants thought to be unable to deal effectively with issues likely to be raised at trial, or whose self-representation is likely to impede processing the case, or whose conduct is likely to be disruptive, should be denied the right to appear pro se. Rule 711 of the Uniform Rules of Criminal Procedure suggests that waiver of counsel not be accepted unless the court is satisfied that the defendant fully understands the charges and the value of the assistance of counsel, and until the defendant has first consulted with an attorney. An ALI standard provides for waiver of counsel only after a defendant is apprised of the right to counsel and "of the significance of counsel for someone in his position." Irrespective of these precautions, the trial judge must remain aware that, if the defendant meets the requirements of Supreme Court precedent incorporated in this standard, the ultimate decision about self-representation is the defendant's. Upon such an election, the judge's attention is called to Standard 6-3.7 on standby counsel.

**Standard 6-3.6(b)**

Since the pro se defendant is not a trained lawyer, the trial judge should avoid impatience with him or her, especially in the jury's presence. However, Standard 2.23 of the Standards Relating to Trial Courts, goes further establishing an affirmative duty of the trial court to "take whatever measures may be reasonable and necessary to insure a fair trial." Measures that might be taken include arranging for access to a law library, making available necessary legal materials, and appointing standby counsel as provided in Standard 6-3.7. Although the judge is not under a duty to provide personal instruction on courtroom protocol and procedure, the judge may do so if he or she wishes. Also, some courts have held that the trial judge has the responsibility to inform the pro se defendant of the elements of the charge and potential defenses, and to prevent the improper admission of evidence at trial even if the pro se defendant fails to object.

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22. ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1(5).
Standard 6-3.7. Standby counsel for pro se defendant

(a) When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in trials expected to be long or complicated or in which there are multiple defendants, and in any case in which a severe sentence might be imposed.

(b) The trial judge should clearly notify both the defendant and standby counsel of their respective roles and duties.

(c) When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

History of Standard

Subsection (a) was amended in two ways for the Third Edition. The reference to the obligation of standby counsel “to call the judge’s attention to matters favorable to the accused upon which the judge should rule on his or her motion” was deleted and subsection (c) was added. Also, subsection (a) now takes the position that standby counsel should always be appointed in “capital cases and in cases in which the maximum penalty is life without the possibility of parole,” and ordinarily be appointed in complicated or serious cases. Subsections (b) and (c) are new.

Related Standards

ABA, Standards for Criminal Justice, Defense Function, Standard 4-3.9 (3d ed. 1993)
ABA, Standards Relating to Trial Courts, Standard 2.23 (1992)
NCCUSL, Uniform Rules of Criminal Procedure 711
Commentary

Standard 6-3.7(a)

The role of standby counsel in a pro se case is to act as a safety net, which can take a number of forms depending on the jurisdiction. One role is to be ready to take over the defense, protecting the Sixth Amendment right to counsel and avoiding a mistrial, if and when the defendant changes his or her mind about self-representation. Standby counsel also can facilitate fairness and justice by assisting the pro se defendant in certain procedural or substantive matters or, when desired and permitted, by active joint representation. The overriding interest in appointing standby counsel, whatever the arrangement with the defendant, is to facilitate the function of the criminal justice process, while protecting the autonomy of the defendant and the principles and policies underlying the right to counsel.

After the judge has conducted the inquiry and stated the admonitions contemplated by Standard 6-3.6, and has permitted the accused to appear pro se, he or she should nonetheless always appoint standby counsel in cases in which the potential penalty is death or mandatory life in prison. In other cases, in all but the simplest trials, the court should ordinarily appoint standby counsel to assist the accused if and when called upon and to perform the limited independent role contemplated by this standard. The judge should not, over the accused’s objections, foist a lawyer on the accused by permitting standby counsel to examine and cross-examine witnesses or make arguments. The United States Supreme Court in Faretta v. California declared that a judge “may even over objection by the accused’ appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.” Often, the accused will quickly recognize the value of counsel and will consent to being represented by the standby counsel.

