The Making of the ABA Criminal Justice Standards

Forty Years of Excellence

BY MARTIN MARCUS

Although 20 years ago it could be said that "professional standards seem[ed] commonplace in every field of criminal justice administration," in 1964, when the American Bar Association first created and implemented its Criminal Justice Standards Project, "such standards were a novel concept." (B. J. George, Jr., *Symposium on the American Bar Association's Mental Health Standards: an Overview*, 53 GEO. WASH. L. REV. 338 (1985).) Forty years have now passed since the approval of the first volumes of the *Standards of Criminal Justice* in 1968, but the Standards remain, as they were when Professor George wrote, "pre-eminent." (*Id.* at 338-39.)

Indeed, the Standards continue to be frequently relied upon by judges, prosecutors, defense attorneys, legislatures, and scholars who recognize that they are the product of careful consideration and drafting by experienced and fair-minded experts drawn from all parts of the criminal justice system.

When the final volume of the first edition of the Standards was published in 1974, Warren Burger, chair of the Standards project until his appointment as chief justice of the U.S. Supreme Court in 1969, described the Standards project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" and recommended that "[e]veryone connected with criminal justice . . . become totally familiar with [the Standard's] substantive content." (Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251 (1974).)

The Standards were an immediate success. As early as 1974, Chief Justice Burger could report that "the Justices of the Supreme Court and hundreds of other judges . . . consult the Standards and make use of them whenever they are relevant." (*Id.* at 253.) By that same year, the Standards had already been cited nationwide in more than 2,000 appellate opinions, and were increasingly used as "bench books" by trial court judges and as hornbooks by practicing defense lawyers and prosecutors. (William H. Erickson and William J. Jameson, *Monitoring and Updating the Standards: The Continuing Responsibility*, 12 AM. CRIM. L. REV. 469, 470 (1974).) "As of July 1979, according to *Shepard's Criminal Justice Citations*, there were 7,520 express citations to the standards. The appellate courts of each state were among those citing the standards, as well as the federal courts and the courts of military justice. All 18 separate sets of standards were cited." (ABA, STANDARDS FOR CRIMINAL JUSTICE, SECOND EDITION, VOL. 1 (Little Brown & Co. 1980), p. xxvii.)

The Standards have remained important sources of authority ever since. A recent Westlaw search indicates that more than 120 Supreme Court opinions quote from or cite to the Standards and/or their accompanying commentary. They were first cited in 1969, the year after the first Standards were approved. (*See* McCarthy v. U.S., 394 U.S. 459, 466, n.17 (1969), citing commentary to Standards Relating to Pleas of Guilty.) In 21 of the past 40 years, three or more opinions made reference to the Standards; in 1976 alone, eight opinions did so. While the Supreme Court does not make reference to the Standards as often as when they were new, they have nonetheless remained a consistent source for guidance. With one exception, Supreme Court opinions have quoted or cited the Standards no less frequently than every other year. Although no Supreme Court opinion made reference to the Standards in 2006 or 2007, three did so in 2005, and another did in 2008. (*See* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 760-61 (2005); Rompilla v. Beard, 545 U.S. 387 (2005); Deck v. Missouri, 544 U.S. 622, 629 (2005); Gonzalez v. U.S., 128 S. Ct. 1765, 1770 (2008).)

In 1986, Justice O'Connor, speaking for the Court, agreed that the Court "frequently finds [the ABA Standards] helpful." (Moran v. Burbine, 475 U.S. 412, 440-41 (1986).) Included among the examples she gave was *Caldwell v. Mississippi*, 472 U.S. 320, 334 (1985), in which the Court held that it was impermissible for the prosecutor in a capital case to urge the jury "not to view itself as finally determining whether petitioner would die, because a death sentence would be reviewed for correctness by the Mississippi Supreme Court." In so concluding, the Court noted that "[t]he American Bar Association, in its standards for prosecutorial conduct, agrees with this judgment. (Footnote citing Prosecution Function Standard 3-5.8, 2d ed. 1980, omitted.) Justice O'Connor also pointed to *Holloway v. Arkansas*, 435 U.S. 475, 480, n.4 (1978), in which the Court cited Defense Function Standard 7.7(c) (1974), concerning the ethical obligations of a defense attorney assisting in the presentation of what the attorney had reason to believe was false testimony; and *Dickey v. Florida*, 398 U.S. 30, 37-38, nn.7 & 8, in which the Court, citing both the Speedy Trial Standards and the Prosecution and Defense Function Standards,

