AMERICAN BAR ASSOCIATION PROJECT ON
STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

The Prosecution Function
and
The Defense Function

Amendments recommended by the

SPECIAL COMMITTEE ON STANDARDS FOR
THE ADMINISTRATION OF CRIMINAL JUSTICE

William J. Jameson, Chairman

and concurred in by the

ADVISORY COMMITTEE ON THE PROSECUTION AND
DEFENSE FUNCTIONS

March 1971

The standards proposed in the Tentative Draft of March 1970, with the
amendments recommended herein, were approved by the House of Delegates
on February 8, 1971. The commentary in this supplement is substantially in
the form in which it accompanied the proposed amendments submitted to
the House.
Proposed Revisions of Standards with Commentary

Introduction

Most of the revisions of the Tentative Draft of Standards Relating to The Prosecution Function and The Defense Function (March 1970) proposed here are designed to bring the standards into closer conformity to the Disciplinary Rules of the new Code of Professional Responsibility. In some instances the changes are merely stylistic in order to avoid unnecessary discrepancies in language. In other instances additions are made to the standards to call attention to the fact that, while the standard is broader than a Disciplinary Rule, failure to adhere to it in some situations may constitute violation of a Disciplinary Rule. In still other instances the change is more substantial in that, in order to conform to the Code, a proscription is raised to the level of "unprofessional conduct," which is the terminology used in the standards to indicate conduct which violates a Disciplinary Rule.

It should be noted that, despite these changes, the conduct covered by the Disciplinary Rules of the Code of Professional Responsibility is not always dealt with in *haec verba* in the standards. This is because the standards focus upon such conduct as it would be engaged in by a prosecutor or defense attorney. In such cases it may be useful and appropriate, in future publications of the Code, to refer to the standard in a footnote to the present Disciplinary Rule. In a few places, however, the standards constitute recommendations that certain conduct not now covered by a Disciplinary Rule be made subject to disciplinary sanctions; and, in those cases, appropriate implementation will require amendments or additions to the Code of Professional Responsibility.

The standards are reproduced as originally proposed by the Advisory Committee. Material which is recommended for deletion is placed in brackets. Material which is recommended for addition is underlined.
The Defense Function

Introduction

Few subjects in the administration of criminal justice are more in need of clarification than the role of the defense lawyer in a criminal case. Not only the public but also the legal profession itself—judges not excluded—at times manifest grave misconceptions and uncertainties as to the defense lawyer's function, the limits of proper conduct, and his relationship to the client. Perhaps most important, there is a lack of understanding of the reasons and rationale for certain standards of professional conduct and rules of decorum which have evolved over centuries to blunt the collisions between the advocates under the adversary system.

News media and editorials sometimes have wrongly criticized lawyers who were performing their professional duties properly; more often, however, both editorial treatment and news stories reflect confused ideas about the role and function of the lawyer for an accused. Yet the press is not the only culprit in this confusion; some lawyers exhibit a grave lack of understanding of this subject. In lurid autobiographical accounts, speeches and even at institutes, seminars and conventions of bar associations some of the more noisome lawyers have added to the confusion by speaking pridefully of their successes by use of tactics which at best were petitifogery and at worst grounds for disbarment; they have recommended to their colleagues tactics and conduct which serve only to confuse the lawyer's concept of his function and to demean the entire legal profession.
It has even been suggested, but universally rejected by the legal profession, that a lawyer may be excused for acquiescing in the use of known perjured testimony on the transparently spurious thesis that the principle of confidentiality requires this. While no honorable lawyer would accept this notion and every experienced advocate can see its basic fallacy as a matter of tactics apart from morality and law, the mere advocacy of such fraud devalues the profession and tends to drag it to the level of gangsters and their “mouthpiece” lawyers in the public eye. That this concept is universally repudiated by ethical lawyers does not fully repair the gross disservice done by the few unscrupulous enough to practice it. See, e.g., H. Steinberg, Book Review (critical of author’s position), 20 Record of N.Y.C.B.A. 220 (1965).

The criminal defense lawyer has long been depicted as a colorful and even romantic figure. There is fascinating challenge and excitement, in addition to social significance, in his role. Despite these attractions, a career as defense counsel has waned in popularity among lawyers generally, although the tide may be turning. A variety of causes for lack of interest in the criminal law have been suggested. Some have blamed the profession itself for too often denigrating criminal practice. For too long the law schools failed to give sufficient emphasis to this branch of the law. See An Interview with Edward Bennett Williams in Center for the Study of Democratic Institutions, The Law (1962). See also Slovenko, Attitudes on Legal Representation of Accused Persons, 2 Am. Crim. L.Q. 101 (1964). Happily, this attitude is changing and the law schools and the organized bar are giving heightened attention to the criminal law. Where once the subject of criminal law was the stepchild of the curriculum in law schools, today there is competition among faculty for the opportunity to teach it and advanced courses and seminars are being developed in the field. Leading bar groups, including the American Law Institute, the American Bar Foundation, the National Defender Project and the National Conference of Commissioners on Uniform State Laws, have recently directed their efforts to problems in this field. The American Bar Association Project on Standards for Criminal Justice, in which this report has been developed, is itself significant witness to the resources now being directed to improved administration of criminal justice. The Section of Criminal Law of the American Bar Association, local bar associations and law schools have organized institutes and other programs of research and continuing education in criminal law and procedure.

The clarification of standards of conduct for defense lawyers in criminal cases and a clearer definition of their role and function consistent with both tradition and present needs must play an important part in the overall reform of criminal justice. The development of institutionalized defense services which has recently been given increased momentum by the National Defender Project and parallel efforts has done much to create a substantial number of career opportunities where formerly there were few. Yet a large obstacle to making criminal defense work more attractive as a career is the ambiguity of the defense lawyer’s role, the uncertainty surrounding the standards of professional conduct applicable to its performance, and the public attitude toward lawyers who specialize in this field.

Where to place the blame for present uncertainty and confusion as to the role, function and standards for defense counsel is not the issue, save as it arises in the effort to formulate new means to remedy those conditions. The more important matter is for the bar to take the lead, first in thinking through and then declaring to itself and the public the standards by which a lawyer’s conduct in a criminal case ought to be measured. That task can be fulfilled only if it is conceived broadly enough to include an understanding of the strengths and weaknesses of the adversary system through which our criminal justice is administered and the lawyer’s role as a professional operating within the framework of that system.

It needs to be understood that defense counsel cannot “win” often, if winning is thought of in terms of an acquittal of the accused. It was brought to the attention of the Committee that most of the clients of several criminal defense lawyers often described in news media and fable as “noted criminal lawyers” are in fact convicted. A combination of unprofessional self-touting and assiduous cultivation of reporters and writers bent on drama rather than factual data has led to emphasizing dramatic acquittals and ignoring convictions and guilty pleas.
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The actual posture of defense counsel is that he undertakes his function with built-in handicaps arising out of the reality that by the time he undertakes his main task a series of events has placed his client under a cloud which is very real, notwithstanding the presumption of innocence. In a typical case, the first event is an arrest on warrant or by a police officer who witnesses the act or flight following the act. Thereafter the accused has been processed through the magistrate hearing and charged on information or by indictment. Between presentment to the magistrate and submission to the grand jury or the filing of an information it can be assumed that police investigation tended to confirm the accused’s participation and the prosecutor has screened the evidence and concluded to proceed. If the police and the prosecutor as well as the magistrate and the grand jury are performing their respective functions properly, the charge has a solid basis by the time defense counsel begins preparation for the trial. This is not simply a matter of the cliche that an accused has “all the forces of government arrayed against him.” The accused often has a large array of facts and adverse evidence against him which neither he nor anyone can alter except by motions to suppress evidence when there is a legal and factual basis for such course.

Several experienced defense counsel, including those with long service in the role of public defender, have emphasized that a defense lawyer who feels he must “win”—i.e. gain an acquittal—to secure satisfaction from his work is doomed to disappointment. Since he cannot “win” often, he must accept a set of values in which his professional satisfaction lies in mitigating the impact of the charge on his client and making sure his case is fairly heard. A variety of avenues are open to him on this score. Careful analysis may show that the evidence will not support the particular degree of crime charged, or that the accused played a secondary role to others, that he lacked responsibility or that as a first offender he is a good candidate for probation or suspension of prosecution of many lawyers and The observation judges has been that too little attention has been given to the role of defense counsel in ameliorating the condition of the accused without a trial. Emphasizing a search for the “golden fleece” by a trial in the manner of the absurdly oversimplified exploits of advocates depicted in television and movies has confused not only the public but many lawyers as well. The standards and commentary of this report will undertake to develop the significance of defense counsel’s role in helping an accused maintain his employment and other relationships pending trial and in seeking disposition by holding charges in abeyance in certain circumstances.

There is no responsible challenge to the view that the basic ethics of defense and prosecution advocates are the same, even though the roles and functions of the two differ, and that each must perform his role as a professional advocate within the rules of law and standards of professional ethics. Defense counsel and prosecution alike have duties higher than “winning the case,” as we emphasize elsewhere. It must be understood that this does not mean that defense counsel serves with any moderation of an advocate’s zeal, but rather that in areas of professional judgment and decision, as distinguished from the limited decisions reserved to his client, the lawyer must have control of the case commensurate with his responsibility as a professional advocate.

The Lawyer as Professional Advocate

The adversary system cannot operate without the services of highly trained advocates for each side as well as a judge skilled in advocacy. Although our law recognizes the right of a defendant to defend himself without the assistance of counsel if he so chooses, judges, prosecutors and defense counsel are unanimous in the opinion that justice is undermined when any party proceeds without a professional advocate. The accused lacks the knowledge which would permit him to take full advantage of his legal rights and demonstrate his position if he elects a trial. It seems amply clear today that a professional advocate for the accused is indispensable to the system, but, curiously, recognition of this came relatively late in common law legal history.

The primary role of counsel is to act as champion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried. Of course, as a practical matter he
does this not by formally educating the client on every legal aspect of the case, but by taking those procedural steps and recommending those courses of action which the client, were he an experienced advocate himself, might fairly and properly take. A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate. And, since the accused may well be the most despised of persons, this burden rests more heavily upon the defense lawyer. Against a "hostile world" the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct.

The second role of counsel is as intermediary. This is not to say that the caricature, in which counsel becomes mere "mouthpiece" for or alter ego of his client, is a valid description of this role, any more than that it is part of counsel's function as champion to employ threats, force, falsehood or chicanery in defense of his client. From time to time over the past one hundred years or more, in both England and America, an occasional voice is raised advocating what has come to be known as the "alter ego" theory of advocacy. The thesis depicts defense counsel as an agent permitted, and perhaps even obliged, to do for the accused everything he would do for himself if only he possessed the necessary skills and training in the law; in short, that the lawyer is always to execute the directives of the client. This spurious view has been totally and unequivocally rejected for over one hundred years under canons governing English barristers and is similarly rejected by canons of the American Bar Association and other reputable professional organizations. It would be difficult to imagine anything which would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defense lawyer should be simply a conduit for his client's desires. As intermediary, counsel expresses to the court objectively, in measured words and forceful tone, what a particular defendant may be incapable of expressing himself simply because he lacks the education and training.

The defendant must not be judged on his own forensic skill or lack of it.

Compensating for the client's inarticulateness is only part of the purpose of introducing an intermediary into the process. As in other contexts of human endeavor, the intermediary brings to the controversy an emotional detachment which permits him to make a more dispassionate appraisal. He translates the desired course of action into those steps which the form and procedure of the system permit and professional judgment dictates. He channels the controversy into the established mode of legal procedure and deals with the other participants in the process—the prosecutor, the judge—on the level of professional understanding of the rules and their respective roles. When the lawyer loses that detachment by too closely identifying with his client, a large measure of the lawyer's value is lost; indeed he then suffers some of the same disabilities as an accused acting as his own counsel.

To fulfill the role of the truly professional advocate, the lawyer must be free to bring to bear on the problems of defense the skills, experience and judgment he possesses. He can do this only if he knows all that his client knows concerning the facts. The client is not competent to evaluate the relevance or significance of facts; hence the lawyer must insist on complete and candid disclosure. Secondly, he must be able to conduct the case free from interference. These two factors explain the rule of leading criminal defense lawyers that they have complete disclosure of all facts and entire control of the technical and legal aspects of the litigation.

The drama of the courtroom may tend to overemphasize in our mind's eye the lawyer trying a criminal case. The defense function in a criminal case, however, is a much broader responsibility than courtroom advocacy; the duties extend far beyond the courtroom in both time and place. As in other areas of the practice of law, negotiation is an important function performed by the defense lawyer. The concept of negotiation may seem to the uninitiated out of place in the context of criminal justice; indeed some lawyers, as well as laymen, have tended to oversimplify criminal cases into the either-or, the black-or-
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white difference between innocence and guilt. In reality, the criminal law is an instrument whose cutting edge must be adapted to the particular facts of each case, facts which are as varied as the range of human experiences. The defense lawyer's greatest contribution often is to mitigate the harshness of the law's judgment; that takes place on several levels: prior to the indictment in the choice of the appropriate charge to be laid against the accused; in the decision about how many of overlapping offenses should be processed; and finally the recommendation for probation, to mention only a few examples. At these stages, the accused needs an advocate or counselor as much as he does in a trial.

Another function of the lawyer is as his client's "learned friend," his counsel in the literal sense. The defense lawyer often may be the only person to whom the defendant can turn in total confidence, once a proper relationship exists, to explain fully his position, which may be incriminating, even though he is in law not guilty of the crime charged. The defendant needs counsel not only to evaluate the risks and advantages of alternative courses of action, such as trial or plea, but also to provide a broad and comprehensive approach to his predicament which will take the most advantage of the protections and benefits which the law affords him.

These functions have been suggested in their ideal and abstract form. In practice they must be performed amidst the tensions that arise from the fact that the lawyer is himself a human being with frailties and is often acting for a client and his family who are distraught and bewildered. The traditional position of the American bar has been that the lawyer may apply his personal views of his client's morality only in a limited degree and only in deciding whether to accept the case in the first instance. He is never required to perform any act which violates his own conscience, but his role as advocate permits and requires that he press all points legally available, even if he must subordinate his personal evaluation of the client's conduct. His private belief that one ought to answer fully any question asked must yield to his role as counsel; as counsel he is prevented from disclosing what he has learned in confidence from his client. He may personally believe that certain rules of law which benefit his client are wrong and ought to be changed, but it is his obligation in the course of representation to invoke them on his client's behalf.

The lawyer also sometimes operates under tensions arising from the seeming conflict between his duty to his client and his duty to the court. When the lawyer's role as an officer of the court is understood in the highest sense, there can rarely be any conflict between these duties. The lawyer's duty to his client is to give him the best professional representation of which he is capable. His duty to the court is to represent the client vigorously, in a manner consistent with his position as professional officer of the court, so that the adversary process may operate. On this level his twin duties coincide rather than conflict. But, it must be recognized, on the level of everyday practice the two duties sometimes may seem to diverge. Thus the court naturally tends to adopt a perspective on a case which differs from that of either litigant. Sometimes the zealous lawyer may seem uncooperative, particularly if he lacks the skill to couch his utterances in terms which will soften aggressive advocacy. However, there are circumstances in which a lawyer must be vigorously aggressive if important rights are not to be undermined by an excess of cooperation with the court. Sometimes the tension is created because the court improperly asks him to step out of his assigned role, as when he is improperly called upon to speak his personal views of the facts or arguments, or when a judge thoughtlessly asks defense counsel questions which impinge on confidential matter acquired from the client. In such situations the strain on counsel may be great, since to seem uncooperative may itself prejudice his client's interests. Where all three professional participants—judge, prosecutor and defense counsel—are adequately skilled, these potential collisions can be dealt with tactfully but firmly.

Another source of the tension which besets the advocate in a criminal case arises from the lawyer's fiduciary position. He holds his client's information and interests in trust, and it is his obligation to act for the protection of those interests even at the expense of his own. This means that the lawyer must pursue the course which will produce the most favorable legitimate disposition of the case for his client, rather than
one which will earn him the largest fee, or a course which will avoid personal discomfort, criticism or embarrassment. An advocate must scrupulously avoid the temptation to pursue a point because of its excitement, its news value, its significance in the growth of the law, or its intrinsic intellectual interest, if to pursue it is in any way inconsistent with the furtherance of his client's legitimate interests. In short, it is the client's interests, not the law's or the lawyer's personal long range interests, which the advocate is pledged to protect. Of course, there are cases where law reform and the client's interests correspond and the lawyer is in the happy position of being able to serve both. This does not mean that the lawyer does not have a separate and important responsibility to work for law reform. The standards provide for this role for the lawyer as a member of the legal profession, but this role must be distinguished from his role as an effective advocate for a client.

It would be dangerously naive, however, if we failed to take into account the very real tensions which proper performance of these duties create for the advocate. Though law is a profession, not a business, a lawyer must earn a living, and it would be unreasonable to create standards of professional conduct which would require him to devote unlimited time to each client without regard to the realities of supporting self and family.

All of these stresses are compounded for the defense lawyer in criminal cases by the intensity with which society and the defendant view criminal proceedings and their consequences, and the need in many cases to resolve these tensions in the heat of trial without opportunity for calm meditation. The complexity of the demands which law and life place upon the trial lawyer requires that his role be approached sympathetically, and that any set of standards for the judging of his conduct be reasonable in the demands it makes upon his capacities and his humanity. On the other hand, the very existence of standards, known and accepted by the profession, will reduce the tensions by reducing the occasions for ad hoc resolution of difficult problems and the attendant risk of diluting standards with expediency. It is the aggregate of his response to these responsibilities and challenges that make the lawyer a true professional; it is as a professional subject to professional standards that he is called upon to function within the adversary system. All this dictates that the lawyer understand his role and obligations and the limits on each and that he not confuse success in the material sense with the correct and honorable performance of his duties within the law.

Future of Defense Bar

In emphasizing the social significance of criminal law and the burdens of responsibility of the defense lawyer we should not lose sight of the many attractions of his career. Trial practice, and especially the defense of criminal cases, remains one of the most challenging, exciting and even glamorous branches of the profession. What is striking about the present situation is that despite these obvious attractions, this area of practice has steadily lost popularity in comparison with others. Indeed, for a half century lawyers and judges have lamented the “decline of the trial bar” as the “office lawyer” and business adviser have become the most “respected” and surely the most highly rewarded members of the profession.

The explanation is partly to be found in the economics of law practice, as the Airlie House Conference soberly concluded. Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389 (1967). Clearly, that problem must be squarely faced if the great demand for defense advocates of high calibre is to be met. Progress is already being made, especially in the compensation of lawyers drafted by society to defend those unable to retain counsel. Making private practice in the administration of criminal law more financially and personally rewarding is equally necessary. The need is not simply for larger fees but for improved organization and administration of criminal justice which will permit the lawyer to be less wasteful of his time and effort. In part it means that ways must be found to permit the available pool of qualified lawyers to serve greater numbers of defendants and to channel the advocates' activities into fruitful effort. To that extent, the accomplishment of this goal hinges on the adoption of practices consistent with the standards promulgated under this American
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Bar Association Project on Standards for Criminal Justice and on such matters as increased special training and specialization, improved pretrial procedures, and recognition that the majority of cases ought not be tried and that some cases should be diverted at the outset from conventional criminal processes. Speedier processing from arrest to trial and to appeal must be developed. These efforts must also include the promotion of a better understanding by the lay public of the role and function of the defense counsel, without which few lawyers will be attracted to such a career.

In meeting the demand for more lawyers as defense attorneys in an ever-increasing number of criminal cases, it is also important to bring a larger cross-section of the bar into contact with the substance of the criminal law and the processes of its administration. In addition to the need for more skilled defense advocates, there is an ever present necessity for the involvement of the non-specialist who is a qualified trial practitioner and who is willing to devote some time to criminal cases. Such lawyers can bring a fresh perspective and stimulate those who are deeply involved in criminal justice to greater efforts and sharper insights; at the same time, by their participation they develop an allegiance to the problems of the criminal law which will insure a continued active concern for criminal justice. Through such participation they will better be able to communicate to the public, as lawyers inevitably are called upon to do both formally and informally, the nature of the defense lawyer's role and function and thus what can properly be expected of him—in short, the yardstick for the performance of the specialist.

Standards

PART I. General Standards

1.1 Role of defense counsel; function of standards.

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

(b) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability, and according to law.

(c) The defense lawyer, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. He has no duty to execute any directive of the accused which does not comport with law or such standards; he is the professional representative of the accused, not his alter ego.

(d) It is unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court.

(e) It is the duty of every lawyer to know the standards of professional conduct as defined in codes and canons of the legal profession and in this report, to the end that his performance will at all times be guided by appropriate standards. The functions and duties
of defense counsel are governed by such standards whether he is assigned or privately retained.