The trial judge must not let standby counsel interject unwanted or unsolicited advice, objections, or motions. In McKaskle v. Wiggins, the Supreme Court made clear that the Sixth Amendment right to self-representation must be respected, and that unwanted interference,

2. Id. note 1.
especially in front of the jury, could undermine this right and lead to the reversal of any resulting conviction. Subsection (c), however, provides the pro se defendant more protection from unwarranted interference from standby counsel than does the McKaskle decision, limiting counsel's assistance to that which is requested by the defendant and/or directed by the court.³

**Standard 6-3.7(b)**

Subsection (b) admonishes the trial judge to make the ground rules on self-representation and participation by standby counsel clear from the outset. Once the defendant elects the kind of representation standby counsel will provide, the judge should make sure both counsel and the defendant understand their respective roles. If, however, the defendant accepts the standby as counsel, the judge should make clear to the defendant that the lawyer and not the accused will conduct the defense thereafter.⁴

**Standard 6-3.7(c)**

Although there is no constitutional right to "joint" or "hybrid" representation, some commentators have advocated such a right,⁵ and some courts and local rules permit it. Subsection (c) recognizes the possibility of mixed representation, which may prevent miscarriages of justice. A judge should encourage the defendant to accept such an arrangement in appropriate cases.

Rule 711 of the Uniform Rules of Criminal Procedure and the commentary to Standard 2.23 of the Standards Relating to Trial Courts also provide for standby counsel. This standard is intended to apply to all stages of the proceedings conducted by judges. Local rules on standby counsel, however, will govern.

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⁴ See People v. Denanny, 519 N.W.2d 128 (Mich. 1994); State v. Small, 988 S.W.2d 671 (Tenn. 1999).

Standard 6-3.8. The disruptive defendant

A defendant may be removed from the courtroom during trial when the defendant's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. The removed defendant ordinarily should be required to be present in the court building while the trial is in progress. The removed defendant should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed defendant who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

History of Standard

There are stylistic changes only.

Related Standards

ABA, STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, STANDARD 15-3.2 (3d ed. 1996)

Commentary

In Illinois v. Allen, the Supreme Court held that a disruptive defendant could be removed from the courtroom and the trial continued in the absence of defendant, subject to certain conditions. The Court said:

Although mindful that the courts must indulge every reasonable presumption against the loss of constitutional rights ... we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behaviors, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be

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carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.²

Public confidence in the trial process requires that removal of a defendant be limited to cases urgently demanding that action be taken, that it be done only after explicit warning, that there be a standing opportunity for the defendant to return to the courtroom, and that the burden that absence creates for the defense be kept to the unavoidable minimum.³ Both to promote public confidence and to encourage the defendant's participation in the trial, the defendant periodically should be offered an opportunity to return to the courtroom, conditional upon good behavior. The defendant's exclusion should end when the defendant assures the court that he or she will behave. Although removal may become necessary in limited cases, the standard emphasizes the right of the defendant to reform his or her behavior and return to the courtroom.

When the defendant is excluded, defense counsel should be granted reasonable opportunities to confer with the defendant. Although on rare occasions it may not be possible to keep a defendant in the court building, ordinarily the defendant should be near the courtroom while the trial is in progress to be available for return and for consultation. Of course, a removed non-custodial defendant cannot be required to stay in the court building. Recognizing that technological devices that might be available in the larger cities are not always available in smaller county courthouses, when practical, the removed defendant should be permitted to hear and observe the proceedings through audio/visual equipment.

² Id. at 343.
³ Quintana v. Commonwealth, 295 S.E.2d 643 (Va. 1982) (inasmuch as defendant's behavior in courtroom was disorderly, disruptive, and disrespectful, and persistently contumacious in face of repeated warnings, trial judge properly removed him from courtroom and, at some point after jury began deliberating, allowed defendant to return and had reporter and interpreter read aloud transcript of proceedings recorded in his absence).
Numerous techniques other than removal from the courtroom have been suggested for dealing with disruptive defendants. There have been actual instances in which the trial judge has ordered a defendant shackled and gagged, presumably in an effort to permit the trial to continue without sacrifice of the defendant's right to be present. The Supreme Court warned in *Illinois v. Allen*:

> But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

The Court pointed out that restraints on the defendant, especially as to the defendant's ability to communicate, greatly reduced the normal advantages of being present at trial. Without ruling out the propriety of these techniques under all circumstances, the Court obviously discouraged their use.