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held that a defendant, tried eight years after the commission of the crimes for which he was convicted, was denied his constitutional right to a speedy trial.

Over the past 40 years, the federal circuit courts have cited to the Standards in some 700 opinions, beginning the year the first Standards were published. (*See* Bruce v. U.S., 379 F.2d 113, 120, n.19 (D.C. Cir. 1967), citing Standards Relating to Pleas of Guilty.) The circuit courts have cited to the Standards at least seven times in 2008 alone. (*See*, *e.g.*, Davis v. Grant, 532 F.3d 132 (2d Cir. 2008) (approving, but holding not constitutionally required, Standard 6-3.9 (3d ed. 2000), providing that if a pro se defendant engages in disruptive conduct "the court should, after appropriate warnings, revoke the permission and require representation by counsel"); Correll v. Ryan, 539 F.3d 938, 942-43, 2008 WL 2039074 (9th Cir. 2008) (quoting Standard 4-4.1 of the Defense Function Standards, 2d ed.).) Over the same time span, state supreme courts have cited to or quoted from the Standards or their commentary in more than 2,400 opinions, including more than 30 in 2008 alone. Not surprisingly, a superior court judge in the District of Columbia described the Standards as "invaluable for trial judges" as well, noting that "[a] set should be readily available and preferably on or near the bench at all times, particularly the Standards Relating to the Function of a Trial Judge, Prosecution and Defense Function, Pleas of Guilty, and Sentencing Alternatives and Procedures." (Tim Murphy, *Trial Court Use of the Standards*, 12 Am. Crim. L. Rev. 421, 422 (1974).)

A jurisdiction may use the Standards not only as a source of authority for judicial opinions, but also "by adoption or reform of rules of criminal procedure by courts having rule-making authority; by new legislation or substantive penal code revision; . . . by utilization of the Standards by individual trial judges and practicing lawyers in their everyday work; and by administrative regulations." (Lauren A. Arn, *Implementation of the ABA Standards for Criminal Justice: A Progress Report*, 12 Am. Crim. L. Rev. 477, 478 (1974).) In fact, legislatures have frequently looked to the Standards for model legislation. By 1979, "20 states [could] be credited with substantial implementation of the Standards" (*id.* at 479), and "[a]s of May 1979, thirty-six states had revised their criminal codes; an additional six had completed drafting revisions but their legislatures had not yet enacted new codes; and in three additional states, revision was well under way, being planned, or in the preliminary planning stages. In the five remaining states, revision had been completed in three but had been aborted and in the two other states no overall revision was being planned." (Standards for Criminal Justice, *supra*, p. xxvii.)

There are recent examples as well. In 2008, federal legislation was enacted that "appears to be aimed at facilitating implementation of the recommendation by the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons that legislatures 'collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code.' " (Kyo Suh, *Midyear Meeting Highlights*, 23 Crim. Just. 54 (Spring 2008).)

The Standards have also had a major impact on court rules. For example, "[m]any jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense." (Revised Comment 1 of the ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates in February 2008.) Recently, in *People v. Wartena,* 156 P.3d 469, 473 (Colo. 2007) (footnote omitted), the Supreme Court of Colorado pointed out that

> [t]he American Bar Association [had] recently addressed the duty to preserve evidence in consumptive testing situations, noting in the Criminal Justice Section Standards on DNA Evidence that courts should consider ordering procedures such as videotaping that would allow for independent evaluation. We agree with the recommendation of the American Bar Association and adopt Standard 3.4(e).