(f) In this report the term "unprofessional conduct" denotes conduct which it is recommended be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are intended as guides for conduct of lawyers and as the basis for disciplinary action, not as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, depending upon all the circumstances.

1.2 Delays; punctuality.

(a) Defense counsel should avoid unnecessary delay in the disposition of cases. He should be punctual in attendance upon court and in the submission of all motions, briefs and other papers. He should emphasize to his client and all witnesses the importance of punctuality in attendance in court.

(b) It is unprofessional conduct for defense counsel to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(c) It is unprofessional conduct for defense counsel intentionally to use procedural devices for delay for which there is no legitimate basis.

(d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

1.3 Public statements.

(a) The lawyer representing an accused should avoid personal publicity connected with the case before trial, during trial and thereafter.

(b) The lawyer should comply with the ABA Standards on Fair Trial and Free Press.

1.4 Advisory councils on professional conduct.

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

(b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exist between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to reveal any disclosure of the client except (i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council; and (ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.

1.5 Trial lawyer's duty to administration of criminal justice.

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.

(b) All qualified trial lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Qualified trial lawyers should not assert or announce a general unwillingness to appear in criminal cases; law firms should encourage partners and associates to appear in criminal cases.

1.6 Client interests paramount.

Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to repre-
sent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance.

PART II. ACCESS TO COUNSEL

2.1 Communication.

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

2.2 Referral service for criminal cases.

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

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

2.3 Prohibited referrals.

(a) It is unprofessional conduct for a lawyer to compensate others for referring criminal cases to him.

(b) It is unprofessional conduct for a lawyer to accept referrals by agreement or as a regular practice from law enforcement personnel, bondsman or court personnel.

(c) It is unprofessional conduct to accept referrals of criminal cases regularly except from an authorized referral agency or a lawyer referring a case in the ordinary course of practice.

(d) Regulations and licensing requirements governing the conduct of law enforcement personnel, bondsmen, court personnel and others in similar positions should prohibit their referring an accused to any particular lawyer and should require them, when asked to suggest the name of an attorney, to direct the accused to the referral service or to the local bar association if no referral service exists.

PART III. LAWYER-CLIENT RELATIONSHIP

3.1 Establishment of relationship.

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and he should explain the obligation of confidentiality which makes privileged the accused’s disclosures relating to the case.

(b) The conduct of the defense of a criminal case requires trained professional skill and judgment; therefore, the technical and professional decisions must rest with the lawyer without impinging on the right of the accused to make the ultimate decisions on certain specified matters, as delineated in section 5.2.

(c) To insure the privacy essential for confidential communication between lawyer and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, court houses and other places where accused persons must confer with counsel.

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

3.2 Interviewing the client.

(a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should
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probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts.

3 Fees.

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

(b) It is unprofessional conduct for a lawyer to imply that compensation of the lawyer is for anything other than professional services rendered by him or by others for him.

(c) It is unprofessional conduct for a lawyer to overreach his client in setting the fee.

(d) It is unprofessional conduct for a lawyer to divide his fee with a layman. He may share a fee with another lawyer only on the basis of their respective services and responsibility in the case.

(e) It is unprofessional conduct to undertake the defense of a criminal case on the understanding that the fee is contingent in any degree on the outcome of the case.

3.5 Conflict of interest.

(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him.

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

(c) In accepting payment of fees by one person for the defense of another, a lawyer should be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due the accused. When the fee is paid or guaranteed by a person other than the accused, there should be an explicit understanding that the lawyer's entire loyalty is to the accused who is his client and that the person who pays his fee has no control of the case.

(d) It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is the prosecutor or has participated in or supervised the prosecution at any stage.

3.6 Prompt action to protect the accused.

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

(b) A lawyer should not act as surety on a bail bond either for the accused or others.

3.7 Advice and service on anticipated unlawful conduct.

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

(b) It is unprofessional conduct for a lawyer to counsel his client in or knowingly assist his client to engage in conduct which the lawyer believes to be illegal.

(c) It is unprofessional conduct for a lawyer to agree in advance of the commission of a crime that he will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Except as provided in section 7.7, a lawyer may reveal the expressed intention of his client to commit a crime and the information necessary to prevent the crime; and he must do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his part is necessary to prevent it.

3.8 Duty to keep client informed.

The lawyer has a duty to keep his client informed of the developments in the case and the progress of preparing the defense.

3.9 Obligations to client and duty to court.

Once a lawyer has undertaken the representation of an accused his duties and obligations are the same whether he is privately retained, appointed by the court, or serving in a legal aid or defender system.

PART IV. INVESTIGATION AND PREPARATION

4.1 Duty to investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

4.2 Illegal investigation.

It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

4.3 Relations with prospective witnesses.

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) In interviewing a prospective witness it is proper but not mandatory for the lawyer or his investigator to caution the witness concerning possible self-incrimination and his need for counsel.

(c) A lawyer should not obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise a person, other than a client, to refuse to give information to the prosecutor or counsel for co-defendants.

(d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person.
1.4 Relations with expert witnesses.

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

(b) It is unprofessional conduct for a lawyer to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony he will give or the result in the case.

1.5 Compliance with discovery procedure.

The lawyer should comply in good faith with discovery procedures under the applicable law.

PART V. CONTROL AND DIRECTION OF LITIGATION

5.1 Advising the defendant.

(a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.

(b) It is unprofessional conduct for a lawyer intentionally to understated or overstate the risks, hazards or prospects of the case to exert undue influence on the accused's decision as to his plea.

(c) The lawyer should caution his client to avoid communication about the case with witnesses, except with the approval of the lawyer, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consul-

tation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation.

5.3 Guilty plea when accused denies guilt.

If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court.

PART VI. DISPOSITION WITHOUT TRIAL

6.1 Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early divestment of the case from the criminal process through the use of other community agencies.

(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.

(c) Ordinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor.

6.2 Conduct of discussions.

(a) In conducting discussions with the prosecutor the lawyer
should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused.

(b) It is unprofessional conduct for a lawyer knowingly to make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(c) It is unprofessional conduct for a lawyer to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client.

PART VII. TRIAL

7.1 Courtroom decorum.

(a) As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.

(b) When court is in session defense counsel should address the court and should not address the prosecutor directly on any matter relating to the case.

(c) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposefully calculated to irritate or annoy the court or the prosecutor.

(d) The lawyer should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial to his client's legitimate interests. He has a right to make respectful requests for reconsideration of adverse rulings.

(e) Lawyers should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

7.2 Selection of jurors.

(a) The lawyer should prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the rais-

ing of any appropriate issues concerning the method by which the jury panel was selected, and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors the lawyer should restrict himself to investigatory methods which will not harass or unnecessarily embarrass potential jurors or invade their privacy and, whenever possible, he should restrict his investigation to records and sources of information already in existence.

(c) In jurisdictions where counsel is permitted personally to question jurors on voir dire, the opportunity to question jurors should be used solely to obtain information for the intelligent exercise of challenges. A lawyer should not purposely use the voir dire to present factual matter which he knows will not be admissible at trial or to argue his case to the jury.

7.3 Relations with jury.

(a) It is unprofessional conduct for the lawyer to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The lawyer should avoid the reality or appearance of any such improper communications.

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

(c) After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service. If the lawyer has reasonable ground to believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

7.4 Opening statement.

In his opening statement a lawyer should confine his remarks to a
brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

7.5 Presentation of evidence.

(a) It is unprofessional conduct for a lawyer knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses.

(b) It is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case unless there is a reasonable basis for its admission in evidence. When there is any doubt about the admissibility of such evidence it should be tendered by an offer of proof and a ruling obtained.

7.6 Examination of witnesses.

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

(b) A lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeach-

ment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) It is unprofessional conduct for a lawyer to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege.

(d) It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence.

7.7 Testimony by the defendant.

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

7.8 Argument to the jury.

(a) In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofes-
sional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for a lawyer to express his personal belief or opinion in his client’s innocence or his personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.

(c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.

(d) A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury’s verdict.

7.9 Facts outside the record.

It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

7.10 Post-trial motions.

The trial lawyer’s responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the defendant’s rights.

PART VIII. AFTER CONVICTION

8.1 Sentencing.

(a) The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to his client.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services.

(c) Counsel should alert the accused to his right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal.

8.2 Appeal.

(a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court’s judgment and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant’s own choice.

(b) The lawyer should take whatever steps are necessary to protect the defendant’s right of appeal.

8.3 Counsel on appeal.

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal if the defendant elects to avail himself of that right unless new counsel is substituted by the defendant or the appropriate court.

(b) Appellate counsel should not seek to withdraw from a case solely on the basis of his own determination that the appeal lacks merit.

8.4 Conduct of appeal.

(a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.
8.5 Post-conviction remedies.

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result he should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post-conviction proceeding unless he has agreed to do so. In other respects the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

8.6 Challenges to the effectiveness of counsel.

(a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the defendant on that ground.

(b) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case provided effective assistance, he should so advise his client and he may decline to proceed further.

(c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence.

Standards with Commentary

PART I. GENERAL STANDARDS

1.1 Role of defense counsel; function of standards.

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

(b) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability, and according to law.

(c) The defense lawyer, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. He has no duty to execute any directive of the accused which does not comport with law or such standards; he is the professional representative of the accused, not his alter ego.

(d) It is unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court.

(e) It is the duty of every lawyer to know the standards of professional conduct as defined in codes and canons of the legal profession and in this report, to the end that his performance will at all times be guided by appropriate standards. The functions and duties of defense counsel are governed by such standards whether he is assigned or privately retained.

(f) In this report the term "unprofessional conduct" denotes con-
duct which it is recommended be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are intended as guides for conduct of lawyers and as the basis for disciplinary action, not as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, depending upon all the circumstances.

Commentary

a. Role of defense counsel

In our legal system, a court constituted to try a criminal case should consist of a judge (and jury), a prosecutor and a defense lawyer, all of these being essential to the fulfillment of the court’s assigned function in the administration of criminal justice. See ABA Standards, Providing Defense Services § 1.1, and Commentary (Approved Draft, 1968). The characterization of a lawyer as an officer of the court is deeply rooted in history and warranted by the peculiar posture of the lawyer in society.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

ABA Code of Professional Responsibility hereinafter ABA Code EC 9-G. But the concept of the lawyer as an officer of the court has sometimes been misread to imply limitations inconsistent with his obligations to his client. The lawyer’s highest obligation, like that of every citizen, is to the administration of justice, whether as prosecutor or defense counsel.

b. Counselor and advocate

To say that the defense lawyer is an officer of the court, as are all lawyers, is not to imply that he stands in a subordinate role as do the reporter, clerk or bailiff. Rather, the defense counsel is to be viewed as one of the three major participants along with judge and prosecutor. The protection of his client’s rights may require that the lawyer resist the wishes of the judge on some matters, and though his resistance should never lead him to act disrespectfully, it may require him to appear unyielding and uncooperative at times. In so doing, he does not contradict his duty to the administration of justice but fulfills his function within the adversary system. The adversary system requires his presence and his zealous professional advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge. Defense counsel should not be viewed as impeding the administration of justice simply because he challenges the prosecution, but as an indispensable part of its fulfillment, and this view should underlie the attitudes of the other participants and the standards governing his own conduct.

The role of counsel for the accused is a difficult one because it is complex, involving multiple obligations. Toward his client he is a counselor and an advocate; toward the prosecutor he is a professional adversary; toward the court he is both advocate for the client and counsel to the court. He is obliged to counsel his client against any unlawful future conduct and to refuse to implement any illegal conduct. ABA Code DR 1-102(A). For example, when the client proposes to testify falsely or tender false and fraudulent documents as evidence, the lawyer must refuse to permit his function to be so prostituted. See § 7.7, infra. But it is a part of counsel’s obligation of fidelity to his client that in his role as advocate, his conduct of the case not be governed by his personal views of right or justice but by the task he has assumed of furthering his client’s interest to the fullest extent that the law and the standards of professional conduct permit. See Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959); Thode, The Ethics of the Advocate, 39 Tex. L. Rev. 575, 583-84 (1961).
Advocacy is not for the timid, the meek or the retiring. Our system of justice is inherently contentious in nature, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer have the urge for vigorous contest. Nor can a lawyer be half-hearted in the application of his energies to a case. Once he has undertaken the case, he is obliged not to omit any essential honorable step in the defense, without regard to his compensation or the nature of his appointment. The lawyer privately retained is free to require assurance of payment of reasonable compensation; if appointed by the court his compensation is governed by other criteria.

Because the law is a learned profession, every lawyer must take pains to guarantee that his training is adequate and his knowledge up to date in order to fulfill his duty as an advocate. Even after the most comprehensive training in fundamentals there remains the final—and large—step of learning the art of advocacy.

c. The limits of professional conduct

"Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim . . . that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause." ABA CANONS OF PROFESSIONAL ETHICS No. 15 (1968). "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . ." ABA CODE EC 7-1.

The "alter ego" concept of a defense lawyer, which sees him as a "mouthpiece" for his client, is fundamentally wrong, unethical and destructive of the lawyer's image; more important to the accused, perhaps, this pernicious idea is destructive of the lawyer's usefulness. The lawyer's value to each client stems in large part from the independence of his stance, as a professional representative rather than as an ordinary agent. What he can accomplish for any one client depends heavily upon his reputation for professional integrity. Court and opposing counsel will treat him with the respect that enables him to further his client's interests only if he maintains the proper professional detachment and conducts himself according to accepted professional standards.

Every advocate should be constantly mindful of the need to preserve his standing in the profession and with the courts. He must not "squander his credibility" by trying to score a point in one case or at one stage if that will impair his standing and hence his advocacy in future cases. Courts are overloaded and all judges are busy; they must rely on what lawyers say—what they represent as to the facts or the law. To have standing with the courts does not mean in any sense that a lawyer should be subservient or venal; he is bound to assert valid positions vigorously, even at the risk of annoyance of the court. But standing and a reputation for credibility and reliability are such enormous assets, whether for the prosecutor or defense, that a lawyer who loses them has lost the most important attributes of his stature in the profession.

This is particularly important in large centers where a lawyer appears infrequently before the same judge. There the judges form their conclusions about lawyers on limited observation and, once a "bad" impression is formed, it is difficult to alter and that impression will remain indefinitely as a handicap for the lawyer even though it is never articulated by the judge.

d. Misrepresentation

It is fundamental that in his relations with the court, defense counsel must be scrupulously candid and truthful in his representations in respect of any matter before the court. ABA CODE DR 1-102. This is not only a basic ethical requirement, but it is essential if he is to be effective in his role as advocate, for if his reputation for veracity is suspect, he will lack the confidence of the court when he needs it most to serve his client.

e. Familiarity with professional standards

Knowledge of the proper professional standards of conduct obviously is prerequisite to their fulfillment by the lawyer. Regrettably, neither the law schools nor the organized bar have done enough in the
past to ensure that lawyers are fully cognizant of the standards governing their conduct. These matters have been subordinated too often to knowledge of the substantive law. While no lawyer can perform adequately in ignorance of the applicable law, his knowledge of the standards of conduct of the bar should receive no lower priority than that accorded to learning legal principles. Attention to ethical problems should be given in the development of law school curricula and in the planning for continuing education. Likewise, the bar should undertake to see that every lawyer has access to the published standards of conduct and decisions interpreting them.

f. Nature of defense counsel's employment

The rapid growth of institutionalized defense services has evoked fear that ethical standards might be abridged. Fear was first expressed that lawyers in defender offices would not be sufficiently aggressive in the protection of the interests of their clients, either because heavy caseloads would not permit it or because they would become too friendly with the prosecution from regular association. More recently a different fear has been expressed: that lawyers in defender offices see themselves as champions of the poor who are not limited by the standards applicable to privately retained counsel. This, of course, is incorrect; standards governing professional ethics apply equally to counsel for the poor and the rich as judges must apply the law equally to both.

Nevertheless, there are often significant differences in the relation of lawyer and client arising from the nature of the lawyer's employment. Where he is privately retained he has a better chance of having the confidence of his client who, after all, has chosen him. The client's desire to have him as his lawyer gives his persuasion greater standing with the client; the threat of withdrawal may be enough to discourage any inclination of the client to engage in impropriety or to demand it of the lawyer. By contrast, the lawyer who is appointed or who serves in an organized defender office must win the confidence of a client who probably had no choice in his selection, although that lawyer derives some independence because he is not dependent on the client's favor for his livelihood. Such factors as the eminence of the lawyer will obvi-

ously affect the relationship, but it is clear that the nature of his employment will itself have an impact on the relationship. These standards have not been drawn in disregard of such considerations, but at no point has it been thought appropriate to set a different standard according to the nature of the employment. Although the difficulties of fulfilling the standards may vary in this respect, they will also vary according to many other circumstances of the case, and it would be inappropriate to discriminate in the application of the standards.

g. Relationship of standards to discipline and judicial decisions

The tensions of his role and the intensity of the pressure of multiple decisions during trial make it imperative that defense counsel be thoroughly familiar with the canons and standards of professional conduct. His place in our adversary process of justice requires that he be guided constantly by the obligation to pursue his client's interests. He must not be asked to limit his zeal in the pursuit of those interests except by definitive standards of professional conduct. Judges and trial lawyers of long experience have observed that the influx of large numbers of inexperienced lawyers into the criminal process has revealed a disturbing lack of understanding of the traditions, standards and canons of professional conduct. The examination and revision of the American Bar Association Canons of Professional Ethics, resulting in the publication in July, 1969, of the Final Draft of a new Code of Professional Responsibility, has been guided by the principle that disciplinary rules backed up by sanctions should be stated with an explicitness and specificity that cannot be given to the broader ethical considerations which guide professional conduct in pursuit of the ideal. See Sutton, Re-Evaluation of the Canons of Ethics: A Reviser's Viewpoint, 33 Tenn. L. Rev. 132 (1966). The Code of Professional Responsibility is divided into three parts: the brief, broadly phrased Canons; the discursive Ethical Considerations; and the precisely stated detailed Disciplinary Rules.

This Report and the Report on The Prosecution Function subscribe to the same pattern. The term "unprofessional conduct" has been chosen to designate violations of duties of such a clear and high order
that their breach should be followed ordinarily by the imposition of some form of professional discipline, including disbarment. This category is reserved for those matters which are of the greatest gravity and which are susceptible to measurement with sufficient accuracy to permit the imposition of sanctions without unfairness to the transgressing lawyer. In other areas which must necessarily be matters of delicate judgment, enforcement has been left to the individual conscience of the lawyer, supported by the recommendations of his professional colleagues. Where these reports use phrases such as "the lawyer should," the standard is offered as advice to those who seek it and as a guide in the conduct of lawyers, but it is not intended that discipline be imposed upon lawyers whose conduct falls short of the standard.

The commentary occasionally refers to judicial decisions involving issues of competency or effectiveness of counsel, insofar as those decisions cast light on standards which courts have concluded are applicable to the conduct of counsel. It is beyond the scope of the function of this Committee, however, to attempt to determine the conditions under which deviation from the standards recommended in these reports warrants reversal or vacation of a conviction.

1.2 Delays; punctuality.

(a) Defense counsel should avoid unnecessary delay in the disposition of cases. He should be punctual in attendance upon court and in the submission of all motions, briefs and other papers. He should emphasize to his client and all witnesses the importance of punctuality in attendance in court.

(b) It is unprofessional conduct for defense counsel to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(c) It is unprofessional conduct for defense counsel intentionally to use procedural devices for delay for which there is no legitimate basis.

(d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective repre-

sentation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

Commentary

a. Prompt disposition; punctuality

Lack of punctuality in attendance upon court disturbs the orderly processes of the court and inconveniences others waiting to be heard. It is costly in terms of wasted time of lawyers, witnesses, jurors and the judge and his staff. It is also a disservice to the client because of the risk that it may irritate the court or the jury. Failure to be punctual in court appearance is ground for punishment for contempt. See e.g., Arthur v. Superior Court, 62 Cal. 2d 404, 42 Cal. Rptr. 441, 398 P.2d 777 (1965); State v. Dias, 76 N. J. Super. 337, 184 A.2d 535 (1962). Punctuality in the filing of briefs and motions is also important. See AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT No. 17 (1963).

As a corollary of his own duty of punctuality, it is incumbent on the lawyer to do all within his power to see to it that his client and witnesses he intends to call are punctual in their attendance at court.