It has been suggested that modern technology provides methods of dealing with disruptive defendants without removing them from the trial. Suggestions have ranged from the use of an isolation booth in the courtroom to the provision of video and audio links between the courtroom and the removed defendant. There remain serious doubts whether these measures would be effective in preventing disruption and distraction. Even the absent defendant can seriously interfere with...

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5. See Tyars v. Finner, 709 F.2d 1274 (9th Cir. 1983); Commonwealth v. Conley, 959 S.W.2d 77 (Ky. 1997) (defendant who fled courtroom and escaped during his arraignment could be shackled to prevent escape during trial, where judge questioned prospective jurors during voir dire examination about their ability to presume defendant's innocence while he was wearing shackles and excused prospective jurors who stated that their judgment might be impaired, and judge gave jury several admonitions to the effect that defendant was presumed innocent and that jurors were not to take into consideration fact that defendant was under restraint).

6. 397 U.S. at 344.
the defense attorney's ability to follow the proceedings and participate
effectively if the attorney is tied to an open communications link with
an obstreperous defendant. In any event, there is no obligation on the
court to provide extraordinary measures to protect the right of a defend­

ant to be in the courtroom if, after appropriate warnings have been
made, the defendant's presence is inconsistent with orderly progression
in the trial process.

The trial judge should also consider the likelihood of disruptions dur­
ing the proceedings in determining issues of severance prior to trial. In
contemplating severance of defendants when the judge has reason to
believe before trial that one or more of the defendants will disrupt the
proceedings, the judge should carefully weigh competing interests.
Judicial efficiency and economy may favor joinder; but disruptive con­
duct at the trial may result in deprivation of a fair trial to co-defendants.7
In the case of multiple defendant trials, cautionary instructions advising
the jury not to allow a disruptive co-defendant's behavior to impact its
decision regarding other defendants is the preferred method of han­
dling the situation. However, if a defendant would suffer undue preju­
dice because of disruption by a co-defendant, severance (and resulting
mistrial) may be the only option.8

**Standard 6-3.9. Misconduct of pro se defendant**

If a defendant who is permitted to proceed without the assistance
of counsel engages in conduct which is so disruptive, including dis­
obeying or failing to respond to judicial orders or rulings, that the
trial cannot proceed in an orderly manner, the court should, after
appropriate warnings, revoke the permission and require represen­
tation by counsel. If standby counsel has previously been appointed,
the counsel should be asked to represent the defendant. When appro­
priate, the trial should be recessed to allow counsel to make the nec­
essary preparations to go forward with the trial.

**History of Standard**

There are stylistic changes only for clarification.

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7. ABA, Standards for Criminal Justice, Joinder and Severance, Standards 13­
3.2(b)(ii), 13-4.2 (2d ed. 1980).
8. See United States v. Kaskela, 86 F.3d 122 (8th Cir. 1996); United States v. Kincaide,
145 F.3d 771 (6th Cir. 1998); Rhoden v, Israel, 574 F.Supp. 61 (E.D. Wisc. 1983).
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Related Standards

NAC, COURTS 13.1(3)

Commentary

Although a pro se defendant cannot be held to the same standards of decorum or competence expected of a member of the bar, such a defendant’s activities should not be immune from the court’s control. The sanctions of removal or contempt, on the other hand, will usually be inappropriate, since the misconduct of a pro se defendant will frequently be a blend of ignorance, emotional involvement, and mounting recognition of the inadequacy of the defense. The preferable course for the defendant who is unable or unwilling to conduct an orderly, adequate defense is to revoke permission for pro se appearance and require the defendant to appear through counsel.1 If the defendant’s misconduct continues after that, the sanctions of removal2 (Standard 6-3.8) and contempt (Standard 6-4.3) may be applied.3

This standard is intended to apply at hearings and other stages of the process over which judges preside, as well as at the trial.

Standard 6-3.10. Misconduct of spectators and others

(a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt. Any person whose conduct in a criminal proceeding tends to menace a defendant, an attorney, a victim, a witness, a juror, a court officer, the judge, or a member of the defendant’s or victim’s family may be removed from the courtroom.