In its decision, the court also noted that it had adopted other ABA Standards in the past, including Standard 12-2.31, which prevents criminal defendants from asserting speedy trial violations while confined in a hospital or mental institution (*see* People v. Jones, 677 P.2d 383 (Colo. App. 1983)), and Standard 7-6.8, which sets out jury instructions for insanity claims (*see* Cordova v. People, 817 P.2d 66 (Colo. 1991).)

The Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, "[o]ne of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release

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projects, speedy trial statutes and court rules, public defender offices, police legal adviser units, and similar developments that had been initiated largely as a result of the influence of the first edition." (Standards for Criminal Justice, *supra*, at xvi.)

Prosecutors and defense attorneys have found the Standards useful, not only in supporting arguments to the judges before whom they appear, but also in guiding their own conduct, and in training and mentoring colleagues. For example:

> The American Bar Association, Criminal Justice Section, also provides general guidance for federal prosecutors. In particular, Standard 3-1.2, entitled "The Function of the Prosecutor," explains in pertinent part: "(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict."

(Melanie D. Wilson, *Prosecutors 'Doing Justice' Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 Am. Crim. L. Rev. 67, 83-84 (2008) (footnote omitted).)

Similarly, in "Indigent Defense: National Developments in 2007," (22 Crim. Just. 58 (Winter 2008)), Georgia N. Vagenas, stated that:

> [i]n Tennessee, Knox County Public Defender Mark Stephens, faced with crushing caseloads, notified the County General Sessions Court that his office would suspend accepting any new misdemeanor cases. . . . Citing the American Bar Association's Standards for Criminal Justice along with other national standards, Stephens declared in his letter to the session court judges, "[w]e can no longer meet our professional, ethical and moral obligations to the clients of this office as contemplated by the laws and performance standards currently in place."

(*See also* Hans Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 42 Prosecutor 20, 23, ("As the comment to the American Bar Association Prosecution Standard 3-3.11, 'Disclosure of Evidence by the Prosecutor' notes, 'independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel.' " (footnote omitted).)

The Standards have also made their way into law school casebooks and other academic literature, having been cited in more than 2,100 law journal and law review articles. In 2008 alone, reference to the Standards has appeared in dozens of articles. Indeed, entire symposia have been devoted to the consideration of particular Standards and the issues they raise, and to the development, implementation, and significance of the Standards. (*See Symposium on the Collateral Sanctions in Theory and Practice*, 36 U. Tol. L. Rev. 441 (Spring 2005); B.J. George, Jr., *Symposium on the American Bar Association's Mental Health Standards: An Overview*, 53 Geo. Wash. L. Rev. 338 (1985); and *A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice, Part I*, 12 Am. Crim. L. Rev. 251, 251-414 (1974): Part II; 12 Am. Crim. L. Rev. 415 (1975).)

The first edition of the Standards included 17 volumes of "black letter" recommendations and commentary, and was completed with the publication of an eighteenth summary volume in 1974. "[T]he idea for updating the standards emerged in 1976 . . . partly stimulated by the realization that almost ten years had passed since many of the volumes of standards in the first edition had been approved and that all of the standards needed refinement, sharpening, and a general reassessment in light of the changes that had swept through the criminal justice system in the 1970's . . . ." (Standards for Criminal Justice, *supra*, at xvi.) The second edition was published in 1980 and supplemented in 1986. In the second edition, some new Standards were added and "[s]ome of the first-edition standards were not changed at all, many only slightly, and a number substantially—depending on what had happened in the [previous] ten years and what each task force believed the present national norm should be and on the stylistic changes deemed appropriate." (*Id.*) Over the subsequent years, most of the Standards have been revised again.