Where additional time is needed properly to prepare a case, the correct course is to seek a continuance. The Advisory Committee on the Criminal Trial of this ABA Project has recommended the following standard on continuances: "The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case." ABA STANDARDS, SPEEDY TRIAL § 1.3 (Approved Draft, 1968).

b. Misrepresentation to obtain a continuance

"The court has a right to expect that attorneys appearing before it in the matter of postponements, as in other matters, will tell the truth and not, through false misrepresentations, trifle with the court's dignity and interfere with its business...." Albano v. Commonwealth, 315 Mass. 531, 53 N.E.2d 690, 692 (1944). Equivocation in stating the grounds
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c. Delay for tactical advantage

A constant complaint of the public against our system of justice is that delays are permitted to undermine the enforcement of law. See Lumbard, The Administration of Criminal Justice: Some Problems and Their Resolution, 49 A.B.A.J. 840, 846 (1963). This is as true today as when Pound wrote The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Rep. 392 (1906). See also Bloom, Why Many Criminals Go Free, Reader’s Dig. 19 (August 1965). Because it is an essential of fair procedure that it be calm and deliberative, rather than hasty and unreflective, to some extent the legal process can never be as expeditious as popular sentiment might wish it, especially when that sentiment is enflamed by an outrageous crime or during a period of crisis in law enforcement.

One of the great temptations that befalls a lawyer is to abuse procedure and employ dilatory tactics in order to gain time for the advantage of his client. Delays sought in hope that testimony will be lost or become stale, that the prosecuting parties will be inconvenienced until they abandon the case, or to continue illegal activity or for other corrupt purposes undermine the entire system. These practices also bring the bar into disrepute. Such tactics may backfire when judge and prosecutor realize they are being employed; stern judicial response may then operate to injure an accused. Cf. Seymour, Some Trade Secrets About Federal Criminal Proceedings, 15 Record of N.Y.C.B.A. 447, 449 (1960). The abuse of procedure for purposes of delay ultimately leads to procedural restrictions which are harmful to those with legitimate needs. Thus, there is an obligation upon the lawyer to “do everything possible to avoid delays and to expedite the trial.” American College of Trial Lawyers, Code of Trial Conduct No. 17 (c) (1963).

Since the reason why any procedural device is being invoked is buried in the mental processes of the lawyer, it is understandably difficult to enforce sanctions against its use for delay. This is especially so be-

cause of the risk that an overly aggressive concern on this score may impel the lawyer to eschew a remedy which in good faith he believes should be pursued in his client’s interest, considerations of delay aside. Moreover, it may tend to imply that the law is more concerned with expedition than with justice, an implication that inevitably will cause disrespect for its processes and thus undermine its efficacy. To the extent that the procedural rules permit dilatoriness by the taking of certain procedural steps, the fault is in the procedure and in lax judicial administration, not alone in the lawyer’s conduct; the remedy must come through reform of the procedural system. The reports of other Committees of this ABA Project deal with recommendations to remove such occasions for delay. But instances have been noted in which lawyers have blatantly demanded and courts granted delays without substantial cause, sometimes for crass motivations. Such conduct demeans the administration of justice. The responsibility must rest with counsel not to seek such favors and with the courts to refuse to grant them. Standards for court administration can be framed to provide safeguards against improperly motivated dilatory tactics, such as requiring sworn statements as a basis for any requested delay.

d. Accepting excessive volume of work

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

Some courts have rules which limit the number of cases in which one lawyer can appear. See, e.g., General Rules, D.D.C., R. 145(d). Independently of such rules a lawyer should comply with the standard stated above.
1.3 Public statements.
   (a) The lawyer representing an accused should avoid personal publicity connected with the case before trial, during trial and thereafter.
   (b) The lawyer should comply with the ABA Standards on Fair Trial and Free Press.

Commentary

a. Personal publicity
   A minority of lawyers have sometimes exploited newsworthy cases for their own personal aggrandizement. Often this operates to the detriment of the particular client, and it is always demeaning of the proper role of defense counsel. The opportunity for personal publicity may color the lawyer's professional judgment and lead him to take steps which are not in the best interests of his clients, the profession and, most importantly, the administration of justice.

b. Trial publicity
   The tendency of a minority of lawyers, including both prosecutors and defense counsel, to indulge in "trial by press" is a disservice to the client and to the fair administration of justice.

   A separate Committee of this ABA Project was given the responsibility of considering the problem of publicity as it affects criminal litigation, including the role of counsel in public discussion of criminal cases. A major portion of its report consists of detailed recommendations for controls on the conduct of attorneys in criminal cases. ABA Standards, Fair Trial and Free Press §§1.1-1.3 (Approved Draft, 1968). These recommendations have been approved by the House of Delegates of the American Bar Association and are covered in ABA Code DR 7-107. This Committee endorses these standards and urges their prompt and vigorous implementation. They strike a careful balance between the needs of the public for information and the interest in preserving fairness of the trial procedure. Moreover, they are designed to preserve and uphold the role of counsel as the courtroom advocate who defends the case by evidence and argument rather than as one who appeals to the public outside the courtroom on the basis of emotion and prejudice. See State v. Kavanaugh, 52 N.J. 7, 243 A. 2d 225, cert. denied sub nom., Matzner v. New Jersey, 393 U.S. 924 (1968).

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

   (b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exist between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to reveal any disclosure of the client except (i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council; and (ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.

Commentary

a. Need for advisory councils
   Many courts and virtually all bar associations have grievance and disciplinary committees to interpret canons of the profession and apply them in specific cases. These committees usually have operated after the fact by way of judging questioned conduct, rather than as a council of advisers to lawyers who desire assistance and are in need of answers. These processes have often been overly cumbersome and their response too slow and sometimes too vague to serve this need. Moreover, these committees often include a cross-section of the bar and, hence, many members are unfamiliar with the litigation or ethical problems submitted to them. Naturally enough, in a bar in which trial lawyers are a
minority and defense lawyers an even smaller fraction, it is unlikely that many members of a general grievance or disciplinary committee of the bar or court will be thoroughly familiar with the problems confronting defense lawyers in criminal cases.

The standards of the profession are steadfast in their fundamental principles, but their application is frequently difficult and calls for intimate knowledge of practice and procedure in litigation problems available only to trial specialists. That task of continuing elaboration, to avoid the perils mentioned, should be vested in a council specially constituted with lawyers experienced on both sides of criminal trial practice and trial practice generally.

Ordinarily the local bar association will be an appropriate entity to initiate the creation of the advisory council. The council need not be an official agency of the bar association, even though it may well have close ties, as the Bar Council in England has with the Inns of Court. Its functions require that its membership have continuity and a tenure sufficient in length to insure a grasp and appreciation of the sensitive problems involved. In a large metropolitan area such a council should have a permanent staff commensurate with the burdens of its duties. The English bar has long had experience with such a council and it has proved to be a major force in the successful resolution of problems of professional conduct. See, e.g., Boulton, Conduct and Etiquette at the Bar 2 (4th ed. 1965). See Defense Appendix, infra, for a detailed description.

b. Confidentiality of advisory council opinions

A recent study has indicated that a major factor in determining whether a lawyer complies with the ethical standards of the profession is the extent of support he receives from his professional colleagues when faced with a difficult ethical decision. See Carlin, Lawyers' Ethics 96-117 (1966). An important function of an advisory council is to provide that support. Jurisdiction over discipline should be entirely separate. The maintenance of a record of each inquiry and the response given will be beneficial if the lawyer is ever challenged for his conduct by his client, the bar or the courts, while avoiding the prejudice to his client which might result if the lawyer were to protect himself by making a record of his quandary with the judge or others not necessarily pledged to respect the client's confidence. The fact of a lawyer's inquiry to the council and its response should be privileged except in two circumstances: first, the privilege is waived if his conduct of the case is challenged by the client, as is already an established doctrine of law; and second, if his conduct becomes the subject of investigation looking toward discipline for breach of professional standards. In this latter case the record of the lawyer's inquiry and the response may be made available to an authorized professional or judicial body conducting such investigation, provided the record of his inquiry is itself privileged. The confidentiality of the lawyer's inquiry to the council prevails as to the client but may not be asserted by him if he attacks his counsel as ineffective, nor may it be asserted by counsel who is charged with conduct contrary to the advice given him. Of course, the fact that a lawyer fails to follow the advice given him by the council does not per se make his conduct improper, but it may be considered by the disciplinary body along with all the evidence. In short, the dialogue between the lawyer and the advisory council is confidential and privileged generally but not in the two circumstances just referred to: the accused may not take advantage of the privilege of confidentiality to injure the lawyer and the lawyer may not exploit it for his personal benefit after he has sought the advice of the council and failed to follow it.

Obviously, there are myriad difficulties in adapting a system in which a single advisory council serves all the barristers in England into a system like ours which has 50 states controlling admission and discipline of lawyers—to say nothing of 93 federal districts in eleven federal circuits and a multitude of local state bar associations.

Within the Committee the view was expressed that the need to encourage lawyers to seek the guidance of such a council suggests that the advice given should be protected by a privilege which only the lawyer could waive. Since he would of course waive the privilege if he followed the advice, the fact of the advice and its purport would be privileged under this view only if he elected to proceed contrary to the advice given.
The opposing view was that the lawyer would not be significantly inhibited from using this council by making the fact and purport of the council's advice available to a professional disciplinary body if his conduct was later challenged when he elected to proceed contrary to the advisory opinion. In addition, this view was that a lawyer ought not use the council's advisory opinion to protect himself from a client's attack only when it suited his purposes, while asserting a "lawyer privilege" if he declined to follow the advisory opinion.

Those holding the latter view pointed out that realistically any such "privilege" in the lawyer would serve no purpose since a disciplinary hearing or inquiry could always inquire whether the lawyer sought council advice and whether he followed it. If the lawyer then claimed some privilege-of-privacy in refusing to answer the question, those conducting the inquiry or hearing would inevitably make inferences far more damaging than candid disclosure of the advisory council communications.

An inquiry by an authorized professional body or a hearing on a disciplinary issue is, of course, not a criminal trial and the protective mechanism of the criminal law ought not be imported into such inquiries. The purpose of such inquiry is not penal but rather to govern a profession in the interests of protecting the public.

In summary, the Committee acknowledged that many complex problems, including the above, could be finally resolved on a sound basis only after study and experimentation with the entire subject. The purpose underlying the Committee's general recommendation in this context is to encourage the legal profession to make a start in the direction of supplying some reliable mechanism for guidance of lawyers in criminal cases. Only experience and careful study can guide the delicate and difficult decisions which must be made as to the protection of the client's privilege and as to whether it is either useful or necessary to create a privilege concerning the fact and purport of advisory opinions sought and received by a lawyer.

1.5 Trial lawyer's duty to administration of criminal justice.
(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.

(b) All qualified trial lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Qualified trial lawyers should not assert or announce a general unwillingness to appear in criminal cases; law firms should encourage partners and associates to appear in criminal cases.

Commentary

a. Goal of wide participation
Wide participation in the defense of criminal cases is important to the health of the administration of criminal justice and to the fulfillment of the bar's obligation to insure the availability of qualified counsel to every accused. Although formally certified specialization has not yet occurred in the legal profession, as it has in medicine, it is on the horizon in some form. Meanwhile, as a practical matter, the overwhelming complexity of modern law has brought some degree of specialization. Lawyers and judges are unanimous in acknowledging that not every lawyer licensed to practice is actually competent to try a case in court effectively. And though only a fraction of all criminal cases go to trial, the judgment and experience of a trial lawyer are essential in the process of negotiation leading to a disposition without trial. The number of specialists in criminal trial practice will not be sufficient in the foreseeable future to satisfy the need. See Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389 (1966). However, the nature of the trial lawyer's experience in civil trial practice is such as to qualify him for participation in criminal practice with a minimum of additional training and experience. Such training is available through the increasing number of programs of continuing
legal education in criminal law and procedure sponsored by state and local bar associations and by such organizations as the Practicing Law Institute, Northwestern University, and the Joint Committee on Continuing Legal Education. Experience can also be gathered without imposing an inexperienced lawyer upon the accused by assigning lawyers with little or no trial experience to act as associate counsel to lawyers who are more experienced in the criminal courts. This Committee has recommended the appointment of such associate counsel. ABA STANDARDS, PROVIDING DEFENSE SERVICES § 2.2 (Approved Draft, 1968).

By encouraging the significant number of lawyers who are now active only in the civil courts to obtain training and experience in criminal practice and to hold themselves available and willing to undertake the defense of criminal cases, the bar will take a significant step toward meeting its responsibility for the availability of competent counsel. At the same time, the participation of lawyers whose practice is largely in the civil courts will avoid the undesirable professional isolation of criminal trial specialists. The civil lawyer’s familiarity and acquaintance with the procedures and problems of the administration of criminal justice will also encourage him to play a larger role in the reform and improvement of the criminal law and its processes.

b. Grounds for declining employment in a criminal case

In England every barrister holds himself out as ready to undertake any case, regardless of its type, which requires his appearance in court, subject only to the availability of his time and arrangements for an appropriate fee. The American position formerly was that a lawyer is entitled to “undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense.” ABA CANONS OF PROFESSIONAL ETHICS Nos. 5, 31 (1968). Thus, the American position emphasized the right but not the duty to participate in the defense of criminal cases.

One result was to encourage the public in the mistaken belief that honorable lawyers must pick and choose criminal cases according to their personal belief in the innocence of the accused. This fostered a confused belief as to the role of the advocate whereby a lawyer is vaguely thought to be unethical if he participates in the defense of someone who has admitted his guilt to the lawyer or whose situation leads to widespread belief in his guilt. The end product of this confused thinking is an identification of the lawyer with his client that defeats many of the purposes of our system in providing independent professional representation for every accused person.

The highest tradition of the American bar is found in the obligation of the lawyer’s oath never to reject “from any consideration personal to myself, the cause of the defenseless or oppressed.” A lawyer has the duty to provide legal assistance “even to the most unpopular defendants...” 78 A.B.A. REP. 304 (1953). The great tradition of the bar is reflected in the history of eminent lawyers—from John Adams’ defense of British “Redcoats” charged after the so-called Boston Massacre to the present day—who have risked public disfavor to defend a hated defendant. See Medina, Courage and Independence at the Bar, 25 OHIO Bar 381 (1952), reprinted in VIRTUE, JUDGE MEDINA SPEAKS 49-50 (1954). This is the position taken in the new ABA Code of Professional Responsibility. ABA CODE EC 2-26 to -29. The sure way to guarantee adherence to this tradition that no defendant will be denied competent legal representation is for every trial lawyer to prepare himself to act in criminal cases. See, e.g., N.Y. COUNTY CRIMINAL COURTS BAR ASS’N CODE, ¶ 3. See Williams, The Trial of a Criminal Case, 29 N.Y.S. B. BULL. 36 (1957).

c. Announced unwillingness to take criminal cases

Often in the past lawyers themselves have been the source of the denigration of their role and function as advocates by all too eagerly announcing that they do not practice in the criminal courts. An important step can be taken if the bar will discourage lawyers from privately or publicly proclaiming that they disdain criminal practice. In a more positive vein, the leaders of the trial bar should take the initiative in accepting criminal cases and in encouraging their juniors to do so. The President’s Crime Commission suggested that “law firms should not discourage prospective associates from a 2- to 5-year stint of defense or
prosecution work and should be willing to grant leaves of absence to those of its young lawyers who would like to spend a period in criminal practice and then return . . .” and believed that “it is essential that law firms make lawyers available to handle assigned cases, or to assist a defender’s office.” President’s Crime Comm’n Report 153.

In seeking to broaden participation by trial lawyers in the criminal courts these recommendations are not intended to imply that it is inappropriate for there to be a division of function within a given law office. In a firm of trial lawyers, for example, it is entirely proper for criminal cases to be directed to a particular member or members of that firm.

1.6 Client interests paramount.

Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance.

Commentary

Although it has occurred infrequently, lawyers have for various reasons, possibly personal aggrandizement, sometimes pursued a particular course in a case and sometimes at the expense of the client’s best interests. See Waltz & Kaplan, The Trial of Jack Ruby (1965). The problem involves so much that is subjective that it does not lend itself to any but a broad standard.

A difference has been noted by qualified observers as to the attitude of experienced counsel privately retained and volunteer-appointed counsel who may be less experienced in criminal matters or less conscious of the real duty owed to clients. The former tend to be result-oriented whereas the latter sometimes exhibit a tendency to seek to make “new law,” even at the expense of a sound result for the accused.

The natural desire to be in the forefront in developing new legal concepts obviously does not justify a lawyer in risking conviction and a severe sentence, for example, in a case where a lesser plea probably can be negotiated or probation secured, if the prospects of a guilty verdict are strong. This standard emphasizes that the correct role of defense counsel is not a striving for “courtroom victories” but results which best serve the client’s long-range interests. The total “war” is not won by transitory victories in the interlocutory battles. An appellate “victory” on some technical point may be a Pyrrhic victory if it is followed by a new trial in which the prosecution repairs technical infirmities and makes a stronger case against the defendant.

PART II. ACCESS TO COUNSEL

Introductory Note

A great deal of attention has been given in recent years to the problem of making legal counsel available to those accused persons without means to retain counsel privately. The pressing need for the various states to respond to the Supreme Court’s decisions with respect to this problem caused this Committee to devote its first effort to the issuance of a separate report on that subject which has since been approved by the House of Delegates of the American Bar Association. ABA Standards, Providing Defense Services (Approved Draft, 1968). Even for those with adequate funds there are obstacles to access to counsel wherever there remain official practices or attitudes which obstruct ready communication with a lawyer. There should be nothing to frustrate an accused from contact with a lawyer who is available and qualified to serve him. Unfortunately there is yet another hurdle because of the limited number of lawyers presently able and willing to undertake the defense of a criminal case; this is especially acute at the misdemeanor level which involves a great many more persons than those charged with felonies.

In some jurisdictions, on the other hand, counsel may seem all too available where officially tolerated practices permit favored lawyers to be literally thrust upon the accused by a bondsman, a policeman or some official attached to the court. Because these problems are deeply rooted in the economic and personal self-interest of the various participants in this undesirable practice, it is not a simple matter to solve them. Regulations reinforced by effective sanctions are required to as-
sure that neither police, bondsmen or favored lawyers are permitted special access to persons in custody. Provision for an effective substitute should be made by a judicially approved referral service and public defender systems.

2.1 Communication.

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

Commentary

Most jurisdictions long have provided by statute for the right of a person in custody to communicate with an attorney, either by a message carried by a peace officer or by a telephone call. See Cal. Penal Code § 851.5 (Supp., 1968); Iowa Code Ann. § 55-17 (Supp., 1962); Minn. Stat. Ann. § 481.10 (1958); Utah Code Ann. § 77-15-2 (1953); and statutes collected in Note, 1962 U.Ill. L.F. 641, 646. If this right is to be meaningful, it must be interpreted to permit prompt completion of the communication and not be narrowly limited to any fixed number of calls for the purpose of arranging for employment of counsel. Communication should be permitted until arrangements for counsel have been completed. Communication facilities should be made available promptly following the arrest. In terms of implementation, this may require not one but as many telephones as are reasonably needed to fulfill the need. One such telephone may be adequate in a small precinct station or jail; numerous phones may be needed in another and larger facility. It is part of the function of defense counsel to engage the aid of the organized bar to insure that adequate communication facilities are made available and that services of an adequate number of lawyers are available. See ABA Standards, Providing Defense Services §§ 1.1, 7.1 (Approved Draft, 1968).

2.2 Referral service for criminal cases.

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

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

Commentary

a. Referral service

The American Bar Association has energetically supported lawyer reference plans for many years. See A.B.A. Rep. 290-91 (1942). There are more than a thousand lawyer referral services throughout the nation. See Cheatham, A Lawyer When Needed 69 (1963). Typically, a supervisory committee of the local bar selects and maintains a list of attorneys willing to participate and a referral officer is appointed to administer the system. Many plans permit lawyers to indicate areas of law in which they feel themselves specifically qualified. Some provide for screening by the supervisory committee to determine whether the lawyers possess the special skill they claim. See Porter, Lawyer Reference Plans 7-8 (1949). The lawyer reference plan has been acclaimed as being "in the highest traditions of public service." Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 294 (Fla. 1958).

The special problems of providing counsel in criminal cases require certain adjustments of the conventional lawyer reference system for all types of cases. Considerations of time and function suggest that it should be somewhat separate from the ordinary referral service for civil cases. Given the urgency of the accused's need, it is imperative that access to the referral service be possible at any time of day or night, Sundays and holidays included. Telephonic answering facilities make this feasible. The list of lawyers willing and able to serve in criminal cases should be compiled and maintained separately from the list of lawyers
available for civil cases. The thrust of the referral service should be to provide immediate access to a lawyer who will respond promptly to calls from accused persons at a time of acute stress. The list should also be carefully screened by the supervisory committee so that it includes only lawyers qualified by experience to handle criminal cases. If the regular committee does not include enough lawyers active in criminal trial practice to make this possible, it should consult with such lawyers or a separate committee for referrals in criminal cases should be established. Careful screening hopefully will lead to a situation in which inclusion on such list will be considered a badge of distinction among trial lawyers, thus serving the goal of broadening participation in the criminal courts. See § 1.5, supra.

b. Publicity and notices

A lawyer referral service cannot fulfill its function without publicity to make its existence and purpose known to those who need it. Such publicity does not violate professional ethics if it avoids naming individual attorneys. ABA OPINIONS No. 227 (1941). In addition to making the referral plan generally known to the public, there is a special need in criminal cases to give widespread notice of its existence, its purpose, and the manner of contacting it at those places where accused persons are taken into custody. The idea of posted notice has been adopted in recent statutory provisions designed to assist accused persons in communicating with counsel, e.g., ILL. ANN. STAT. 103-3, -7 (1963). As this Committee stated in its earlier report in a related context:

For the accused, the situation is likely to present itself rarely; for the authorities, it will arise daily. This is sufficient reason to place the responsibility on the authorities to take the initiative. . . . Making this step an integral part of police procedure is the means best calculated to achieve the goal of early representation.

ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.1, Commentary at 46 (Approved Draft, 1968).

2.3 Prohibited referrals.

(a) It is unprofessional conduct for a lawyer to compensate others for referring criminal cases to him.

(b) It is unprofessional conduct for a lawyer to accept referrals by agreement or as a regular practice from law enforcement personnel, bondsmen or court personnel.

(c) It is unprofessional conduct to accept referrals of criminal cases regularly except from an authorized referral agency or a lawyer referring a case in the ordinary course of practice.

(d) Regulations and licensing requirements governing the conduct of law enforcement personnel, bondsmen, court personnel and others in similar positions should prohibit their referring an accused to any particular lawyer and should require them, when asked to suggest the name of an attorney, to direct the accused to the referral service or to the local bar association if no referral service exists.

Commentary

a. Compensation for referrals

The payment of compensation by a lawyer to another for referring a case violates the canons against solicitation and advertising which govern the bar generally. ABA CODE DR 2-103(B); see Alpers v. Hunt. 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am. St. Rep. 17 (1890). Where any commission is paid to a law enforcement officer for the referral of cases or other benefits or "rewards" are given, there is the highly undesirable temptation to the officer to make arrests or have his evaluation of probable cause influenced by his desire to obtain compensation from the lawyer to whom the case is referred.

The mere existence of any arrangement with lay intermediaries may result in a lay intermediary exercising control over the lawyer's conduct of the case. This is a practice forbidden by Canon 5 because of the danger that one who is not subject to the professional discipline of the bar will attempt to dictate the tactics to be used. ABA CODE DR 5-107(B). If the referral is made by law enforcement personnel, the conflict between their public duty and private interest is apparent. Any

The prohibition of the payment of a fee for the referral of a case also applies to payments by one lawyer to another. A division of fees between lawyers must be on the basis of services rendered to the client and responsibility assumed by the lawyer, ABA CANONS OF PROFESSIONAL ETHICS No. 34 (1968); hence a "forwarding" fee is impermissible. See, e.g., ABA CODE DR 2-107; ABA OPINIONS No. 265; N.Y. CITY OPINIONS No. 500 (1939); N.Y. COUNTY OPINIONS No. 382 (1948). Payment of such a fee undermines the concept that professional compensation is only for services rendered, see ABA CANONS OF PROFESSIONAL ETHICS No. 12 (1968), and may result either in the client's being charged more than he otherwise would or the lawyer's rendering less than the service required in an effort to offset this item. In some states the payment of such a fee has not been considered unprofessional conduct. See McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 415 (1951). And where it has been prohibited, lawyers have not uniformly respected the prohibition. See Carlin, *Lawyers on Their Own* 81, 162, 208 (1962). Thus, it is important that the bar sternly oppose this practice and discipline violators.

b. Authorized and unauthorized referrals

Regardless of the factor of compensation, the acceptance of regular referrals entails most of the pernicious consequences of compensated solicitation. Even where the police officer, bondsman or court attaché making the referral may be motivated not by desire for economic gain but by friendship for the lawyer or honest sympathy for the defendant's plight, the potential for abuse in permitting the practice outweighs such considerations. The potential conflict of interest which exists when the

one making the referral is a police officer is the same whether or not compensation is involved, since the officer may be called as a witness in the proceedings. Moreover, any practice of referrals which fails to meet the conditions set out in section 2.2, supra, is likely to direct the defense of criminal cases into the hands of a few lawyers, and not necessarily to the competent and ethical members of the bar.

These prohibitions do not preclude a lawyer from accepting referrals from a clergymen or other person comparably situated.

c. Regulation of police officers, court personnel, bondsmen and others

Unprofessional referral practices which have existed in some jurisdictions cannot be extirpated by action taken against participating lawyers alone. To be effective, sanctions must be directed at both parties to the transaction. Some major police departments, such as New York City, have provided by departmental regulation that an officer may not recommend a lawyer to a person in custody. Such regulations should be universal. Likewise, those responsible for the licensing or supervision of bondsmen or others in a position to be tempted to make such referrals should undertake to discourage the practice by the imposition of appropriate sanctions pursuant to regulations duly promulgated. Court rules could readily accomplish this in many situations.

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PART III. LAWYER-CLIENT RELATIONSHIP

Introductory Note

At whatever stage a lawyer is called into a criminal case, he encounters problems unlike those of his counterpart in an ordinary civil case. Like a person who has been struck down in the street by a hit-and-run car, the person who is suddenly arrested or indicted may have "shock" reactions which block communication with those who are trying to aid him. The inexperienced, illiterate or unsophisticated defendant may be unable to grasp the nature of his predicament or the relevance of certain facts which he ought to relate to his lawyer. In addition, there are often psychological barriers to revealing information essential to the
conduct of an effective defense. The accused may be frightened and apprehensive or hostile and uncooperative. Even with sophisticated clients these barriers exist. The lawyer must recognize these problems and deal patiently and persistently with them.

This is often true even where an affluent and sophisticated person selects his own lawyer and is even more often true when the accused must depend upon counsel selected for him either by the court or within the operation of a public defender system. At some levels an accused tends to view with suspicion any lawyer whose services are provided by the court or a public defender office; he may view such a lawyer as part of the official structure and not as the advocate of his cause. Medalie, Zeit & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968); Comment, Interrogations in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1605 n.244 (1967). Most clients of public defenders or other assigned counsel will respond less readily, and it will ordinarily take considerable time and patience to establish a workable relationship. The lawyer cannot expect a good relationship to spring into being at once. Several conferences, or many, may elapse before the accused is willing to put his trust and confidence in the lawyer.

Experienced defense lawyers who testified before the Committee emphasized that it often required repeated interviews to establish an adequate working relationship and rapport with an accused. The relationship of confidence is obviously essential to gain complete and candid disclosure of relevant facts which are often embarrassing to the accused and to gain his consent to placing control of the litigation in the hands of the lawyer. If this is the experience of seasoned criminal defense lawyers whose clients often are sophisticated men who selected them because of their confidence in their abilities, clearly the lawyer who does not have these advantages must be prepared to devote special efforts to insure that this necessary relationship develops.

Part of the function often served by the lawyer in the initial stages of representation is to calm his troubled client. The accused may have apprehensions about his family, his job and his reputation as well as the matter of freedom. The lawyer may need to contact family, friends, the accused's employer or others to help to set his client's mind more at ease. This portion of the functions traditionally served by lawyers in criminal cases may lend itself to being performed by other personnel; hence the recent proposals for the development of para-legal personnel, trained to assist lawyers in the performance of certain delegated functions, have particular relevance here. See Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 402 (1966).

Experienced defense lawyers consulted by the Committee were of the opinion that two factors are indispensable to effective representation of the accused: complete candor of the client and consent to the advocate's control of the technical aspects of the case. It was conceded that such an understanding must be established over a period of time and that it may deteriorate during the relationship. Generally it will be more difficult for appointed counsel than for retained counsel to achieve complete candor and consent to control of the professional aspects of the case. Often these are achieved only after defense counsel has had an opportunity to impress his client with his earnestness in his behalf, perhaps in an appearance in court on a motion in the case, or through his other efforts to protect the defendant's rights. Confidentiality is a necessary adjunct to candor, just as candor lays the basis for an effective defense. All the lawyers consulted by the Committee agreed that appointed and retained counsel had the same basic need for full and candid disclosure and the need to control the handling of the case.

Because of these factors a defense lawyer should make clear that he cannot give effective representation without complete disclosure from the accused or without wide latitude in controlling the technical legal aspects of the defense. To secure full disclosure he must convince the accused that all statements are privileged and cannot lawfully be revealed by the lawyer, provided they relate to the charge.

A number of other substantial issues must be dealt with in a comprehensive review of the establishment of the lawyer-client relationship in criminal cases. The concept of the independent lawyer has suffered in
the public eye because of a very small number of lawyers who are involved on a continuing basis by those engaged in organized crime. That this group is a minute fraction of the legal profession does not lessen the shadow it casts on the system of justice. The matter of fees is another topic in this area which requires attention, both because of the implications for the independence of the lawyer and because of the undesirable innuendoes which arise from excessive fees. This section of the report also considers the problem of conflicting interests. Recent cases have pointed up the importance of insuring that the representation of one client is not diluted by claims or interests of others to whom the lawyer may owe allegiance. The establishment of a proper lawyer-client relationship can be a sound basis for the further steps in representation by counsel only if all the facets of the problem concerned in this part of the report are considered.

3.1 Establishment of relationship.

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and he should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

(b) The conduct of the defense of a criminal case requires trained professional skill and judgment; therefore, the technical and professional decisions must rest with the lawyer without impinging on the right of the accused to make the ultimate decisions on certain specified matters, as delineated in section 5.2.

(c) To insure the privacy essential for confidential communication between lawyer and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, court houses and other places where accused persons must confer with counsel.

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

Commentary

a. Confidentiality

Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. The result may be that the case is prepared by counsel without important evidence that might have been obtained, that valuable defenses are neglected and, perhaps most significantly, that the lawyer is not forewarned of evidence which will be presented by the prosecution. It is to encourage candor and full disclosure that the obligation of confidentiality which surrounds the lawyer-client relation has been erected. The Canons of the American Bar Association reflect the ancient doctrine that a lawyer must preserve all confidences which relate to the representation of the accused. ABA CANONS OF PROFESSIONAL ETHICS No. 37 (1968). See also 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961). “The first duty of an attorney is to keep the secrets of his clients.” Taylor v. Blacklow, 3 Bing. N.C. 235, 249, 132 Eng. Rep. 401, 406 (C.R. 1836). There are two well-established exceptions to the duty of confidentiality: the lawyer is free of the obligation to the extent necessary to defend his own conduct, where the client has called the lawyer's conduct into question, as in a post-conviction proceeding or disciplinary proceeding against the lawyer, ABA OPINIONS 19, 202; and the lawyer may disclose, and indeed may be obligated to disclose his client's stated intention to commit a crime at a future time. See § 3.7(d), infra.

b. Control of conduct of case

In Part V this report will treat the necessity of the lawyer controlling all technical legal aspects of the defense. However, since laymen may not understand the reasons and need for the degree of control which the lawyer must have, it is essential that it be clarified at the inception
of the lawyer-client relationship. The Commentary section 5.2, infra, is applicable here.

c. Facilities for private interview

The importance of permitting access to counsel has been stressed in recent Supreme Court decisions, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964). Even if accused persons are permitted to contact a lawyer and counsel is allowed to see his client, the assistance of counsel cannot be rendered fully unless interviews can be held in private and at convenient times. This is true while an accused is in custody pending trial or while incarcerated after conviction if an appeal or a post-conviction proceeding is pending or contemplated.

But these matters should not be relegated to post-conviction relief or the seeking of court orders before and during trial. Regulations governing custodial institutions and rules of court should provide for adequate opportunities for consultation between lawyer and client. Many lawyers have noted that some jail regulations limit the hours and frequency of consultations in a manner that severely restricts necessary lawyer-client discussions. Restrictions to weekdays during daytime hours, for example, may make such interviews unduly expensive in terms of the lawyer's time or may intrude upon his other obligations.

In the determination by courts of what are reasonable provisions and in the drafting of regulations governing this matter, emphasis should be given to flexibility in all arrangements for lawyer-client contacts. Defense counsel should protest against any barriers to reasonable lawyer-client communication.

On a number of occasions courts have been called upon to consider invasions of the privacy of the attorney-client interview. The placing of a guard in a position to overhear conversations between lawyer and client has been held to be a violation of the right to counsel, see, e.g., Turner v. State, 91 Tex. Crim. 627, 241 S.W. 162 (1922); Ex parte Rider, 50 Cal. App. 797, 195 P. 965 (Dist. Ct. App. 1920); see also Louie Yung v. Coleman, 5 F. Supp. 702, 703 (S.D. Idaho 1934). It is not necessary that disclosure to the prosecution be shown; the risk of disclosure and the inhibiting effect on full communication are suffi- cient. State v. Davis, 90 Okla. Crim. 95, 130 P. 962, 964 (1913). Courts have looked even more harshly upon secretive encroachment on the privacy of the interview, obviously because in these situations the lawyer and client have acted in the belief that privacy had been afforded. Convictions have been reversed and new trials ordered where telephone conversations between lawyer and client were intercepted, Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), or where an informant for the prosecution was present during the interview, Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953). (In the recent case of Hoffa v. United States, 385 U.S. 293 (1966), the testimony of an informant to conversations between lawyer and client was held admissible where the conversations concerned one case and the testimony was given in a later jury-tampering trial.) One court has held that eavesdropping on the discussions between defense counsel and the defendant in an interview room at the jail via a hidden microphone created such ineradicable prejudice to the defense that a new trial could not be permitted and required that the case be dismissed. State v. Cory, 62 Wash. 2d 371, 382 P.2d 1019 (1963). A responsibility rests heavily upon the courts, the bar and the law enforcement authorities to see that such invasions of the privacy of the lawyer-client relation do not occur. Law enforcement personnel should be brought to understand the vital interest that society has in maintaining that privacy, and appropriate measures should be taken at all levels to see that it is ensured.

d. Correspondence between lawyer and client—censorship of mail

It is fundamental that there should be untrammelled communication between client and lawyer.

A number of courts have struggled recently with the question of censorship of correspondence between a prisoner and his lawyer. See, e.g., Cox v. Crouse, 376 F.2d 824 (10th Cir. 1967); Haas v. United States, 344 F.2d 56 (8th Cir. 1965). A traditional reluctance to interfere in prison administration and concern for the security of such institutions have led courts to uphold censorship regulations which they have found to be reasonable. On the other hand, the Supreme Court
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has said that “even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection. . . .” Lanza v. New York, 370 U.S. 139, 143-44 (1962). Censorship of correspondence between prisoners and their lawyers may inhibit communication and impair the relationship, require time-consuming and expensive travel to assure confidentiality, or even serve as a means of preventing legitimate grievances from being brought to light. Of course, a prisoner serving a sentence has no claim to privacy relating to an effort to conduct matters unrelated to his legal claims—a business enterprise, for example.

This standard seeks to accommodate these conflicting considerations by insisting that censorship be prohibited with respect to all correspondence between lawyer and client concerning a pending or prospective case or appeal. Thus, the prohibition would not be applicable where some relationship of lawyer and client had not been established. If desired, a prison might require a certificate of the lawyer that he wishes to engage in uncensored correspondence, showing his office address, to prevent circumvention of the limits on this exception to the censorship policy.

3.2 Interviewing the client.

(a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client’s responses.

(b) It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer’s knowing of such facts.

Commentary

a. Securing facts from the client

The client himself is usually the lawyer’s primary source of information necessary for an effective defense. An adequate defense cannot be

framed if the lawyer does not know what is likely to develop at trial. He needs to know essential facts including the events surrounding the act charged, information concerning the defendant’s background and his record of prior convictions, if any. In criminal litigation, as in other matters, information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case incapacitates himself to serve his client effectively.

The client, whether innocent or guilty, often knows facts which may tend to incriminate him. For example, though he may be innocent, he may have been near the scene of the crime at the time it was committed and hence be reluctant to disclose that fact to his lawyer for fear the lawyer will lose confidence in his innocence and pursue the case less zealously. The lawyer must recognize this reluctance and overcome it if he is to be informed of facts necessary for an effective defense.

Defense counsel has been sometimes depicted as following the strategy of informing the client of the legal consequences of various factual situations in order to influence the client to adopt that factual version most favorable to a legal defense, for example, the claim of insanity. See, e.g., Traver, Anatomy of a Murder (1958). Canon 22 is addressed to this question. It provides that “it is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses.” When the lawyer follows the former course, he violates the explicit canons of professional conduct and handicaps an effective defense by promoting his own ignorance of the facts as they may ultimately be revealed at trial.

b. Calculated ignorance of facts by the lawyer

The most flagrant form of the practice of “intentional ignorance” on the part of defense lawyers is the tactic, occasionally advocated by unscrupulous lawyers both in private and in practice manuals and seminars, of advising the client at the outset not to admit anything to the lawyer which might handicap the lawyer’s freedom in calling witnesses or in otherwise making a defense. Apart from the professional impropriety, this tactic is most egregious because it runs a risk of misinforming the lawyer so that he may be the victim of surprise at trial. A
lawyer should make clear to the client the imperative need for the advocate to know all aspects of the case; he should explain that all of the client's statements and those of other witnesses must be fully investigated.

Elsewhere in this report we have noted the critical importance which leading defense lawyers placed on complete candor from the client. These lawyers stressed that at the outset they invariably informed the client that, if the client failed to disclose all relevant facts, they would consider immediate withdrawal from the case. These lawyers also pointed out that securing such complete disclosure depended on developing a relationship of trust. To secure candid disclosure from the client of facts which are often both incriminating and embarrassing, the client must be sure that these facts will not be divulged by the lawyer; he must also be made to understand that the lawyer cannot prepare an effective case in defense unless he knows all that the client knows. An explanation of the privileged status of all information should be given in most cases unless it is clear that the client is sophisticated enough to understand the lawyer's duty as to confidentiality.

3.3 Fees.

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

(b) It is unprofessional conduct for a lawyer to imply that compensation of the lawyer is for anything other than professional services rendered by him or by others for him.

(c) It is unprofessional conduct for a lawyer to overreach his client in setting the fee.

(d) It is unprofessional conduct for a lawyer to divide his fee with a layman. He may share a fee with another lawyer only on the basis of their respective services and responsibility in the case.

(e) It is unprofessional conduct to undertake the defense of a criminal case on the understanding that the fee is contingent in any degree on the outcome of the case.

Commentary

a. Determination of fee

The factors properly considered in establishing the lawyer's compensation trace back at least as far as an ordinance of the City of London of 1280. See DRINKER, LEGAL ETHICS 173 § n.42 (1953). The Canons of Ethics advise that "lawyers should avoid charges which overestimate their advice and services as well as those which under-value them." ABA CANONS OF PROFESSIONAL ETHICS No. 12 (1968). ABA Code DR 2-106 relates primarily to civil cases and suggests several factors which can properly be considered, although no one of these factors is controlling. For a number of reasons, it is the general practice of lawyers in criminal cases to accept a case only if the fee is paid or assured in advance. It should be recognized that this requires that factors of time and effort be estimated in advance. The lawyer should not be faulted where his estimate was reasonable at the time it was made.

b. Implication that fee is other than for professional services

At one of its hearings the Committee was told by an experienced criminal lawyer, now a judge, that "I have heard more than one lawyer say to a man [by way of justifying a large fee], 'You know you don't get things done for nothing.'" Another recounted the use of the ambiguous phrase, "You'll have to pay me $5,000 because a lot of people get in the act." Clients in criminal cases are sometimes more willing to pay lawyers for results secured by unethical conduct than for skillful representation within the law and the rules of professional conduct. A lawyer should scrupulously avoid permitting an impression that the fee will be used for undefined purposes or vaguely defined purposes which may be interpreted as including bribery, or that the service
which will be provided has a special value because of the lawyer's relationship to the prosecutor or judge or other officials or because of any factors unrelated to his professional services. The creation of such an impression has been held to be ground for professional discipline. See In re Farris, 340 Mo. 1206, 105 S.W.2d 921 (1937); State Bd. v. Sheldon, 43 Wyo. 522, 7 P.2d 226 (1932).

c. Overreaching

It is generally accepted in the United States that attorneys' fees are a matter of agreement between lawyer and client, although the lawyer should be guided by the considerations enumerated in this section. However, it is clear that a lawyer may be disciplined where his fee is flagrantly excessive or results from overreaching of his client. See Drinker, Legal Ethics 174 (1953). In criminal cases, because of the intensity of the values at stake, there is a special danger that the lawyer may exploit his client's apprehensions and difficulties to his own pecuniary advantage. As a result, disciplinary measures should be invoked when such overreaching can be clearly demonstrated. A lawyer who demands that his client pay an additional fee on the eve of trial beyond that which had been previously agreed is particularly suspect, In re Karp, 240 App.Div. 388, 270 N.Y.S. 113, aff'd, 266 N.Y. 473, 195 N.E. 160 (1934), since once the relationship of lawyer and client has been established he stands in a fiduciary relationship to his client and no longer can claim that the additional fee demanded in those circumstances results from arms-length bargaining. United States v. Stringer, 124 F. Supp. 705 (D. Alaska 1954), rev'd on other grounds, 233 F.2d 947 (9th Cir. 1956). Misrepresentation to the client of the extent of his predicament is a form of overreaching which should lead to discipline. State Bd. v. Sheldon, supra.