2. See People v. Davis, 851 P.2d 239 (Col. 1993) (upholding exclusion of pro se defendant from courtroom after he spat in the prosecutor’s face, fought with deputy sheriffs, and shouted obscenities at and physically attacked a prosecution witness).
3. In some cases, courts have even approved shackling pro se defendants. Jones v. Meyer, 899 F.2d 883 (9th Cir. 1990); Brooksany Barrowes, The Permissability of Shackling or Gagging Pro Se Criminal Defendants, 1998 U. Chi. Legal F. 349.
(b) When a victim or a member of a victim’s or a defendant’s family is removed from the courtroom during trial, he or she should ordinarily be allowed to return upon assurance of good behavior.

History of Standard

The former first sentence of the standard, “The right of the defendant to a public trial does not give particular members of the general public or of the news media a right to enter the courtroom or remain there,” was deleted as unnecessary, and arguably not in conformity with existing legal standards.

A specific reference to the victim, and a member of the victim’s or the defendant’s family who might be threatened by menacing behavior was added to the second sentence of subsection (a). Likewise, subsection (b), in conformity with Standard 6-3.8, was added to state that, when these persons with a special interest in the trial are removed for disruptive behavior, they be provided an opportunity to return.

Related Standards

ABA, MODEL CODE OF JUDICIAL CONDUCT, CANON 3B(3) (2000)

Commentary

As stated, the judge should maintain the dignity of the courtroom at all times during a criminal proceeding. The judge must ensure the right to a public trial, and to the extent possible, should seek to accommodate the press, family members of the defendant and the victim, and the general public in their desire to be present for a criminal trial. In some cases, this may mean switching to a larger courtroom to make room for members of the public. The right to a public trial is in no way infringed by excluding unruly persons, whoever they may be, and those whose conduct tends to menace the participants.1 Menacing conduct can be subtle, such as threatening gestures or the display of gang signs or colors. Mere

1. Commonwealth v. Martin, 653 N.E.2d 603 (Mass. 1995) (judges must have power to maintain order in court proceedings so that administration of criminal law will be fair and just; as a corollary to this power, judge has authority to exclude spectators whose presence intimidates witnesses or who conduct themselves in a manner that disrupts order and decorum of the proceedings).
presence in the courtroom, although it might make some persons uncomfortable, does not amount to "menacing" behavior.

The trial judge should not too readily infer intent on the part of spectators who engage in minor departures from courtroom decorum, as they may be unfamiliar with expected patterns of conduct. In the case of disruptive conduct, the judge should not precipitously exercise the right to exclude, but should consider the least restrictive alternatives. A gentle correction quietly delivered by trained court officers should generally be tried first.

Just as Standard 6-3.8 provides a removed disruptive defendant with the opportunity to return to the courtroom, new subsection (b) indicates that those with a special interest in the proceedings, like the victim or members of the victim’s or defendant’s family, be offered a similar right to return on the promise of good behavior. Again, the reference to victims does not suggest that a crime has been committed; it is used only in the sense of putative victim, as suggested earlier in the commentary to Standard 6-1.1.

Standard 6-3.11. Attorneys from other jurisdictions

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge should grant such permission if the attorney is admitted to practice and in good standing in another jurisdiction. The judge may:

(a) grant such permission on condition that:

   (i) the petitioning attorney associate with him or her as co-counsel a local attorney admitted to practice in the jurisdiction;

   (ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his or her duties; and

   (iii) the defendant consents to the foregoing conditions; or

(b) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that the attorney has engaged in courtroom misconduct sufficient to warrant disciplinary action.

2. State v. Ware, 498 N.W.2d 454 (Minn. 1993) (although trial court has authority and obligation to maintain order among spectators during criminal trial, court ordinarily should impose least severe sanction appropriate to correct any breach of courtroom peace).
History of Standard

The word "may" has been changed to "should" in the second clause of the first sentence which now reads "the trial judge should grant such permission if the attorney has been admitted to practice and in good standing in another jurisdiction," with the caveats expressed in subsections (a) and (b), the order of which has been switched.