Striving to take account of changing technology and science, as well as other developments in criminal justice, new Standards have been added to the third and latest edition. For example, Standards concerning Technologically Assisted Physical Surveillance were added in 1999, Standards concerning Collateral Sanctions and Discretionary Disqualification of Convicted Persons in 2004, and DNA Standards in 2007. One task force is now drafting standards on government access to third-party records, and another is addressing standards on diversion and special courts. For the past several years, all current "black letter" Standards have been available online and can be accessed at www.abanet.org/crimjust/standards. For those Standards published since 1989, the Web site also includes the commentary, which explains and elucidates the Standards.

Chief Justice Burger described the first edition of the Standards as "a balanced, practical work designed to walk the fine line between the protection of society and the protection of the constitutional rights of ac-

cused individuals." (Burger, *supra*, 12 Am. Crim. L. Rev. at 252.) In 1984, in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), the Court described the Standards as reflecting "prevailing norms of practice" and "guides to determining what is reasonable." Since then, opinions of the Court have repeated that description as they have relied on particular Standards in fashioning and applying constitutional rules concerning such matters as ineffective assistance of counsel (*see* Rompilla v. Beard , *supra*, 545 U.S. at 375; Wiggins v. Smith, *supra*, 539 U.S. at 522; Williams v. Taylor, 529 U.S. 362, 396 (2000); Burger v. Kemp, 483 U.S. 776, 799, n.4 (1987); Darden v. Wainwright, 477 U.S. 168, 191-92 (1986); Nix v. Whiteside, 475 U.S. at 157, 170, n.6 (1986); and Alvord v. Wainwright, 469 U.S. 956, 960, n.4 (1984)); a prosecutor's *Brady* obligations (*see* Kyles v. Whitley 514 U.S. 419, 437 (1995), citing Prosecution Function and Defense Function 3-3.11(a), 3d ed. 1993; Giglio v. United States, 405 U.S. 150, 153-54 (1972) (same); *see also* the dissenting opinion in U.S. v. Williams, 504 U.S. 36, 64, n.9 (1992)); and a defendant's right to appear at trial free of visible restraints (Deck v. Missouri, 544 U.S. at 629 (2005).)

In some cases, the majority and dissent have debated whether a particular Standard reflected a constitutional requirement or was only a statement of better practice. In *Roe v. Flores-Ortega*, 528 U.S. at 479 (2000), for example, while the majority, citing ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d ed.1993), observed that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal," it held that such consultation is not constitutionally required in every case. The concurring and dissenting opinion, however, relied on the same Standard in finding it constitutionally necessary. Similarly, in *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991), the dissent relied on Standard 8-3.5 (2d ed. 1980), which would require excusing a potential juror who has been exposed to and remembers incriminating matters likely to be outside the trial evidence, but the majority, although recognizing it as, perhaps, the "better view," held it was not one incorporated in the Fourteenth Amendment. (*See also* Rector v. Bryant, 501 U.S. 1240 (1991) (Justice Marshall, in dissent, applying Mental Health Standard 7-5.6(b), concerning a convict's competency to be executed).)

It is no accident that the Standards are perceived as both balanced and practical. From the beginning of the project, the Standards have reflected a consensus of the views of representatives of all segments of the criminal justice system. The first edition was developed by an ABA Special Committee on Minimum Standards for the Administration of Criminal Justice, which Chief Justice Burger described as comprised of "more than 100 of the nation's leading jurists, lawyers and legal scholars operat-

STANDARDS FOR CRIMINAL JUSTICE

The "black letter" Standards for Criminal Justice are available on the Standards homepage at www.abanet.org/crimjust/standards/home.html. Standards that have been published with commentary since 1991 are also available in book format on the Web site as well as in hard copy. Listed here are the individual sets of Standards and the dates of publication.