Family ties and loyalties often lead others, even though not legally obligated to pay for the defense, to offer financial assistance to an accused. While it is not improper for a lawyer to accept fees derived from such sources if no conflict of interest results, see § 3.5(c), infra, a lawyer should avoid the appearance of overreaching which in some circumstances may follow if he urges the accused to appeal to such sources. A fortiori, the lawyer should not bypass the client and appeal directly to family and friends except when requested to do so by a client who is in custody.

d. Division of fees

Any division of fees with laymen is prohibited because of its tendency to open the door to control of the conduct of the case by one who is not subject to professional discipline. There is also the danger of a conflict of interest between the client and the person who shares in the fee. The layman's "fee" is also an added cost to the client.

Division of fees with another lawyer is also prohibited except on the basis of a fair division of responsibility and services in the case. See ABA Code DR 2-107(A)(2). Referral fees are discussed in the Commentary to section 2.3, supra. The practice of lawyers sharing a "forwarding" fee to be paid out of the fee charged by the lawyer who tries the case is so widespread that it commands far more attention from the bar and the courts than it has received to date.

e. Contingent fees

Fees contingent upon a successful disposition of the case have long been prohibited in criminal cases. See MacKINNON, Contingent Fees for Legal Services 52 (1964). The contingent fee implies that the client is paying for a result rather than compensating the lawyer for purely professional services and puts the advocate in the position of having a monetary stake in the outcome of the case. Such a fee arrangement demeans the advocate and puts pressures on him to employ improper or corrupt tactics to enhance his fee. It is recognized that, although the contingent fee conflicts with the principle that the lawyer should not have a pecuniary interest in the litigation, it has been regarded as necessary in some civil cases lest a large segment of the public be denied the opportunity to litigate just claims because of lack of financial capacity. In the administration of criminal justice the stakes are high, and thus the danger of abuse resulting from a contingent fee is especially great. Moreover, a method of representation for those who cannot afford to retain counsel is now widely available. See ABA


3.4 Obtaining literary rights from the accused.

It is unprofessional conduct for a lawyer consulted by or representing an accused to negotiate with the accused to secure, either as part of his compensation or as a condition of the employment, right to publish books, plays, articles, interviews or pictures relating to the case.

Commentary

A grave conflict of interest can arise out of an arrangement between a lawyer and an accused to give to the lawyer the right to publish books, plays, articles, interviews or pictures, or related literary rights concerning the case. First, it violates the fiduciary relation by dealing with one’s own client on matters apart from professional advocacy; second, the client is not a free agent, particularly if he does not have independent legal advice concerning the extraneous transaction; third, it may place the lawyer under temptation to conduct the defense with an eye on the literary aspects and its dramatic potential. If such an arrangement or contract is part of the fee, in lieu of the fee, or a condition of accepting the employment, it is especially reprehensible. The “inside story” of a sensational criminal case can produce literary royalties and other economic benefits largely in excess of a normal fee for the conduct of the case. Finally, such an arrangement is a blatant form of self-touting or advertising which ought not be engaged in by members of the bar.

In this connection, the lawyer may well have a duty to advise the client of the risks of disclosing facts to a third party who is not bound by any duty of confidentiality, hence removing the protection of the attorney-client privilege.

3.5 Conflict of interest.

(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant’s selection of a lawyer to represent him.

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

(c) In accepting payment of fees by one person for the defense of another, a lawyer should be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due the accused. When the fee is paid or guaranteed by a person other than the accused, there should be an explicit understanding that the lawyer’s entire loyalty is to the accused who is his client and that the person who pays his fee has no control of the case.

(d) It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer’s partner or other professional associate is the prosecutor or has participated in or supervised the prosecution at any stage.

Commentary

a. Disclosure of conflict of interest

The obligation to disclose to a potential client any relationship to other parties or the subject matter of the case that might undermine or draw into question his ability to guard his client’s confidences and zealously pursue his client’s interest is a general one that extends to
members of the legal profession in all the aspects of their activity. See ABA Code DR 5-101 (A). Drinker, Legal Ethics 103-31 (1953).

In a criminal case this responsibility rests heavily upon the lawyer because the circumstances of his initial contact with the client are likely to render the client less sensitive to such considerations or less capable of understanding them. In most instances, the fact of confrontation with the criminal law will loom so large before him that he will be eager to obtain any representation as soon as possible and thus will not be as cautious in evaluating a potential conflict even when it has been disclosed.

While the obligation to disclose a conflicting interest is most apparent when the lawyer has other loyalties which might cause him to modify his zeal in representation, there is a more subtle type of conflict that also must be avoided. Counsel may see in a criminal case an opportunity to further personal or general social interests which are not those of the client. The lawyer who takes a criminal case because of the great publicity he expects it will attract for him is in danger of taking action which furthers the interest of his publicity at the expense of reaching a quieter disposition more favorable to his client. Another example of this may be observed where counsel wishes to test the constitutionality of a law under which the accused is charged although a plea to a minor offense is available. The decision must be made on the basis of the client’s best interests, uninfluenced by the lawyer’s self-interest in being identified with a “landmark case.”

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

is faithfully discharged. This problem is one of the arguments frequently made against the desirability of a full-time defender agency. Those who have studied voluntary and public defender offices have concluded that the inbred adversary tendencies of the lawyer are sufficient protection. See Special Comm’n of the Ass’n of the Bar of the City of N. Y. & the Nat’l Legal Aid and Defender Ass’n, Equal Justice for the Accused 61, 71, 74 (1959). In the sphere of private representation and in institutionalized prosecution offices many of these risks are present in some degree. Here, too, the innate competitive instincts of an advocate and the integrity of the bar is society’s protection. Because these pressures are endemic to the system, they should be explained carefully to law students and again to those entering the bar so that they may be alert to the warning signals of potential conflicts and the realities of the problem.

b. Representation of co-defendants

Beyond the obligation of disclosure, there are situations in which the lawyer’s independent representation of his client is so inhibited by conflicting interests that even full disclosure and consent of the client may not be an adequate protection. ABA Code DR 6-106. In criminal cases this most frequently occurs where the lawyer undertakes the defense of more than one co-defendant. In many instances a given course of action may be advantageous to one of the defendants but not necessarily to the other. The prosecutor may be inclined to accept a guilty plea from one of the co-defendants, either to a lesser offense or with a lesser penalty or other considerations; but this might harm the interests of the other defendant. The contrast in the dispositions of their cases may have a harmful impact on the remaining defendant; the one who pleads guilty might even, as part of the plea agreement, consent to testify against the co-defendant. Moreover, the very fact of multiple representation makes it impossible to assure the accused that his statements to the lawyer are given in full confidence. Defense counsel necessarily must confront each with any conflicting statements made by the other in the course of planning the defense of the cases. In this
situation he may find that he must "judge" his clients to determine which is telling the truth, and his role as advocate would inevitably be undermined as to one if not both defendants.

The Supreme Court has recognized that in such circumstances the impact of the conflict of interest is so severe as to warrant the conclusion that the defendant has been denied due process of law. See Glasser v. United States, 315 U.S. 60, 75-76 (1942), in which the Court noted that "[i]rrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness. . . . The right to have the assistance of counsel is too fundamental and too absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." See also Craig v. United States, 217 F.2d 355 (6th Cir. 1955); People v. Douglas, 61 Cal. 2d 420, 38 Cal.Rptr. 884, 392 P.2d 964 (1964). The weaker defense may often detract from the stronger, and a lawyer may find that to assert a point vigorously for one client operates to disparage the other or put him in a bad light. Such situations underscore the need for separate representation. Although there may be some situations where it will be mutually advantageous to the defendants to have a single lawyer represent them, the risk of an unforeseen and even unforeseeable conflict of interest developing is so great that a lawyer should decline multiple representation unless there is no other way in which adequate representation can be provided to the defendants.

A variation of this problem arises if two or more lawyers associated in practice are asked to defend co-defendants. This is really not different from the problem of one lawyer representing multiple defendants. For the same reasons that argue against such dual representation, law partners or associates should avoid being placed in such a situation by eschewing the representation of co-defendants. Cf. ABA INFORMAL OPINION NO. 284, in ABA OPINIONS 642 (1957).

c. Payment by one for representing another

There are other situations in which a conflict may arise. For example, counsel is not infrequently employed in criminal cases by a relative or friend or employer or co-defendant of the defendant. In such cases there is the possibility of conflicting allegiances developing. This possibility is especially aggravated if the person paying fees of counsel is himself a party defendant or witness to the alleged offense, as is sometimes the case where an employer pays for a lawyer for one of his employees when both are indicted. There are inherent risks that the person paying the fees may regard himself as the principal to whom counsel's primary loyalty is due. A lawyer for an accused must give his entire loyalty to the accused without regard to the source of his fees. Payment of fees and costs by a person other than the accused can never be allowed to dilute or influence the undivided loyalty of counsel to the accused or confer on the fee-payer any control of the litigation inconsistent with the best interests of the accused. ABA CODE 6-108(B).

d. Prosecutors and their partners as defense counsel

The particular form of conflict of interest which arises when two lawyers who are associated in the practice of law appear on both sides of a case has been the subject of legislation in many states. These statutes typically make it a misdemeanor and provide for the revocation or suspension of the license of an attorney who in any way participates as prosecutor and then advises in the defense of the same case. See, e.g., MISS. CODE ANN. § 8672 (1956); UTAH CODE ANN. § 78-51-30 (1953). The same result has been reached in the absence of a pertinent statute. Fitzsimmons v. State, 116 Neb. 440, 228 N.W. 83 (1928). See also Green v. State, 241 Ind. 96, 168 N.E.2d 345 (1960); ABA OPINIONS No. 16 (1929); Rostow, The Lawyer and His Clients, 48 A.B.A.J. 25 (1962).

A number of courts have imposed professional discipline upon a lawyer who appeared on both sides of the same case, either first as prosecutor and later as defense counsel, e.g., State v. Robbins, 221 Ind. App. 125, 46 N.E.2d 691 (1943); Hawkins v. Eighth Judicial Dist. Ct., 67 Neb. 248, 216 P.2d 601 (1950), or first as defense counsel and later as prosecutor, e.g., State v. Leigh, 178 Kan. 549, 289 P.2d 774 (1955). But where the circumstances have shown no division of loyalties, courts have recognized that it is permissible for one who holds prosecutorial office to act as defense counsel in another.
jurisdiction. People ex rel. Colorado Bar Ass'n v. Johnson, 40 Colo. 460, 90 Pac. 1038 (1907); Yancey v. State, 41 Okla.Cr. 197, 271 Pac. 170 (1928). The ABA Committee on Professional Ethics and Grievances has ruled that, at least in rural communities where lawyers are few in number, a city prosecutor could act as defense counsel in cases prosecuted in the district court by the district attorney. ABA OPINIONS No. 55 (1931).

In all of these situations the controlling consideration is the avoidance of any possibility of division or dilution of loyalties. Relationships between lawyers who are associated in practice are so close and the potential for conflict is so great, given the lack of any strong reason for permitting such representation, that a flat prohibition is warranted against lawyers from the same firm or office appearing as prosecutor and defense counsel. Similarly, it would not be sound to permit one who regularly serves as a prosecutor to appear as defense counsel opposing one who ordinarily is his associate in the prosecution office.

Yet there are advantages to the operation of the adversary system if lawyers can avoid being stereotyped in their roles. See THE PROSECUTION FUNCTION, Introduction, supra, at 20-21. Obviously, in our system of institutionalized prosecution offices, unlike England, for example, it is difficult if not impossible for prosecutors to appear in the defense role. More feasible is the interchange of roles by having experienced defense counsel appointed as special prosecutors from time to time. The long range benefits of interchange, however, are such that lawyers who have been trained in prosecution offices should be encouraged to devote some period of their professional careers in defense work, whether privately or as a public defender, after they have left prosecution offices. Correspondingly, public defender staff members should be encouraged to move into prosecution offices.

3.6 Prompt action to protect the accused.

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

(b) A lawyer should not act as surety on a bail bond either for the accused or others.

Commentary

a. Prompt protection of legal rights

Many of the rights which the law guarantees to an accused person can be vindicated only by prompt action. One of the lawyer's most significant tasks is to inform the client of the nature, extent and importance of his constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning his privilege against self-incrimination and the appropriate response to be made to a line-up, interrogation or problems relating to statements to news media. See Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases §§ 35-37 (1967). Many cases will require that special steps be taken to preserve existing evidence under the control of others, prompt ballistics or handwriting tests, or medical examinations of the accused.

One of the most vital of the accused's rights is the right to be released from custody pending trial. Not only is this essential to his immediate freedom, continuation of his employment and his associations with family and friends, but also it is directly related to a favorable disposition of the case. In many cases the accused, if not confined, can personally assist counsel by identifying and locating material witnesses or securing evidence vital to the defense. Moreover, if he is able to continue his employment, the groundwork may be laid for a strong showing for probation if he is found guilty. See ABA STANDARDS, PRETRIAL RELEASE § 1.1, and Commentary (Approved Draft, 1968).
The particular procedural steps which should be taken to protect the rights of the accused will vary greatly from case to case. The Committee particularly rejects any implication that a lawyer is obligated to take every step which the accused demands unless in his professional judgment it has some utility in the particular case. His professional judgment that the particular step can be appropriately invoked in the case to his client’s advantage should govern. See § 5.2, infra. Among the obvious steps to be considered at once are motions for pretrial release, for continuance of the preliminary hearing if that will benefit the accused, for suppression of evidence if grounds exist, for change of venue if that will benefit the accused, or for pretrial psychiatric examination if any reason for such examination appears. At an early stage there may be need for defense counsel to move that he be allowed access, depending on the nature of the case, to such matters in the possession or control of the prosecution as ballistic test reports, autopsy reports or other scientific evaluations of evidentiary matter which may be used at trial.

Counsel’s role at the pretrial stage is not limited to formal legal steps that should be taken in the accused’s behalf. The accused often needs assistance with his personal relationships that have been disrupted merely because he has been charged with a crime. This may require advising the accused concerning his relationships with his employer, landlord or creditors or even direct efforts by the lawyer to persuade them to defer adverse action until final disposition of the case. See President’s Crime Comm’n Report 151.

b. Lawyer as bondsman

In some jurisdictions lawyers are restricted by rule of court or otherwise with respect to acting as surety on bail bonds. It is particularly important that a lawyer not act as surety with respect to his own client. This limitation enables the lawyer to avoid identification and involvement with the client which is beyond the lawyer’s role as advocate, and which if not observed undermines the detachment which an advocate should have.

A member of the bar engaged in practice should not engage in the business of acting as surety on bail bonds even if he does not represent the defendant bonded. A few members of the bar have engaged in occasional or regular activities as bail bondsmen in order to secure clients. Lawyers should advocate rules of court or statutes prohibiting this highly undesirable practice. This Committee concurs in the recommendation of the Advisory Committee on Pretrial Proceedings of this ABA Project that “No attorney should be permitted to act as surety on a bail bond.” ABA Standards, Pretrial Release § 5.4 (Approved Draft, 1968).

3.7 Advice and service on anticipated unlawful conduct.

(a) It is a lawyer’s duty to advise his client to comply with the law but he may advise concerning the meaning, scope and validity of a law.

(b) It is unprofessional conduct for a lawyer to counsel his client in or knowingly assist his client to engage in conduct which the lawyer believes to be illegal.

(c) It is unprofessional conduct for a lawyer to agree in advance of the commission of a crime that he will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning or application of the law, or where the defense is incidental to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Except as provided in section 7.7, a lawyer may reveal the expressed intention of his client to commit a crime and the information necessary to prevent the crime; and he must do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his part is necessary to prevent it.

Commentary

a. Advising compliance with law

Since the system of justice cannot function if the professional participants—the advocates—do not comply with standards of honesty
and integrity, the bar is firmly committed to the proposition that the lawyer’s function must at every stage be performed within the law. Each of the contending advocates is assigned a different role or function but each is an indispensable component of the system of justice and bound by its rules. While it demands that a defense counsel protect the confidences of his client, it also demands of him that he perform his duties pursuant to the canons, traditions and standards of professional conduct and of course in accordance with law.

A lawyer’s right to withdraw from a case at any stage if his client states his intent to violate the law is undoubted. ABA Code DR 2-110 (C)(1)(b). This rule is also given recognition in the limitation on the privilege of attorney-client confidentiality which explicitly provides that the lawyer is not permitted to treat as confidential his client’s stated intention to commit a crime in the future. 8 Wigmore, Evidence § 2298 at 372 (McNaughton rev. 1961); cf. ABA Code DR 4-101(C)(3).

b. Advising unlawful conduct

It is fundamental that the lawyer’s function must be performed within the law. ABA Code DR 1-102; 7-102. The lawyer’s professional capacity does not immunize him from responsibility if he aids and abets the commission of a crime. Cf. Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953). It has been held improper for a lawyer to advise a client that it would be better to pay a fine under a penal statute than to obey it. N.Y. County Opinions No. 27 (1913).

Of course, well-intentioned citizens are entitled to advice concerning the legality of prospective conduct. The lawyer properly may give his candid opinion on the interpretation which may be given to any provision of law, as well as his opinion on its validity. ABA Code EC 7-1 to -3. Thus, a lawyer consulted by a person or organization contemplating a test of the constitutionality of a law, as in the civil rights cases, would not be obliged to counsel against conduct which would provoke prosecution. Similarly, a corporation seeking to determine whether its proposed course of action would violate the antitrust laws could properly be advised by counsel of the applicability of those laws to the proposed conduct.

c. Representation in future criminal cases

An agreement, whether express or implied, to defend criminal prosecutions arising out of contemplated criminal acts is an incentive to the commission of crime and has been held to be ground for disbarment. See In re Davis, 252 App. Div. 591, 299 N.Y.S. 632 (1937). Thus, it is obviously unprofessional conduct for a lawyer to enter into an arrangement with those engaged in organized crime to provide representation on a regular basis to the participants. The lawyer who agrees to represent a person against future charges of prostitution, gambling, narcotics violations and the like in violation of state or federal laws is encouraging illegal activity by his willingness to defend.

This situation should be distinguished from that of the lawyer who is under a general retain or who regularly represents a client engaged in legitimate activity and who is expected to defend criminal charges should they ever be brought against his client. See Note, 47 Yale L.J. 812, 815 (1938). Persons engaged in legitimate business activity may be exposed to possible violation of criminal laws such as those regulating safety or business economics. The scope of the law may be uncertain and the managers of such enterprises are entitled to counsel. Regular employment or a retainer which contemplates the defense of a criminal charge if one is brought in circumstances does not operate as an encouragement of law violation, provided that the lawyer fulfills his duty to counsel compliance with the law.

A lawyer may properly agree in advance to defend a client who has stated his intention to violate a criminal statute where the violation is for the express purpose of testing in good faith the validity or scope of the law and the lawyer has advised the client that the law is open to question on such grounds. ABA Code EC 7-4 to -6.

d. Duty to report threatened crime

The lawyer’s duty of confidentiality does not extend to threatened criminal acts. ABA Code DR 4-101(C)(3). Not only is he free to
reveal any stated intention of his client to commit a crime, but where
the crime is one which would seriously endanger life or safety of any
person or corrupt the processes of the courts he has a duty to take
action to protect against its commission. Thus, should his client reveal
an intention to bribe or coerce a juror or witness and the lawyer does
not succeed in discouraging such action, he must report the matter to
the authorities. Obviously, this is most clearly necessary where the law-
ger learns that his client intends to injure person or property. The spe-
cial problem of an intention to give false testimony is treated in section
7.7, infra.

3.8 Duty to keep client informed.

The lawyer has a duty to keep his client informed of the develop-
ments in the case and the progress of preparing the defense.

Commentary
A common complaint of laymen is that lawyers, whether acting in
civil or criminal cases, fail to keep their clients adequately informed.
This is usually a consequence of the lawyer's preoccupation with per-
forming the essential tasks rather than indifference. At best it is diffi-
cult for a lawyer to establish and maintain a relationship of confidence
and trust an anxious client in a criminal case, especially one in
custody, and this task is made more difficult if the client is not kept
reasonably informed. A lawyer must remember that the case is the
defendant's case and he is entitled to know of the progress of the law-
ner's work. Here again, the duty in this respect does not vary because
of the nature of the employment or assignment of counsel.

The busy lawyer performing his services in many cases at a personal
sacrifice may regard the burden of reporting to his client as an added
imposition, but it is important to keep the client aware that his lawyer
is actively attending his interests.