Related Standards

None

Commentary

Even though the defendant has no absolute right to be represented by counsel who is not a member of the court where the trial will be held, great deference should be given to the defendant's choice in counsel. Thus, the trial judge should normally grant a defendant's request to be represented by counsel from another jurisdiction as long as the attorney is in good standing in the other jurisdiction. The language of the standard has been changed in the Third Edition to reflect this presumption. Paragraph (a) suggests some conditions that might be imposed to assure compliance with local rules and procedures, and to minimize the risk of a trial being aborted because of the petitioning counsel's failure to adequately perform his or her duties. No rigid rules are appropriate, however, and each application should be considered on its own circumstances. While it may be prudent to require the addition of local counsel in some cases, it may be totally unnecessary in others. Paragraph (b) sets forth some grounds (by no means exclusive) on which a judge might justifiably decline to permit counsel to be specially admitted. Only when a judge has serious questions about the competency, behavior, or integrity of counsel should permission be denied. The trial judge should apply the law of the forum in determining whether any misconduct brought to the judge's attention would warrant disciplinary action. A citation for contempt may justify a refusal to allow an appearance pro hac vice.¹

¹. See Standard 6-4.3 and the commentary to Standard 6-3.5.
PART IV.
USE OF SANCTIONS

Standard 6-4.1. Power to impose sanctions

The court has the inherent power to protect the integrity and fair administration of the criminal justice process by imposing sanctions. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in the judge’s presence in open court, willfully obstructs the course of criminal proceedings.

History of Standard

The standard refers more broadly to “sanctions” rather than the former “contempt.” Other changes are stylistic.

Related Standards

None

Commentary

The trial judge has the inherent power to impose sanctions for any behavior or activity which undermines the operation of the criminal justice system. This includes the power to punish for acts of contempt and to punish summarily any act of contempt committed in the presence of the court.1 This standard reaffirms these powers. The standards in part IV can be used to guide the trial judge in his or her use of sanctions under varying circumstances consistent with local rules, practice and custom.

Standard 6-4.2. Imposition of sanctions

If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanc-

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1. Cooke v. United States, 267 U.S. 517 (1925); Ex parte Terry, 128 U.S. 289 (1888).
tion appropriate to correct the abuse and deter repetition and should do so outside the presence of the jury, if possible. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction or the time of its imposition.

**History of Standard**

This new standard is the last two sentences of former Standard 6-3.3 with the addition of the new language, "and should do so outside the presence of the jury, if possible," at the end of the first sentence of the new standard. This provision was moved to Part IV because this section specifically deals with the imposition of sanctions. Similarly Second Edition Standard 6-3.5 was deleted. However, its Commentary relevant to sanctions is included below in the Commentary to Standard 6-4.2. The standard no longer refers to referral of an attorney for disciplinary proceedings because this does not constitute a courtroom sanction, although a judge the power or duty to refer such matters to the local bar.

**Related Standards**

None

**Commentary**

In imposing sanctions for courtroom misconduct, the trial judge should select the least severe appropriate sanction.¹ An unnecessarily severe sanction may be self-defeating,² as may any appearance of passion or pettiness, because it will bring "discredit to a court as certainly as the conduct it penalizes."³ It may also engender further displays of disrespect or defiance.

The trial judge should require attorneys to respect their obligations as officers of the court to enable the trial to proceed with dignity. When

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². See Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), cert denied, 466 U.S. 919 (1980).
³. Sacher v. United States, 343 U.S. 1, 8 (1952).
an attorney causes a significant disruption in a criminal proceeding, the
trial judge should discipline the attorney by use of the least severe dis­
ciplinary measure necessary to correct the abuse. Possible sanctions
include (1) reprimand and warning; (2) citation or punishment for con­
tempt; (3) removal from the courtroom; and (4) suspension for a limited
time of the right to practice in the court where the misconduct occurred
if such sanction is permitted by law.

Generally, courts have the power to bar an attorney, for a limited
time, from appearing in the court where the misconduct occurred.4 Such
a restriction seems an appropriate response to conduct that is contemp­
uous of the court, without wholly depriving the attorney of the right to
practice before the bar.