- Collateral Sanctions and Discretionary Disqualification of Convicted Persons (published 2004)
- Criminal Appeals (published 1980, 1986 supp.)
- Defense Function (published 1993, 4th ed. forthcoming)
- Discovery (published 1996)
- DNA Evidence (published 2007)
- Diversion and Special Courts (new; forthcoming)
- Electronic Surveillance of Private Communications (published 2002)
- Fair Trial and Free Press (published 1992)
- Government Access to Third-Party Records (tentative title; forthcoming)
- Joinder & Severance (published 1980; 1986 supp.)
- Legal Status of Prisoners (published 1983; 1986 supp., 3d ed. forthcoming)
- Mental Health (published 1986; 1989)
- Pleas of Guilty (published 1999)
- Postconviction Remedies (published 1980, 1986 supp., 3d ed. forthcoming)
- Pretrial Release (published 2007)
- Prosecution Function (published 1993, 4th ed. forthcoming)
- Prosecutorial Investigations ("black letter" approved; publication forthcoming)
- Providing Defense Services (published 1992)
- Sentencing (published 1994)
- Special Functions of the Trial Judge (published 2000)
- Speedy Trial and Timely Resolution of Criminal Cases (published 2006)
- Technologically Assisted Physical Surveillance (published 1999)
- Trial by Jury (published 1996)
- Urban Police Function (published 1980)

ing in advisory committees of 10 or 12 each," with "the participants . . . drawn from every part of the country and includ[ing] state and federal judges, prosecuting attorneys, defense lawyers, public defenders, law professors, penology experts and police officials." (Burger, *supra*, at 251 (1974).) Thus, Chief Justice Burger concluded, "this project was much more than a theoretical and idealistic restatement of the law, but rather a synthesis of the experience of a diverse and highly experienced group of professionals." (*Id.* at 252.) This special committee was superseded in 1973 by an equally distinguished and similarly composed Special Committee on Administration of Criminal Justice, the purpose of which was to monitor and update the Standards. (Erickson and Jameson, *supra*, at 472 (1974).)

To give permanence to the project, in August of 1986 the House of Delegates transferred jurisdiction of the Standards to a newly created standing committee of the Section of Criminal Justice, which was composed, as the governing bylaws required, "of a balance of defense, judiciary, and prosecution." (STANDARDS FOR CRIMINAL JUSTICE, *supra*.) Originally, the ABA president appointed seven members to the committee, and the chair of the Criminal Justice Council, the governing body of the ABA's Criminal Justice Section, appointed two. A revised process, approved by the ABA Board of Governors in 2005, calls for the ABA president to appoint all members exclusively from recommendations of the Section chair that anticipate "balanced representation by prosecutors, defense attorneys, other criminal justice practitioners, judges, and academics." (American Bar Association, Summary of Action of the House of Delegates, 2005 Annual Meeting, August 8-9, 2005, "Reports of the Board of Governors," p. 59.) Optimally, three of the nine committee members are prosecutors, three are defense attorneys, and three are academics and judges. Nonvoting liaisons from the National District Attorneys Association, the National Association of Attorneys General, the U.S. Department of Justice, the National Association of Criminal Defense Lawyers, and the National Legal Aid & Defender Association are also invited to participate in the work.

In order to ensure that the Standards continue to be relevant, timely, and of the highest quality, the Standards Committee determines the priorities for updating, revising, and expanding existing volumes and for developing new ones. Whether revised or new, Standards are established as official ABA policy in four steps. First, the Standards Committee establishes a task force assigned to draft or revise a particular set of Standards. Like the Standards Committee, each task force is composed of a balance of prosecutors, defense attorneys, academics, and judges, and each task force welcomes liaisons from the National District Attorneys Association, the National Association of Attorneys General, the U.S. Department of Justice, the National Association of Criminal Defense Lawyers, and the National Legal Aid & Defender Association. With the chair presiding over its discussions, a particular task force may meet from four to eight times until a draft is finalized. At each meeting, the discussion focuses on extensive memoranda and preliminary drafts the task force reporter—usually a law professor, judge, or practitioner well schooled and experienced in the subject matter of the Standards—has disseminated well in advance of each meeting.