3.9 Obligations to client and duty to court.

Once a lawyer has undertaken the representation of an accused
his duties and obligations are the same whether he is privately re-
tained, appointed by the court, or serving in a legal aid or defender
system.

Commentary
Until a relatively recent date lawyers and judges took it for granted
that one standard governed the duty and function of all defense counsel
and that the genesis of his engagement to represent the accused was
irrelevant. However, the vast and swift expansion of provision for de-
fense counsel at public expense has brought forth new problems. Else-
where we have discussed the problems of establishing a relationship of
trust and confidence with the accused. It is recognized that this rela-
relationship is likely to be more difficult to establish when the lawyer is
assigned by the court or serves in a legal aid or defender system than
when the accused has sought out the lawyer because of his professional
standing or because he knows the lawyer. One of the leading defense
lawyers consulted by the Committee stated that the five or six cases
conducted in his office by court appointment and without compensa-
tion occasioned more lawyer-client relations problems than all his
other cases. Unfortunately the assigned lawyer is often regarded by
the accused as part of the "government establishment" which has been
invoked against him.

In addition to all other difficulties which impede the develop-
ment of a good relationship with the assigned lawyer, the "jailhouse lawyers" 
and "jailhouse grapevine" inspire the accused to put pressure on his
assigned lawyer to engage in dilatory or frivolous tactics by way of
multiple motions or other pretrial processes which are not warranted
by the law and facts. This situation may become even more acute if
the accused is at liberty and desires to postpone the confrontation with
reality at a trial of his case.

It is plain that assigned counsel should conduct a case under ap-
pointment just as he would a case for the client who had retained him;
Neither more nor less should be given and at every stage the standards
of professional conduct and canons of ethics must govern. Specifically,
if an accused demands that a dilatory or groundless motion be made,
the assigned lawyer should refuse to comply if he would so act with
plea. In the words of one experienced criminal defense lawyer consulted by the Committee:

As lawyers we know that we plead more defendants guilty than we try. But I always like to think that I know more, or at least as much, about every case in which my client pleads guilty as when I go to trial. Investigation, research, developing a theory of the case legally and factually—the work has been cut out for you and the decision to enter a plea of guilty involves a tremendous amount of work.

Thus, investigation and preparation are the keys to effective representation in either a trial or a plea disposition.

Investigation is a complex matter. Even the task of locating persons who observed a crime or who have information concerning it may be difficult because of a general distaste for becoming “involved.” After witnesses are located, their cooperation must be secured. It may be necessary to interview a witness several times to compare his version of the events with the version gleaned from others and to reconcile conflicting versions. The resources of scientific laboratories may be required to evaluate certain kinds of evidence. Analysis of fingerprints or handwriting, clothing, hair, blood samples, or ballistics tests may be necessary. Psychiatric evaluation of the defendant or of a witness may be essential. Neglect of any of these steps may preclude the presentation of an effective defense.

It is important that all investigation be conducted in a manner which reflects favorably on the integrity of the legal profession. Witnesses are entitled to be treated fairly and honestly. Expert witnesses must be treated in a manner calculated to achieve their cooperation in a process of fact-finding which may be unlike that employed in their own disciplines. It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice.

4.1 Duty to investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession
of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Commentary

Facts are the basis of effective representation. Effective representation consists of much more than performing the advocate's function in the courtroom. Adequate investigation may avoid any courtroom confrontation. As previously noted, considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to return to a witness several times to raise new questions in the light of facts learned from others. The resources of scientific laboratories may be required to evaluate certain kinds of evidence; analysis of fingerprints or handwriting, clothing, hair or blood samples, or ballistics tests may be necessary. Neglect of any of these steps may preclude the presentation of an effective defense.

The prosecutor and law enforcement agencies are an important source of information needed by the lawyer for the defense. Apart from any formal processes of discovery which are available, prosecutors and law enforcement officers have in their possession facts which defense counsel must know. Often prosecutors will reveal the facts freely in the hope of inducing a guilty plea. If defense counsel can secure the information known to the prosecutor it will obviously facilitate his investigation. He should always urge the prosecutor to disclose the facts even though he must then proceed to verify them. Some inexperienced lawyers think any overtures toward the prosecution are an indication of weakness, but experienced defense counsel routinely approach the prosecutor at an early stage of their own investigation, except in unusual circumstances.

The lawyer's duty to investigate is not discharged by the accused's admission of guilt to him or by his stated desire to enter a guilty plea. The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law. In many criminal cases the real issue is not whether the defendant performed the act in question but whether he had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility. Similarly, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities is the lawyer's factual investigation for which the accused's own conclusions are not a substitute.

The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense. An accused may feel a sense of guilt but his subjective or emotional evaluation is not relevant; an essential function of the advocate is to make a detached professional appraisal independent of the client's belief either that he is or is not guilty.

The lawyer also has a substantial and very important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant himself. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.

The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. He needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If they were eye-witnesses, he needs to know the conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of his advocacy is not to be measured solely by what the lawyer does in the trial; without
careful preparation he cannot fulfill his role. Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel. See Shepherd v. Hunter, 163 F. 2d 872, 873 (10th Cir. 1957).

4.2 Illegal investigation.

It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

Commentary

The use by investigators of wiretaps, electronic surveillance devices and other prohibited means is well known. See Lipset, The Wiretapping-Eavesdropping Problem: A Private Investigator’s View, 44 Minn. L. Rev. 873, 874 (1960). Such practices are a serious threat to personal privacy. Lawyers who use the services of private investigators are in a strategic position to control the means by which investigation is conducted. A recent study recommends the use of professional standards for this purpose, as a necessary adjunct to other forms of control. See Westin, Privacy and Freedom 382-84 (1967). Lawyers have a special responsibility to act within the bounds of law and to see that those they employ do so also. See ABA Code DR 1-102. Lawyers must also forbid the use of oppressive methods of securing information, as by threats or intimidation or invasions of privacy other than those discussed above. Obviously, the use of fabricated tangible evidence or false testimony is both illegal and forbidden by professional standards; this subject will be treated later in this report, in section 7.5, infra.

4.3 Relations with prospective witnesses.

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) In interviewing a prospective witness it is proper but not man-
datory for the lawyer or his investigator to caution the witness concerning possible self-incrimination and his need for counsel.

(c) A lawyer should not obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise a person, other than a client, to refuse to give information to the prosecutor or counsel for co-defendants.

(d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person.

Commentary

a. Compensation of witnesses

Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony, though they may be paid ordinary witness fees. It has long been held that a contract to secure testimony to a given state of facts is against public policy and void, e.g., Neece v. Joseph, 129 S.W. 797, 30 L.R.A. (n.s.) 278 (Ark. 1910). However, it is well accepted that the prohibition against paying for testimony does not forbid reimbursement by the parties of their actual expenses and reasonable payment for loss of income. ABA Code DR 7-109 (C). It is generally considered advisable to disclose such payments as a matter of sound trial tactics.

b. Self-incrimination of witnesses

A delicate balance of interests is presented when a prospective witness gives a statement which might be used to the advantage of the client on whose behalf the statement is obtained but at the cost of possibly incriminating the prospective witness. The lawyer’s paramount loyalty to his own client must govern in this situation. The New York County Ethics Committee considered this problem and concluded that the interest of the client seeking the statement must govern his attorney and
investigators, provided that the witness is not misled or deceived. N.Y. COUNTY OPINIONS No. 307. The ABA Ethics Committee has recently considered the converse problem, whether it is proper for a defense lawyer to warn a witness for the prosecution that his testimony might incriminate him when it is done for the purpose of discouraging the witness from testifying. It was held that such advice was proper. ABA INFORMAL DECISION No. 575 (1962).

Disclosure that the interviewer is acting for a principal involved in a criminal case is not required unless the prospective witness makes inquiry, at least if the witness is not charged jointly with the defendant, according to ABA INFORMAL OPINIONS No. 581 (1962).

c. Obstructing communications between witnesses and the prosecution

Prospective witnesses are not partisans; they should be regarded as impartial spokesmen for the facts as they see them. Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs whether it is proper for the witness to submit to an interview by opposing counsel or whether he is under a duty to do so, the witness should be informed that, although he is not under a legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness make himself available for interview by counsel.

Counsel may properly request an opportunity to be present at opposing counsel's interview of a witness, but he may not make his presence a condition of the interview. It is proper to call the attention of the witness to the problem of subscribing to a statement prepared by another person. In the event that a written statement is signed or otherwise acknowledged by the witness as a correct representation of facts known to the witness, a copy of the statement should be furnished the witness at his request.

d. Interviews by the lawyer personally

Two problems can arise in relation to possible impeachment. The first arises out of a defense lawyer's interview with the "friendly" witness, an alibi witness, for example. But the friendly witness is likely to be cooperative in giving and signing a statement; and the problem of impeaching him will arise only in the unusual situation when the witness' testimony varies from his pretrial statement and takes counsel by surprise.

The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what he has stated to defense counsel before trial. It is here that there is need to conduct interviews of such witnesses with a third person present; prosecution witnesses do not often sign written statements for defense counsel. The availability of a third person is virtually the only effective means of impeaching an adverse witness; defense counsel would be in a difficult if not impossible situation to seek leave to withdraw and substitute other counsel so that he might take the stand to relate what he claimed the adverse witness had said to him—assuming a court would permit this course.

The Code of Professional Responsibility takes a firm position that a lawyer should avoid testifying in court on his client's behalf. ABA Code EC 5-9 & -10; DR 5-102. See also Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961) (concurring opinion). Use of investigators to conduct all initial interviews avoids many of the potential problems in this area.

After counsel secures written statements from investigators, it is proper under our system, and indeed wise, for him to interview such witnesses personally, not only to verify the investigator's report but to acquaint himself with the personality of the witness so as to be aware how the witness will react on the stand; but a third person should be present.
4.4 Relations with expert witnesses.

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

(b) It is unprofessional conduct for a lawyer to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony he will give or the result in the case.

Commentary

a. Advising the expert witness

Statements made by physicians, psychiatrists and other experts about their experiences as witnesses in criminal cases indicate the need for care on the part of lawyers who engage experts. Nothing should be done by the lawyer which would cast suspicion on the process of justice by suggesting that the expert should color his opinion to favor the interests of the client the lawyer represents. Depending on the extent of the expert’s experience with courtroom procedure, the lawyer should explain enough of the workings of the adversary system and the expert witness' role within it as an independent and impartial expert so that he will not be confused about his role; it should be explained that the expert is to testify in accordance with the standards of his own discipline without regard to the wishes of the accused or the lawyer, in the event he is called.

b. Fees to experts

It is important that the fee paid to an expert not operate as an inducement to influence the character of the expert's testimony. To avoid both the existence and the appearance of influence, the fee should not be made contingent on a favorable opinion or result in the case, and the amount of the fee should be reasonable. See ABA Code DR 7-109.

4.5 Compliance with discovery procedure.

The lawyer should comply in good faith with discovery procedures under the applicable law.

Commentary

Recent and proposed expansion of discovery in criminal cases entails new obligations on defense council to seek in good faith to make discovery procedures function effectively. See ABA Standards, DISCOVERY AND PROCEDURE BEFORE TRIAL §§ 3.1 & 3.2 (Tent. Draft, May, 1969). He should not compel the prosecution to resort to a court order for discovery in order to harass the prosecution, make it more costly, or obstruct the flow of information when he knows the information is discoverable. Id., § 1.4(b).

PART V. CONTROL AND DIRECTION OF LITIGATION

Introductory Note

An important function of a defense lawyer is to serve as adviser and counselor to his client. The definition of this role assumes that there are basic decisions which are the client's, rather than the advocate's. Yet it is equally clear that there are matters of strategy and tactics which can only be decided by the lawyer. The precise boundary between those decisions that belong to the client and those of the lawyer has never been defined.

The underlying problem comes to the surface when the lawyer and the client have divergent views of the decision which will operate best to the client's advantage. For example, the lawyer may consider it strategically beneficial to waive jury trial but the client may prefer a jury, or vice versa. The lack of well-established principles governing the respective areas of decision is partly a reflection of the fact that the matter has been considered to be one of custom or practice embedded in tradition rather than for the courts. Recently, however, the matter has been presented to the courts in the form of attacks on convictions based on allegations that certain rights were waived by the lawyer without the consent of the defendant. Another reason for the increasing importance
of this problem is that when a defendant has retained his own lawyer, he has usually made his selection on the basis of the reputation, experience and judgment of the particular attorney. If the privately-retained lawyer insists on asserting control over the case, backed by his freedom to withdraw from the case if approval is not given, the client usually will accede because of his desire to be represented by that lawyer. At the present time, however, an overwhelming proportion of accused persons are represented by the public defender or assigned counsel who do not have the same degree of leverage over their clients.

The issue is a highly sensitive one to both the client and the lawyer. From the client’s viewpoint, his life and liberty are at stake; from the lawyer’s perspective, his professional judgment is being challenged. In medicine, it is the patient’s choice whether to undergo an operation, but no surgeon accepts directions from the patient on medical procedures. In law a comparable distinction must be drawn, since the legal process uses the services of professionally trained lawyers so that judgments can be made on the basis of special skills, insights based on experience and subject to accepted standards of conduct.

Within the range of decisions which are the client’s, the lawyer’s function is to advise the client fully so that he may make an informed decision. With respect to those decisions which are the lawyer’s, disagreement should be rare if the lawyer is careful in explaining the basis of his view to the client, but he should nonetheless insist upon ultimate authority to make the decisions which are within the province of the lawyer.

5.1 Advising the defendant.
(a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.
(b) It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case to exert undue influence on the accused’s decision as to his plea.
(c) The lawyer should caution his client to avoid communication about the case with witnesses, except with the approval of the law-

er, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Commentary
a. Advice on the plea
The duty of the lawyer to investigate fully the facts of the case, regardless of the anticipated plea, is discussed in section 4.1, supra. The lawyer’s duty to inform himself on the law is equally and often more important; although the client may sometimes be capable of assisting in the fact investigation, he is not educated in or familiar with controlling law. The responsibility to know the law which the lawyer bears is a heavy one, given the rapid pace of change in many areas of criminal law and procedure. See, e.g., People v. Ibarra, 34 Cal. Rptr. 863, 386 P.2d 487, 491 (1963).

If the defendant is mentally competent, the decision as to what plea to make ultimately belongs to him; this is emphasized by the increasing concern of appellate courts that the sentencing judge exercise great care to make sure not only that a guilty plea is voluntarily and intelligently made but that the accused admits facts which would support a guilty verdict. The amended Fed. R. Crim. P. 11 now declares what many courts had accomplished by local practice. The decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his rights and as to the probable outcome of his alternative choices. Kercheval v. United States, 274 U.S. 220, 223 (1926).

Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, he should use reasonable persuasion to guide the client to a sound decision. See §§ 6.1(b) and (c), infra. However, he should make clear that the accused has the right to put the prosecution to its proof and that the decision is ultimately for the accused to make. A lawyer’s advice to a defendant to plead guilty merely because he has admitted guilt to the lawyer, without exploration of all relevant facts and analysis to determine whether the prosecution can establish guilt, is improper. See Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950). Because of the elements of uncertainty that surround any estimate of probable outcome, the lawyer who has fulfilled
his duties of investigation and analysis should not be faulted when subsequent events show his prediction to have been incorrect.

The matters on which the defendant needs advice before entering his plea go beyond appraisal of the likelihood of conviction or acquittal. Counsel should inform the defendant of the maximum and minimum sentences which could be imposed, but he should also be aware of the actual sentencing practices of the court and advise the defendant, when that is possible, what sentence is likely. In addition, a lawyer should advise the defendant concerning possible collateral consequences of conviction, "such as the loss of civil rights . . . or inability to enter the armed services, loss of or ineligibility for licenses granted by the state, use of the conviction in a subsequent civil case, and even deportation or expatriation . . .," ABA Standards, Pleas of Guilty § 3.2(b), Commentary at 71 (Approved Draft, 1968).

b. Misrepresenting the risks, hazards or prospects

Overreaching the client by misrepresenting the prospects of his case in order to obtain employment as counsel or to charge a larger fee is unprofessional conduct which requires disciplinary sanction, as the courts have held. State Bd. v. Sheldon, 43 Wyo. 522, 7 P.2d 226 (1932); see United States v. Stringer, 124 F. Supp. 705 (D. Alaska 1954); In re Karp, 240 App.Div. 388, N.Y.S. 113, aff'd, 266 N.Y. 473, 195 N.E. 160 (1934). See also People ex rel. Chicago Bar Ass'n v. Green, 353 Ill., 638, 187 N.E. 811 (1933). Considerations of fee limitations should never influence a lawyer's decisions or his advice.

c. Cautioning the client

"A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct toward Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing, the lawyer should terminate his relation." ABA Canons of Professional Ethics No. 16 (1968). It is improper for a lawyer to communicate in any way with jurors before and during trial or with prospective jurors, whether it is about the trial or any other subject, no matter how trivial, see section 7.3, infra, and of course it is equally improper for the client to do so. Since the accused may be unaware that even a casual communication with a juror is an impropriety, he should be so cautioned in order to avoid even the appearance of impropriety.

The client's relations with witnesses is a more difficult question. Often persons to be called as witnesses are relatives, friends or fellow workers with whom normal communication cannot be avoided. The defendant's familiarity with the witnesses and their whereabouts also may require that he participate in locating them and his aid may be needed in securing their willingness to discuss the case with defense counsel and their appearance at trial. Contact by the accused with witnesses involves some measure of risk that something may be said that could later give rise to embarrassment or misunderstanding. The lawyer should caution the defendant to avoid communication with witnesses unless the lawyer approves. One type of situation was described by an experienced criminal lawyer at a hearing held by this Committee:

While the case is still in the investigative stage, frequently the client will say, "Joe Jones called me and said that he has been called before the Grand Jury, and he wants to know what he should do." Of course you tell him, "Stay away from Jones; he will have to appear and testify." Indirectly, the client may be asking how to control the testimony which may be given to the Grand Jury. Obviously no lawyer can encourage or participate in such conduct.

Obviously, just as it is the lawyer's duty to tell all witnesses to tell the truth under all circumstances, so it is his duty to admonish his client to so advise any witnesses the client may contact. In situations like these, counsel should make clear to the client that any conduct on his part which has even the appearance of an effort to influence or color the testimony of a witness may provide ammunition to the prosecution which can be used at trial to suggest a consciousness of guilt on the client's part and that this type of conduct will be highly prejudicial in the eyes of the judge and jury because it may be used to impeach the credibility of the witness. At worst, such conduct could expose the client to the risk of a charge of obstructing justice or suborning perjury.

5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are u
mately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation.

Commentary

a. Allocation of decision-making power

The history of the criminal process in our system and the rights vested in an accused under the Constitution mark out certain basic decisions as belonging to the client; other decisions fall within the province of the lawyer. The requirement that the defendant personally enter a guilty plea and that it be voluntary and informed carries the implication that it is the defendant who must make the choice. See Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220 (1926); Orfield, Criminal Procedure from Arrest to Appeal 294 (1947). Similarly, the decision whether to waive a jury trial has been considered to belong to the defendant. See Patton v. United States, 281 U.S. 276, 298 (1930); Hensley v. United States, 281 F.2d 605, 608-09 (D.C. Cir. 1960). With respect to the decision whether the defendant should testify, the lawyer “should give his client the benefit of his advice and experience, but the ultimate decision must be made by the defendant, and the defendant alone.” Levy, Some Comments on the Trial of a Criminal Case, 10 Record of N.Y.C.B.A. 203, 213 (1955); accord, Steinberg & Paulsen, A Conversation with Defense Counsel on Problems of a Criminal Defense, 7 Prac. Law. 25, 37 (May 1961). In making each of these decisions—whether to plead guilty, whether to waive jury trial, and whether to testify—the accused should have the full and careful advice of his lawyer. Although counsel should not demand that his own view of the desirable course be followed, he is free to engage in fair persuasion and to urge his considered professional opinion on his client. Ultimately, however, because of the fundamental nature of these three decisions, crucial in such basic matters governing his own fate, the decisions on these matters belong to the accused.

Some other significant decisions fall into a gray zone. In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court indicated that on a petition for habeas corpus the federal courts should hold the petitioner to have waived a constitutional right only if it is established that he deliberately by-passed the available state procedure. The court emphasized that the waiver would be found only if the defendant himself had made the choice. 372 U.S. at 438-39. More recently the Court has stated that the defendant would be bound by his attorney’s deliberate choice of a trial strategy to forego an objection available on constitutional grounds. Henry v. Mississippi, 379 U.S. 443, 451-52 (1965). See also Nelson v. California, 346 F.2d 73 (9th Cir.), cert. denied, 382 U.S. 964 (1965).