In addition to sanctions for courtroom misconduct, the judge may
have the power or duty to refer the matter to bar authorities in the juris­
diction where the attorney practices so that they may determine if dis­
ciplinary proceedings are appropriate. In making such a referral when
not required to do so, however, the judge should be aware that referral
by a court may have very serious consequences for the attorney
involved.

Standard 6-4.2 recognizes that, if possible, any sanction should be
imposed outside the presence of the jury in order to avoid unnecessary
unfairness and prejudice, and that the appropriate use of a sanction
requires consideration of its effect on the orderly conduct of the trial.
For example, removal of a defense lawyer may well frustrate prosecu­
tion of the case, serving the purpose of the defense’s willful obstruction.
While judges are generally aware of these factors, they are articulated
here to emphasize that at all times the judge’s primary goal is to con­
tinue the proceedings in a fair and orderly manner.

Interference with the proceedings, intentional or otherwise, proba­
bly presents one of the greatest challenges to the trial judge. Challenges
to authority are always difficult episodes, and the trial judge has not
only his or her own dignity to consider, but also must protect the
integrity of the judicial process. Thus, a judge’s response to interfer­
ence with the criminal process must be measured and careful, yet swift
and forceful when necessary. It is a careful balance which judges are
encouraged to strike.

4. Id.; Jones v. Stokes, 551 N.E.2d 220 (Ill. 1989). Federal courts have the inherent
power to suspend or disbar a lawyer from practicing in the district. In re Snyder, 427 U.S.
634 (1985).
Standard 6-4.3. The sanction of contempt

The sanction of contempt should not be imposed by the trial judge unless:

(a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous; or

(b) the conduct warranting the sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

History of Standard

This is former Standard 6-4.2. A stylistic change has been made to refer specifically to the sanction of contempt and the limitations under which it should be imposed.

Related Standards

None

Commentary

Except as to the most willfully disruptive conduct, a trial judge should not find contempt without giving prior notice that the conduct, if engaged in or repeated, would result in a contempt finding. A warning may be effective in preventing further disorder and is therefore preferable to sanctions as a first step.\(^1\) It also assures both the court and the public that subsequent misconduct will be considered willfully contemptuous and deserving of punishment. Moreover, the practice of warning before imposing punishment reduces the risk that attorneys will be deterred from zealous and appropriate advocacy by the fear of punishment.\(^2\) The trial judge should keep in mind that a fine is a form of contempt and is subject to this standard.

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1. It is, for example, improper to hold a witness who has stated a refusal to testify in "anticipatory contempt before the trial has actually started and the witness shown a present refusal to testify." United States v. Johnson, 736 F.2d 358 (6th Cir. 1984).

Although a thorough discussion of the complex law of contempt is beyond the scope of this commentary, a few basic points can be made. Criminal contempt differs from civil contempt, not on the basis of the proceedings in which it is imposed, but based on its function. Civil contempt is designed to be coercive, that is, to enforce compliance with a court ruling or order, whereas criminal contempt is imposed as punishment for past misconduct. Also, civil contempt can be purged by compliance; criminal contempt is a fixed punishment. All the procedural rights applicable to a criminal charge apply to criminal contempt, while minimal due process protections apply to the civil counterpart. In almost all instances involving counsel's conduct during a criminal trial, criminal, not civil, contempt will be at issue.

There also is a difference between summary and non-summary contempt trial proceedings. Summary contempt is committed in the physical presence of the court and can be punished summarily. There is no need for hearing and proof because the behavior occurs before the judge. However, a jury trial is required if more than six months imprisonment or a "nonpetty" fine is imposed. Summary contempt should be reserved in cases where necessary to restore order and maintain the dignity and authority of the court. In the limited situations in which summary contempt is appropriate, the judge must prepare a certificate or order of contempt indicating that the conduct occurred in the presence of the court and identifying the facts giving rise to the contempt. The Supreme Court has held that the party cited is entitled to notice of the charges and opportunity to be heard.

The standard authorizes immediate, summary contempt when the conduct is so flagrant and abusive that a warning is superfluous. Violence in the courtroom generally would qualify. And although sanctioning should take place outside the presence of the jury, if possible,

3. For a thorough discussion of the law of contempt and relevant Supreme Court cases, see Joel M. Androphy & Keith A. Byers, Federal Contempt of Court, 61 Tex. B.J. 16 (1998).
5. Id. Bagwell at 2557 n.2.
9. See also Standard 6-4.4(b).
certain conduct might be so egregious that contemporaneous imposition of a sanction is necessary.