Second, once a task force draft is completed, it is sent to the Standards Committee. In a series of its own meetings, the committee, aided by the task force chair and reporter, reviews, revises, and approves the draft. Although the Standards Committee recognizes and often defers to the expertise of those specialists who serve on the task force and to the compromises reached in task force meetings, the discussions in the Standards Committee are often spirited and may lead to significant, substantive changes, as well as stylistic ones, in the Standards draft. As in the task forces, though, the goal is persuasion and consensus; close votes on the language of a particular Standard are rare.

Third, the draft that emerges from the Standards Committee is submitted to the 34 members of the Criminal Justice Section Council. Council elections follow the issuance of a slate of candidates from a Nominating Committee required by the Council bylaws to "strive to achieve broad representation . . . from the defense bar (including defender services), the prosecution (including law enforcement), the courts (including Court administration), the academic community, the military, corrections, and others with an interest in criminal justice." (ABA Criminal Justice Section Bylaws, Sec. 9.5(C).) The Council's bylaws require that voting members include, in addition to elected members, representatives appointed by the Federal Public and Community Defenders, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, the National Legal Aid & Defender Association, and the U.S. Department of Justice. (*Id.*, Sec. 5.3.) Another bylaw requires that the Section chair rotate among prosecutors, judges, defense attorneys, and academics. (*Id.*, Sec. 9.4.)

Again with the assistance of the task force chair and reporter, the Council reviews, revises, and approves draft Standards in at least two meetings, in which the Standards receive a first and second "reading." Before each reading, drafts are circulated widely within and outside the ABA, and comments are solicited, not only from the Section's own committees, but also from the national organizations represented on the Council and other potentially interested individuals and organizations. As in the Standards Committee, despite the deference owed and given to the expertise and effort that produced the draft

before the Council, significant changes may result from the Council's discussions as the body seeks to achieve a final consensus of opinion.

Fourth, once the Council approves the proposed Standards, they are forwarded to the House of Delegates for its consideration. Before the House takes them up, the draft is again circulated widely within and outside the ABA, providing a final opportunity for comment and suggested revisions. Upon approval by the House of Delegates, the Standards become the official policy of the 400,000-member ABA. Thereafter, the task force reporter prepares a draft of the Standards' commentary, which is presented to and finalized by the Standards Committee prior to publication of the new volume.

This process is not only exhaustive; it is expensive as well. The annual budget of the Standards Committee is $200,000. The ABA employs one full-time and one part-time staff member for the committee and reimburses in substantial part the travel expenses of the members of the committee and of the task forces. In addition, each task force reporter receives an honorarium in recognition of the countless hours required for drafting memoranda and standards for consideration by the task force, the Standards Committee, the Criminal Justice Council, and the House of Delegates, and for drafting the commentary for consideration by the Standards Committee.

In sum, the Standards finally approved by the House of Delegates are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years. While this process is undeniably lengthy and painstaking, the final product can fairly be said to be a thoughtful, informed, and balanced reflection of the views of all the relevant parts of the criminal justice system. Indeed, "the Standards are a valued criminal justice asset largely because of the process through which they are created. . . . At the end of the process, the Standards represent the best thinking of the ABA." (Irwin Schwartz, "Introduction to Criminal Justice Standards," in The State of Criminal Justice 2006 (Criminal Justice Section, American Bar Association 2007), at 69.)

I have seen the Standards process up close, having served as a reporter for one task force and the chair of another, as a member of the Criminal Justice Council, as a member of the Standards Committee, and now as its chair. In all of these capacities, I have been consistently impressed with the willingness of all who participate in the process to set aside parochial interests and individual biases in order to produce a document upon which all parties can agree and upon which all others can rely. All these participants, past and present, can take immense satisfaction in the Standards' quality, in the high regard in which they have been held, and in the frequent use that they have enjoyed, over the past 40 years. ■