A number of cases have held that counsel’s failure to object to the racial composition of the jury did not preclude the defendant from collaterally raising that constitutional objection. See, e.g., Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964); Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. denied, 372 U.S. 924 (1963).

b. Strategy and tactics

In general, however, it may be said that the power of decision in matters of trial strategy and tactics rests with the lawyer. See Henry v. United States, supra; Nelson v. State, supra. The lawyer must be allowed to determine which witnesses should be called on behalf of the defendant. See Vess v. Peyton, 352 F.2d 325 (4th Cir. 1965). Similarly, the lawyer must be allowed to decide whether to object to the admission of evidence, see Hester v. United States, 303 F.2d 47 (10th Cir. 1962); People v. Rideauz, 39 Cal. Rptr. 391, 393 P.2d 703 (1964), whether and how a witness should be cross-examined, e.g.,
O'Malley v. United States, 283 F.2d 733 (6th Cir. 1961), or whether to stipulate to certain facts, see People v. Woods, 23 Ill. 2d 471, 179 N.E.2d 11 (1961). Cases which have reversed convictions for failure of counsel to call certain witnesses, cross-examine, object to evidence and the like have been decided not on the ground that counsel must heed the client's wishes on such matters, but on a determination that these actions were in these cases not strategic or tactical decisions by counsel but rather revealed his ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles, amounting to ineffective assistance of counsel. See, e.g., Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963); State v. Lopez, 3 Ariz. App. 200, 412 P.2d 881 (1966); Blincoe v. State, 185 N.E.2d 729 (Ind. 1962).

Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance and an explanation to any but the most sophisticated client would be futile. Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which will be made in circumstances which will not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client "plucks at his sleeve" offering gratuitous suggestions. Some decisions, especially as to which witnesses to call and in what sequence and what should be said in argument to the jury, can be anticipated sufficiently so that counsel can ordinarily consult with his client concerning them. Because these decisions require the skill, training and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that he should completely ignore his client in making them. The lawyer should seek to maintain a cooperative relationship at all stages, while maintaining also the ultimate choice and responsibility for the strategic and tactical decisions in the case.

c. Record of advice

A disagreement between counsel and the accused on a decision to be made before or during the trial may be the subject of post-conviction proceedings questioning the effectiveness of the lawyer's performance. Rather than leave the matter to be determined on the strength of the memories of the lawyer and client, which are invariably in conflict if the issue arises, some record should be made. This may be accomplished by a notation of the nature of the disagreement, the advice given, and the action taken, either in the lawyer's file or by letter to the client, depending upon the gravity of the problem. If advisory councils are established as recommended in this report, section 1.4, supra, a new means will be available to lawyers to meet this problem.

The trend to enlarge the defendant's role in decisions on trial tactics and strategy is regarded by many experienced criminal defense lawyers as denigrating the status of counsel. For example, some appellate holdings have required that trial judges interrogate the defendant directly as to whether his counsel has explained fully the right and consequences of taking the stand or declining to exercise that right. On the other hand, this trend may mean only that counsel must spell out to his client more fully than previously the meaning of the rights of every accused. While Henry v. United States, supra, reveals a reluctance to permit the defendant to avoid the consequences of a waiver made by his attorney as part of the trial strategy, it contains no suggestion that it is desirable or preferable for counsel to make such decisions without consulting his client. A lawyer should take care to consult with his client to the extent feasible on all matters affecting substantial rights.

5.3 Guilty plea when accused denies guilt.

If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court.

Commentary

The rule relating to the obligations of federal judges in accepting guilty pleas, articulated in amended Fed. R. Crim. P. 11, brings into focus a difficult problem which has long been skirted by courts, prosecutors and defense counsel. It pertains to the accused who insists either
that he is innocent or whose statement of the events would not afford a basis for the plea but desires nevertheless to enter a plea of guilty. Many states by statute, rule or established practice require either that the prosecution prove a prima facie case as a condition to consideration of a plea of guilty or require that the accused be interrogated in sufficient detail to make out a comprehensive judicial confession. Some jurisdictions, however, have been content with a bare affirmative response to the ritual question, “Do you plead guilty to this indictment because you are guilty and for no other reason?” This unwholesome practice has confused and complicated consideration of post-conviction attacks on the plea as not intelligently and knowingly made. This contributed to the requirement in the federal and other jurisdictions that the court determine that there is a factual basis for the plea of guilty before accepting it.

The federal rule embodies a salutary policy. In many, perhaps most, situations the accused is simply not capable of relating his conduct to the legal conclusion of guilt or innocence. The law does not permit his opinion on the ultimate and often complex question of his guilt as a matter of law to control the judgment of the court. That judgment can only be made in accordance with the processes of the law. Hence the accused’s desire to plead guilty cannot be accepted by his counsel unless counsel is himself satisfied that the plea is justified in fact and in law without full disclosure to the court.

This Advisory Committee’s report on The Prosecution Function § 4.2, infra, requires that a prosecutor decline to acquiesce in a disposition by a guilty plea when the accused maintains his innocence, unless there is complete disclosure to the court. The standard now stated seeks to place a counterpart burden on defense counsel not to lend his function to any process which could conceivably permit a consensual judicial determination of guilt of one who claims he is innocent, without full knowledge by the court.

It can cogently be argued that the plea of nolo contendere permits an acceptable evasion of this principle, but this is one of the clouds which hovers over the whole subject of the nolo plea and accounts for the challenges made that it serves no valid function. On the other hand, there are areas where the plea of nolo is appropriate but its proper function is limited.

The essence of the principle stated in this standard is that a court considering the acceptance of a plea of guilty should be fully informed and never misled and that both counsel have a duty of candor in this respect.

PART VI. DISPOSITION WITHOUT TRIAL
Introductory Note
For many years the process of so-called “plea bargaining” was little understood and rarely discussed. Prosecutors sometimes feared that the public would believe that concessions were obtained by improper influence, personal favoritism, or even more invidious considerations. Defense counsel were concerned lest it seem to reflect lack of zeal for the protection of the defendant’s rights, a “selling out” of his chance for acquittal for the benefit of avoiding trial. The subject recently has been brought into the light of day by a number of studies, e.g., NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Polstein, How to “Settle” a Criminal Case, 8 PRAC. LAW. 35 (1962); Comment, 32 U. CHI. L. REV. 167 (1964); Note, 112 U.PA.L.REV. 865 (1965), and by the report of the Advisory Committee on the Criminal Trial of this ABA Project, ABA STANDARDS, PLEAS OF GUILTY §§ 3.1-.4 (Approved Draft, 1968).

These studies have revealed what lawyers and judges familiar with criminal practice long have known: that the plea agreement is a valid and important means of serving the legitimate ends of society and the interests of the defendant and is supported by considerations underlying the law’s encouragement of settlements of civil cases. The propriety of plea discussions and plea agreements now has been given explicit recognition. ABA STANDARDS, PLEAS OF GUILTY, supra. These standards recognize that a plea agreement may serve the public interest because it increases the promptness and certainty of the application of correctional measures, because by his plea the defendant acknowledges
his guilt and, hopefully, shows a willingness to accept responsibility for his conduct, because the plea may permit a more appropriate sanction, because the plea obviates the need for a costly and time-consuming trial, and, in some cases, because the defendant has cooperated in the prosecution of other offenders.

Since the overwhelming percentage of criminal cases in all state and federal courts, something on the order of 90 per cent, are disposed of by pleas of guilty, this aspect of the lawyer’s role in a criminal case obviously has great importance. The lawyer’s function is crucial, since discussions must be among professional equals—the two contending advocates. The participation of defense counsel in plea discussions provides assurance that the plea is accurately and truthfully made and that the defendant is competent to make it, and it is also a source of corroboration of what took place in the discussions should the plea ever be subject to attack. Counsel helps to guarantee fairness and equitable and consistent treatment of offenders. To the extent that this procedure may satisfy the defendant that he has been treated fairly, the lawyer contributes to the effectiveness of correctional measures.

To be equipped to perform his tasks in plea discussions the lawyer requires the same knowledge of criminal law and procedure that is needed for effective trial representation; without these he could not evaluate the relative prospects of trial or plea. In addition, however; effective plea discussion calls for other knowledge and other skills. The lawyer must be familiar with the sentencing practices of the court and, if possible, of the particular judge, and the factors likely to secure probation or a favorable sentence. He should be prepared to make recommendations for the rehabilitation of the defendant and his integration into community life if he is placed on probation. He should be familiar with practices of the prosecutor in charging offenses and in dispositions without trial.

Occasionally observations are made relating to plea discussions which do not reflect the practical realities of the problem. Those experienced in the actual processes recognize that, when the prosecutor initially fixes a charge by information or presentment to a grand jury, his investigation is incomplete and he may not have all the facts he will have at the time of trial. It is normal and appropriate for the prosecutor to resolve doubts as to the level of the charge in favor of the higher, since he can reduce the charge more readily than enlarge it. As the trial date approaches defense counsel adequately prepared can discern the weaknesses of an excessive charge. One experienced prosecutor has pointed out that a charge by indictment or on information “is not holy writ” but represents the mechanism for initiating a criminal prosecution and in that respect is not unlike a complaint in a civil case which establishes jurisdiction and fulfills a notice function. Civil cases are routinely disposed of without trial for less than the damages pleaded in the complaint. This is not to suggest that a prosecutor is justified in taking a casual or careless approach in deciding the scope of the indictment or charge by information, but only that there should be flexibility.

The multitude of considerations that may enter into plea discussions in a particular case, of course, cannot be stated in detail. These sections, however, and their corresponding sections in ABA STANDARDS, THE PROSECUTION FUNCTION, seek to state some general principles and conditions which should guide the conduct of plea discussions. The treatment both here and in the report on The Prosecution Function has as a prime objective the recognition of the validity and importance of a fair and just administration of the plea discussion process and, by the same token, the dispelling of any vestige of the notion that there is something improper about discussions on this subject with the prosecutor. Limitations on his role will be treated.

6.1 Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.
(c) Ordinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor.

Commentary

a. Exploring early diversion

There is increasing awareness that the criminal process is only one of a number of society's methods of dealing with antisocial conduct and that in many cases it may not be in the best interests of either society or the accused to pursue that process under the particular circumstances. Prosecutors long have exercised their discretion informally to defer prosecution when they conclude that an offender, particularly a first offender, ought not be subjected to full scale criminal prosecution, for example, when he is seeking psychiatric or other expert assistance. This practice is described and endorsed in ABA STANDARDS, THE PROSECUTION FUNCTION § 3.8, infra. The existence of a practice or even occasional willingness to work out some form of diversion from the criminal process emphasizes the need for defense counsel to be aware both of the prosecutor's attitudes in appropriate cases and the need to outline to the prosecutor an appropriate course of action outside the criminal process.

b. Early evaluation of case

As soon as the lawyer has an understanding of the factual and legal aspects of the case he should determine whether a plea of guilty is the desirable course in the best interests of his client. If that is his informed conclusion, it is his duty to advise his client and seek the client's authority to explore with the prosecutor the prospects of a favorable disposition without trial.

Most cases are disposed of by trial but as the result of a plea of guilty. In large measure this reflects the fulfillment by prosecutors of their screening function, their obligation not to press charges unless a conviction is likely or unless other considerations demand that prosecution be pursued. The disposition by plea satisfies a variety of interests of the administration of justice as a whole as well as of the defendant. To the defendant it affords the opportunity to avoid the ordeal of trial, to mitigate the penalties, and often also to have sentence determined without having the sentencing court hear all of the adverse testimony which would be produced at trial. To the prosecutor it offers the certainty of conviction with the least drain on the resources of his office and in an atmosphere free from the tensions of conflict, thus enhancing prospects of rehabilitation. The broad definitions of offenses and the wide ranges of punishment typical of American penal law usually permit him to achieve this certainty at minimum cost without sacrificing the objectives of law enforcement. To the administration of justice as a whole, disposition by plea represents substantial savings to the public in terms of prosecutorial and judicial time and also a greater confidence in the certainty of guilt of the accused and increased likelihood that the rehabilitative process will be successful. Moreover, assuming an adequate record is made of the factual basis for the plea at the time of plea and sentence, the problems of post-conviction attacks are lessened.

Since disposition by plea is mutually advantageous in many circumstances, plea discussions are a significant part of the duty of defense counsel. Courts and prosecutors have developed criteria which guide the exercise of their respective discretions. These standards and rules of-thumb are not to be found in the codes, case reports and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the defense lawyer. Ignorance of the prevailing practices and attitudes of the prosecutor and the court as to plea discussions may be as much a handicap to effective representation as is unfamiliarity with the facts or law related to the case; hence it is imperative that the defense lawyer be aware of them. If he lacks sufficient personal experience, he should consult experienced colleagues. Legal aid and defender offices also serve as a repository of such information to which all members of the bar may turn and the expansion of such facilities gives the bar a rich source of potential assistance.

A corollary to the duty to explore the possibility of disposition by plea when a lawyer concludes that a conviction of some kind is likely is the duty to try to seek dismissal of charges if the lawyer concludes the accused is not guilty or ought not be convicted. The lawyer's investigation may have disclosed an erroneous identification, a misconception
by the prosecutor as to the scope of a statute or other basis for pressing for a dismissal of the charge. Although no accused person has any burden to prove he is not guilty, if he can do so it is to his advantage, ordinarily, to try to avoid undergoing the burden of a trial. In such circumstances the lawyer should consider whether to present the exculpatory facts to the prosecutor in order to secure a dismissal. Even an accused who has violated the law may be able to present to the prosecutor facts in extenuation which could lead to dismissal of charges. For example, in the case of an employee who has embezzled funds of an employer, the lawyer may be able to work out means of restitution. With the employer’s acquiescence many prosecutors are likely to drop or suspend further proceedings. Such a solution is well known among experienced defense lawyers.

In all circumstances, defense counsel should challenge the government’s case if there is genuine doubt that the prosecution can carry its burden of proof. That the accused is guilty in fact is, of course, not relevant. It is not the function of the advocate to make a moral judgment as to the guilt of the accused.

c. Consent to engage in plea discussions

Plea discussions should be considered to be the norm and failure to seek such discussion an exception unless defense counsel concludes that sound reasons exist for not doing so. In some cases the factual or legal situation or considerations of strategy may dictate that no overtures to the prosecution be made. Ultimately, the definitive decision whether to engage in plea discussions is for the client, as is the decision on how to plead. However, in many cases it will be appropriate to make an early contact with the prosecutor to secure information concerning the charge. In the course of this contact the matter of reduction of the charge or making a plea may arise and counsel may have an opportunity to advance his client’s interests without making any disclosures concerning the defense. Ordinarily the client’s consent should be sought and obtained before any approaches are made, but there will be occasions in which some discussion, even if only of a very tentative and preliminary nature, has occurred before an opportunity to obtain his consent has arisen. Experienced lawyers pointed out that, especially when good professional relations exist between the lawyer and the prosecutor, even the most casual and informal discussion of the case can develop information useful to the defense.

Even though no binding commitments can be made by the lawyer, he should be careful to secure the informed consent of the accused at every stage of discussion which is directed toward a disposition.

6.2 Conduct of discussions.

(a) In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused.

(b) It is unprofessional conduct for a lawyer knowingly to make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(c) It is unprofessional conduct for a lawyer to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client.

Commentary

a. Informing the client of progress of plea discussion

Plea discussion is inherently a “two-way street.” Settlement negotiations in a civil suit for personal injury usually begin with an assumption, however tentative, of the defendant’s liability. In a criminal case the probabilities are that defense counsel may proceed on an assumption, but only for the purpose of the discussions, that the defendant may be willing to enter a plea of guilty to some charge. It is because of this that the consent of the accused to such discussions is important. This does not mean in any sense that the lawyer yields on the position that the accused can, if he desires, put the prosecution to its proof.

Although statements made during plea discussions by counsel cannot be used against the accused if he goes to trial, admissions made directly by the accused might be admissible against him. This is one reason, among others, why it is usually undesirable for the accused to be
present during the actual discussions in most cases. If the accused is present, either because he insists or because counsel considers it advantageous, he should be cautioned by counsel against making any statements that have not been carefully explored in advance with counsel.

Apart from the risk of admissions, the presence of the client during plea discussions may hinder them in other ways. The discussions are best conducted on a level of mutual professional respect that may be undermined by the presence of the accused, or indeed misunderstood by him. Both sides may be hampered by an unwillingness to be as candid as necessary in the presence of the accused, or by the added burden of explaining to him the significance of what is taking place. For these reasons, ordinarily plea discussions should be held without the accused being present.

Because plea discussions are usually held without the accused being present, there is a duty on the lawyer to communicate fully to his client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to pass on prosecution proposals, even when a proposal is one which the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, he must act with full awareness of his alternatives, including any that arise from proposals made by the prosecutor.

It is also important, as numerous appellate opinions in post-conviction remedy cases attest, that the accused be informed that the action of the sentencing judge cannot be definitely predicted. Too often an accused who has consented to a particular plea on the basis of discussions between the prosecutor and defense counsel has some impression either that the judge is a party to the arrangement or that estimates made by his lawyer are guarantees of what the sentence will be. This situation should be anticipated by defense counsel. If the lawyer has any doubt about the defendant's complete understanding of the alternatives, he should seek to clarify the situation, for example, by calling in a relative of the accused or a trusted friend, with the defendant's permission.

It cannot be emphasized too much that a crucial factor in plea discussions is the duty of counsel to explain fully to the accused the consequences of a guilty plea in terms of the range of sentences the court can impose. Special care must be exercised to distinguish between what a particular judge may do or usually does from what he is authorized to do by law. An accused under tension, whether incarcerated or not, will not easily carry in mind distinctions which are clear to the lawyer. Moreover, the advent of the "jailhouse lawyer," sometimes quite expert and sometimes not, can leave the defendant confused by the difference between what he hears in the cellblock and what his lawyer tells him. In some instances experienced defense lawyers give the accused a brief memorandum setting forth the range of possible sentences for various crimes or counts of an indictment, retaining a copy in their files. The need for the accused to understand the range of possible penalties is obvious; without such understanding a truly intelligent and voluntary choice is hardly possible. Even if the choice is in fact an informed and voluntary one it is important that the record demonstrate this. The hearing at which a plea is made to the court cannot be meaningful if defense counsel has not explained the alternatives. Moreover, if the interrogation by the judge does not make an adequate record on which a reviewing court can determine whether the defendant acted in an informed and voluntary manner, defense counsel should seek to enlarge the record on these aspects.

A defense lawyer must recognize that most persons standing before a court tendering a plea are under stress and likely to be less articulate than under normal conditions. Ordinarily the plea is made because the defendant and his counsel understand that the prosecutor will drop other charges, or recommend probation or a particular sentence, where prosecution recommendations are permitted. Whatever is the true situation, the "inducements" or the considerations should be disclosed candidly and promptly. A lawyer should not place on the defendant the burden of articulating these factors to the court in the first instance. He should make a statement to the court, disclosing the essence of the result of plea discussions, including, for example, a statement that the defendant will plead guilty to one or several counts or to one indictment and that the prosecutor has agreed to dismissal of others. Since something along these lines is the realistic basis for most guilty pleas, they
should be on the record. The prosecutor, being present, may simply acquiesce by silence. However a careful judge or indeed a careful lawyer will not let the matter rest there but will make sure, again on the record, that the defendant understands what his counsel has stated to the court. Other reports in this Project deal with the judge’s responsibility in this process.

Even when judges are accustomed and willing to give their “informal blessing” to a valid and appropriate plea understanding by discussions in chambers, defense lawyers (and prosecutors) should emphasize to the court the imperative need to have all the discussions at the time of plea on the record. When a judge balks at this, counsel should tactfully point to the need of a record to protect the sentencing court and the defense counsel and, indeed, the integrity of the entire process.

The crucial factors to be developed at the time a plea is made are the underlying factual basis for the plea, voluntariness and the negation of any threats, pressures or overreaching of the defendant or promises and assurances as to what the sentence will be. A prosecutor may properly inform the defense in advance as to what he will recommend, if his recommendation is permitted, and defense counsel may properly give his client an opinion as to what sentence may be imposed, so long as it is clear to the defendant that no one has authority to speak for the judge. All of these considerations underscore the sound reasons why the judge should not participate in plea discussions or be a “party” to any agreement between the prosecutor and defense counsel. See ABA Standards, Pleas of Guilty § 3.3 (Approved Draft, 1968).

There is, of course, no impropriety as to the defense counsel, the prosecutor and the judge discussing the subject after the two lawyers have reached a tentative understanding on disposition. It must always be clear to everyone that no commitment is sought from or given by the judge until the time sentence is imposed.