**Standard 6-4.4. Notice of intent to use contempt power; postponement of adjudication**

(a) The trial judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intention to institute such proceedings.

(b) The trial judge should consider deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney, or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

**History of Standard**

This is former Standard 6-4.3. There are stylistic changes only.

**Related Standards**

None

**Commentary**

In a celebrated case in which several attorneys and one defendant who represented himself were held in contempt, the trial judge waited until after the trial was over to cite, adjudicate, and sentence the condemners. The procedure was upheld, and the Supreme Court suggested that if the adjudications had occurred during the trial, the defendants would have been prejudiced, since the contempt proceedings must be public and "[o]nly the naive and inexperienced would assume that news of such action will not reach the jurors."¹

It is usually desirable to defer adjudication and sentencing of participants for contempt until the trial is over; it does not necessarily follow, however, that the citation should be deferred. If the conduct of an accused or accused's attorney merits a contempt proceeding, the

offender should be informed without delay. This should maximize the potential for deterring misconduct during the remainder of the trial, which is the principal purpose of the sanction. It also reduces the likelihood that the contempt sanction, if and when imposed, will appear unfair. When the judge first announces an intention to cite participants for contempt (or worse, summarily convicts them) at the end of trial, the judge’s action may appear to be vindictive. If the announcement follows the verdict, it may even appear to have depended on the outcome. Moreover, unless a course of contemptuous conduct during the trial is broken up by separate citations for contempt, the justness and validity of cumulative sentences for separate acts of contempt may be open to doubt.

The citation of a party or the party’s attorney for contempt need not be public. If it is accomplished in chambers, there is virtually no danger that the jury will hear of it. Thus, the accused will not be prejudiced by a prompt but private citation during trial.

An adjudication of misconduct after trial cannot adversely affect the course of the trial proceedings. Imperative reasons for immediate adjudication can override this consideration; but the risk of prejudice to the proceedings must be given full and calm consideration. Postponement will also facilitate transfer of the contempt proceedings to another judge, a desirable practice even in those cases in which transfer is not required by law.

Standard 6-4.5. Notice of nature of conduct and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

6-4.6

Special Functions of the Trial Judge

History of Standard

This is former Standard 6-4.4. Changes are stylistic only.

Related Standards

None

Commentary

Although in an extraordinary situation an in-court contempt might require punishment without notice of charges or an opportunity to be heard, such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect on the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course.

It also should be noted, however, that in Bloom v. Illinois the Supreme Court held that the Sixth and Fourteenth Amendments require a jury trial for criminal contempt except for petty cases. A non-petty offense is an offense carrying a sentence of more than six months. The imposition of summary punishment for contempt thus must be penalized as a petty offense.

Standard 6-4.6. Imposition of sanctions and referral to another judge

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge whenever the presiding judge has any doubt about his or her ability to preside over the matter impartially, or if the presiding judge's objectivity can reasonably be questioned.

1. Ex parte Terry, 128 U.S. 289 (1888).
History of Standard

This is former standard 6-4.5. There are stylistic changes only.

Related Standards

None

Commentary

Respect for the court may be diminished if a judge who was personally involved in a misconduct or provoked some or all of it also adjudicates and punishes the contempt.\(^1\) If the judge is the target of personal attacks occurring during trial and does not take instant action against the contempt, due process requires that the contempt be tried before another judge.\(^2\) Not every attack on a judge disqualifies the judge from sitting, and schemes to drive a judge out of a case for ulterior reasons should not be allowed to succeed. But even though the judge’s objectivity has not been affected by the attacks, “justice must satisfy the appearance of justice.”\(^3\) Judges should be aware of their duty to accept from fellow judges cases referred for these reasons and view the reference as necessary to preserve the respect and dignity due the court.

Federal Rule of Criminal Procedure 42(b), and states following the federal model, in fact require a different judge to preside at the trial or hearing on the contempt charges, unless the defendant consents to the original judge presiding.

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