A critical factor is that the defendant not commit himself irrevocably to a guilty plea without knowing approximately what the consequences will be. The prosecutor and defense counsel may have “agreements” but there can be no agreement binding on the judge, since he must retain his independent posture at all times. Confusion in treatment of this subject which exists among lawyers and among judges stems from failure to distinguish between agreements between two lawyers and tentative, preliminary expressions from a judge. The outer boundary of what lawyers can derive from any expression by the judge is that, if pre-sentence reports or other sources confirm representations made by the lawyers, a particular disposition will be made.

b. Misrepresentation by defense counsel to prosecutor

“Intentionally deceiving opposing counsel is ground for disciplinary action.” Monroe v. State Bar, 10 Cal. Rptr. 257, 358 P.2d 529, 533 (1961). Although defense counsel is under no obligation to reveal any evidence to the prosecution in the course of plea discussions—indeed, he must preserve his client’s confidences unless he has been granted consent to make disclosures for this purpose—truth is required in the presentation to the prosecutor of facts relating to the case or any mitigating facts. Not only does misrepresentation reflect upon the integrity of counsel, but it severely handicaps his usefulness to the accused and to future clients, since the prosecutor will understandably be reluctant to negotiate with a lawyer who cannot be trusted.

c. Trading the interest of one client for that of another

The allegation has sometimes been made against lawyers and particularly the public defender system that the lawyer may be tempted to compromise the interest of one of his clients for the advantage of another. See Note, 76 Harv. L. Rev. 579, 603 (1963). The accusation has been repudiated as to public defenders, in part by pointing out that the pressure on the defender in this regard is little different from that which confronts private counsel who has a substantial criminal law practice. Whether the lawyer is the public defender or is privately retained, he may have pending other cases which the prosecutor is eager to dispose of without trial, and defense counsel may volunteer the suggestion or be offered the possibility of a more favorable disposition of the case at hand if he will “cooperate” in the disposition of some other case. Regardless of the motivation for the proposal and whether it originates with the defense attorney or the prosecutor, such conduct plainly violates the lawyer’s fundamental duty of undivided loyalty to each client. See ABA Code DR 5-106.
PART VII. TRIAL

Introductory Note

Most of the consideration that has been given by writers to the function of and limitations on the defense lawyer in a criminal case has focused on the trial. This is understandable, given the central and dramatic role which the trial, and especially trial by jury, plays in our system of justice. The ethics of advocacy is not a new topic in relation to the standards of professional conduct. Indeed, one criticism that has been leveled against the Canons of Ethics is that they are primarily an ethical code of advocacy, to the neglect of other significant aspects of the practice of law, such as counseling and negotiation; all too little attention has been given to the special problems of criminal cases. Moreover, questions about the propriety of lawyer conduct, especially of the prosecutor, during trial are much more likely to reach the appellate courts and become part of the body of case precedent than are questions about the lawyer's duties apart from the trial. In addition to the cases arising out of post-conviction claims of ineffective assistance of counsel, there are appeals from contempt citations for courtroom misconduct. However, the limitations on government appeals which obtain generally in Anglo-American systems of justice mean that many instances of courtroom misconduct by defense counsel are part of the accumulated observation and experience of trial courts and the bar, but are not found in appellate opinions. Nevertheless, defense counsel's trial conduct is a subject as to which many standards have general acceptance; more, for example, than as to conduct of plea discussions and other important functions of the defense counsel. See, e.g., American College of Trial Lawyers, Code of Trial Conduct (1963).

Two large questions dominate discussion of the defense function in a criminal trial. One is an outgrowth of the layman's query, "How can you honorably defend a guilty man?" For the thoughtful lawyer the justification is obvious and is rooted in the adversary process of the common law. What is not obvious, even to some lawyers not close to problems of criminal justice, is the appropriateness of particular kinds of conduct in the defense of one known to be guilty. In practice, the lawyer may often find himself involved in the defense of a man of whose guilt he has no doubt because of admissions made to him, and this problem has tended to grow with the expansion of defense services provided at public expense, with the result that accused persons frequently tend to go to trial in part because it is "free." The proper function of defense counsel representing an accused known to be guilty presents no insurmountable problems once the lawyer recognizes the scope of his role and duties.

The second question is much broader and is faced by active trial lawyers quite frequently. What limits are imposed on what the lawyer may do in the zealous defense to which even a known guilty client is entitled? Obviously, counsel may not engage in bribery or tender perjured or fraudulent evidence. Such conduct so grossly undermines the basic function of the trial process as well as common standards of decency that no concept of ethics, professional or general, would tolerate it. There is, of course, no place for such conduct in legitimate advocacy. The subtler and therefore real problems of the limits of advocacy involve the difficult task of delineating the boundary between persuasion and deception, between relentless examination of a witness in pursuit of the truth and the unjustified infliction of pain upon a witness. Cutting across all of these issues is the fact that advocacy does not take place in a vacuum. Lawyers sometimes seek to justify an obvious breach of courtroom decorum or professional ethics on the ground that it was "provoked" by the adversary. The "situation ethic" of retaliation, however, has no place in legitimate advocacy. The difference between small boys on a playground and lawyers in a courtroom is that the latter are professional advocates engaged in a grave and serious process which affects life and liberty, the preservation of order and the maintenance of a system of justice. Rules of conduct must be enforced to substitute for punch and counterpunch the orderly process of point and counterpoint. One of the most basic reasons for the presence of trained advocates in the trial process, both civil and criminal, is the need to restrain the natural tendencies of often quarrelsome principals and confine the contention within a framework of orderly and rational procedure so that the trial can fulfill its function.
British barristers and judges, and outside observers as well, attribute a large measure of credit for the expeditious and efficient handling of litigation in the British courts to the strict code of etiquette and decorum which governs the barrister and which is strictly enforced by judges and Inns of Court. A century ago or more the courts in England were plagued, as are some of our courts today, with rude conduct of lawyers on the one hand and undue interference by trial judges on the other.

Of all the mighty changes that have taken place in the nineteenth century, the greatest change has been in the tone of the administration of both the civil and criminal law. Formerly judges browbeat the prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duty. Formerly, too, counsel bullied the witnesses and perverted what they said. Now the attitudes of and temper of Her Majesty's judges towards parties, witnesses, and prisoners alike has wholly changed. Of course if a witness is deliberately trying to conceal the truth, he must be severely cross-examined; but an honest and innocent witness is now always treated with courtesy by counsel on both sides. . . . This is due partly to the improved education of the Bar; partly no doubt to the influence of an omnipresent press; but still more to Her Majesty's judges. If counsel for the prosecution presses the case too vehemently against a prisoner; if counsel cross-examining in a civil case pries unnecessarily into the private concerns of the witness; a word, or even a look, from the presiding judge will at once check such indiscretion.

ODGERS, A CENTURY OF LAW REFORM 41-42 (1901).

Clearly, the responsibility rests most heavily upon trial judges to control the conduct of lawyers in the courtroom. See Kandt, The Judge as Administrator—Let Us Look at Him, 8 KAN. L. REV. 435 (1960). However, lawyers must recognize that the orderly process of a fair trial is best served when the advocates are sufficiently cognizant of their responsibilities that admonitions from the judge are unnecessary. The objective of standards dealing with the trial must be to keep the understandably contentious spirit of the advocates within bounds so that the issues may be resolved on their merits, and the participants not be diverted by the intrusion of irrelevant or acrimonious exchanges between counsel, judge and lawyer or lawyer and witness. The duties of the trial judge in this respect will be covered in a Project report on the Function of The Judge.

7.1 Courtroom decorum.

(a) As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.

(b) When court is in session defense counsel should address the court and should not address the prosecutor directly on any matter relating to the case.

(c) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposefully calculated to irritate or annoy the court or the prosecutor.

(d) The lawyer should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial to his client’s legitimate interests. He has a right to make respectful requests for reconsideration of adverse rulings.

(e) Lawyers should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

Commentary

a. Dignity of judicial proceedings

Human experience with deliberative and judicial processes demonstrates that certain rules or standards of conduct are needed to ensure that, notwithstanding differences in their objectives, contending advocates will work in harmony for what is their common cause, the administration of justice. They must not allow themselves to be diverted by irrelevant, extraneous or disrupting factors. Basic to an efficient and fair functioning of our adversary system of justice is that at all times there be an atmosphere manifesting mutual respect by all participants. This can be achieved only by strict adherence to firm standards of
what may be called, for want of better terms, professional etiquette and deportment. There is no place and no occasion for rudeness or over-bearing, oppressive conduct. The control of courtroom decorum lies in the advocates’ acceptance of standards of elementary courtesy and politeness in human relations, but ultimately the presiding judge has the responsibility to govern the conduct of all persons in the courtroom, and especially the conduct of the advocates who, as officers of the court, are subject to the court’s control.

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

The same considerations which call for certain standards of conduct for advocates require that the judge should at all times maintain a scrupulously neutral and fair attitude; deviations from standards of appropriate judicial conduct should be made part of the record so as to be brought to the attention of reviewing courts.

b. Exchanges between lawyers

One of the breaches of courtroom decorum which occurs most often arises out of lawyers addressing each other directly, rather than through the court. Such exchanges may begin with innocent purpose relating to the trial and escalate because of the natural tensions of the courtroom. Sometimes a lawyer will deliberately “bait” a less experienced opponent to shake his composure or to impress the jury. In the courtroom, as in legislative bodies and other formal proceedings, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. A challenge to a statement of opposing counsel should be made in the form of an objection or a request to the judge rather than to the opposing counsel directly. Both the formality of the request and the intermediary role it imposes on the judge serve to temper the exchange and provide an insulation to avoid the risk of friction. The need to curb direct exchanges between counsel is greatest when a jury is present, since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers. Jurors and others who observe the trial process have been critical of the manners and conduct of trial lawyers. See, e.g., Brown, A Juryman’s View, 72 CASE & COM., Jan.-Feb., 1967 at 44.

c. Respect for the judge, opposing counsel and witnesses

The obligation of the lawyer to maintain a respectful attitude toward the court is “not for the sake of the temporary incumbent of the judicial office,” but to give due recognition to the position held by the judge in the administration of the law. ABA CANONS OF PROFESSIONAL ETHICS No. 1 (1968). The lawyer, by his attitude, communicates to the laymen in the courtroom the professional relation which exists between judge and lawyer. The appropriate way to challenge the judge’s decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by seeking to impress the client by a show of belligerency which exceeds the need to make a record of what he believes is error in the case. A restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, is a mechanism which depends upon evidence and the rule of law, not vituperation or personalities. See, e.g., In re Schofield, 362 Pa. 201, 66 A.2d 675 (1949); DRINKER, LEGAL ETHICS 69-70 (1953).

A reasonable balance must be reached on matters of conduct so that judicial proceedings are not permitted to degenerate to the level of
street brawls, but it is important that no artificial standards of courtroom conduct impede the advocates from performing their legitimate function so as to preclude vigorous advocacy of their viewpoints on legal questions and the zealous advancement of their side of the case. It is for this reason that the law grants the lawyer an absolute privilege against actions for defamation for anything said or written in the course of judicial proceedings which is pertinent to that proceeding, under a broad standard of pertinence. See Wall v. Blalock, 245 N.C. 232, 95 S.E.2d 450, 61 A.L.R.2d 1297 (1956); Restatement of Torts § 586 (1938). The privilege, of course, would not preclude professional discipline by the court or by a professional body if the utterances were improper.

Public respect for law derives in large measure from the image which the administration of justice presents. It is not enough that justice be done; there must also be the appearance of justice. The law is a great teacher not only in its substantive principles but also in the example it sets of dispassionate and rational methods for the resolution of conflicts. An important aspect of the image of justice is the relations which are seen to exist in the courtroom between the several lawyer-participants: defense counsel, the prosecutor and the judge. See generally Bedford, The Faces of Justice (1961); Calamandrei, Procedure and Democracy (1956).

Of necessity, the lawyer must often be forceful and vigorous in his questioning of witnesses and his argument to the jury. This does not mean, however, that he may make a farce of the trial or undermine the dignity of the legal process by excessive histrionics. The line between legitimate cross-examination and "witness baiting" is difficult to draw; ultimately an experienced and vigilant trial judge will draw it if the advocates fail to stay within reasonable bounds. See ABA Code DR 7-106(C)(2), (6).

These standards seek to suggest certain limited forms of courtroom misconduct as unprofessional conduct, appropriate for the imposition of disciplinary sanctions. To avoid undue limitation on appropriate advocacy, the extreme sanctions are limited to conduct which is purposefully calculated to annoy or irritate. Repetition of misconduct after a warning from the bench should be considered sufficient to establish a prima facie showing of purposeful misconduct.

d. Compliance with court orders

The relationship between the court and counsel is most severely put to the test on those occasions when the judge issues a direct command to counsel, for example, by instructing him to cease interrogation of a witness or to desist from a particular line of argument.

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

Sacher v. United States, 343 U.S. 1, 9 (1952). Correlative to the lawyer's obligation to accede to the court's command in good grace is the duty of the court to permit an adequate record to be made of the court's order and the circumstances under which it was made, as seen by counsel.

e. Code of decorum

The particular formalities observed in American courts differ from place to place. The lawyer is entitled to know just what standards of decorum are expected in a particular court, especially with regard to the use of conventional forms of address, when he is required to stand, and where he is allowed to be in the courtroom during the trial, and other similar matters. To avoid misunderstanding between court and lawyer concerning such formalities, achieve greater uniformity within jurisdictions, and generally improve the dignity of courtroom proceedings, lawyers should take the lead in developing rules governing these matters. See, e.g., Wisconsin Rules of Decorum in Circuit Court; Rules promulgated by the district Judges of Minnesota.

7.2 Selection of jurors.

(a) The lawyer should prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the rais-
ing of any appropriate issues concerning the method by which the jury panel was selected, and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pre-trial investigation of the background of jurors the lawyer should restrict himself to investigatory methods which will not harass or unnecessarily embarrass potential jurors or invade their privacy and, whenever possible, he should restrict his investigation to records and sources of information already in existence.

(c) In jurisdictions where counsel is permitted personally to question jurors on voir dire, the opportunity to question jurors should be used solely to obtain information for the intelligent exercise of challenges. A lawyer should not purposely use the voir dire to present factual matter which he knows will not be admissible at trial or to argue his case to the jury.

Commentary

a. Preparation for jury selection

The process of jury selection and voir dire examination by lawyers has been subject to severe criticism as wasteful and open to abuse by lawyers seeking not impartial jurors but jurors favorably disposed, and as sometimes offensive to prospective jurors. Independent of these underlying factors the selection of a jury is an important phase of the trial and its unfolding is often beyond the comprehension of the lay client and the prospective jurors. The process requires the alert attention of the lawyer. As elsewhere in the trial, in the selection of the jury the advocate’s decisions must be made under time pressure; they can be made wisely only if the lawyer has prepared himself adequately before trial. The lawyer should consider whether his case is an appropriate one to raise objections to the jury selection mechanism as it operates in the particular jurisdiction. Cf. United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir.), cert. denied, 361 U.S. 850 (1959). More frequently, counsel needs to prepare himself for the exercise of challenges for cause and peremptory challenges.

b. Pre-trial investigation of jurors

Pre-trial investigation of jurors may permit a more informed exercise of challenges than the voir dire affords and can be justified on that score. The practice of conducting out-of-court investigations of jurors presents serious problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. To minimize these risks, counsel should be careful to conduct investigations of jurors in a manner which avoids invasions of privacy. Except in unusual circumstances of necessity, he should limit his inquiry to records already in existence, rather than make contemporaneous inquiry of the potential juror’s neighbors. See ABA Code EC 7-29 to -31.

c. Use of voir dire

The process of voir dire examination of prospective jurors by the lawyer is often needlessly time-consuming and frequently used to influence the jury in its view of the case. To reduce these abuses, the Advisory Committee on the Criminal Trial of this ABA Project has recommended that the questioning be conducted by the judge, including those questions submitted by counsel. ABA Standards, Trial by Jury § 2.4 (Approved Draft, 1968). In those jurisdictions which retain the practice of permitting the lawyer to question the jurors, the responsibility must rest with the lawyer, supervised by the court, to limit questions to those which are designed to lay a basis for the use of his challenges. The view that the voir dire may be used to influence the jury in its view of the case is rejected as an improper use of the right of reasonable inquiry to insure a fair and impartial jury.

The use of the voir dire to inject inadmissible evidence into the case is a substantial abuse of the process. Note, Voir Dire—Prevention of Prejudicial Questioning, 50 Minn.L.Rev. 1088, 1093-95 (1966). Treatment of legal points in the course of voir dire examination should be strictly confined to those inquiries bearing on possible bias in relation to the issues of the case.
7.3 Relations with jury.

(a) It is unprofessional conduct for the lawyer to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The lawyer should avoid the reality or appearance of any such improper communications.

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

(c) After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service. If the lawyer has reasonable ground to believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

Commentary

a. Communication with jurors before or during trial

Discussing the case privately with a juror before verdict is obviously a gross breach of professional standards of conduct. ABA Code DR 7-108(B). Many courts have considered the broader question of the impropriety of any conversation, however innocent in purpose or trivial in content, between counsel and juror during the trial, since the mere fact that counsel is seen conversing with a juror may raise a question whether the juror reached his verdict solely on the evidence. See Garden Grove School District v. Hendler, 63 Cal. 2d 141, 45 Cal. Rptr. 313, 403 P.2d 721 (1965). The issue usually is raised as a ground for a new trial and, although the misconduct has sometimes been held not to have been prejudicial, the lawyer's communication with the juror has not been condoned. See, e.g., California Fruit Exchange v. Henry, 89 F. Supp. 580, 588-89 (W.D.Pa.), aff'd 184 F.2d 517 (3rd Cir. 1950). See generally Annot., 62 A.L.R.2d 298, 310-22 (1958). The lawyer's legitimate communication must be with the jury as an entity—not with jurors individually. For obvious reasons, these strictures apply as well to communications with persons summoned for jury duty who may be impaneled as jurors in the particular case.

b. Attitude toward jury

The lawyer "should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration." ABA Code EC 7-36. Referring to individual jurors by name during the trial has been ruled unethical, ABA Informal Decision No. C 739 (1963), and courts have condemned the practice. See Commonwealth v. Teater, 397 S.W.2d 137 (Ky. 1965). See generally Annot., 55 A.L.R.2d 1198 (1957). Just as respect for the position of the judge requires that he be addressed formally as "Your Honor," the jury's symbolic position as representing the community in the court requires that a degree of formality be observed in addressing the jury. The typical form of address is, of course, "Ladies and Gentlemen of the Jury," or "Members of the Jury."

c. Post-trial interrogation

Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they will be harassed after the trial by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss the case after trial with jurors in any way which is critical of their verdict in the case. See Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir.), cert. denied, 335 U.S. 826 (1948); United States v. Driscoll, 276 F. Supp. 333, 339-40 (S.D.N.Y. 1967).

Where there is some evidence of juror misconduct which might undermine the verdict, ordinarily the lawyer may make inquiries for this purpose, carefully avoiding any harassment, but the court and opposing counsel should be advised. A lawyer may properly inquire as to the nature and basis of the division, where the jury did not reach a verdict, for guidance in his subsequent course of action in the case.
The ABA’s Committee on Professional Ethics has also recognized that “it is not unethical, in States where it is not illegal, for the purpose of self-education, to communicate in an informal manner with jurors who are willing to talk.” ABA Opinions No. 319 (1967). To avoid influencing the jury in its hearing of subsequent cases, however, such inquiries should be made only of a jury which has been discharged from jury service for the entire term of court. American College of Trial Lawyers, Code of Trial Conduct 6 (1963). The ABA’s Standing Committee on Professional Ethics, in Opinion No. 109, recognized an exception for interviewing of jurors necessary to prevent a miscarriage of justice, as when the verdict has been incorrectly announced. See also United States v. Beach, 296 F.2d 153, 160 (4th Cir. 1961). Drinker supports the view taken in Opinion 109, but notes that “a number of experienced lawyers have expressed disagreement” with it. Drinker, Legal Ethics 84 & n.38 (1953). On the other hand, the Committee on Professional Ethics of the Association of the Bar of the City of New York has ruled that the interviewing of jurors after verdict to determine if there are valid grounds to challenge the verdict or for the benefit of the lawyer’s guidance in trial technique is permissible. N.Y. County Opinions Nos. 285, 767 (1956); see Harnsberger, Amend Canon 23 or Reverse Opinion 109, 51 A.B.A.J. 157 (1965). The American College of Trial Lawyers supports the propriety of interviewing jurors after trial, with the proviso that “the scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror or to influence his action in any subsequent jury service.” American College of Trial Lawyers, Code of Trial Conduct 6 (1963). Of course, no inquiry should be made if rules of court prohibit post-trial inquiry.

7.4 Opening statement.

In his opening statement a lawyer should confine his remarks to a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

Commentary

The purpose of the opening statement is narrow and limited to a brief outline of the issues and the matters which counsel believes he can support with competent and admissible evidence. Leonard v. United States, 277 F.2d 834 (9th Cir. 1960). In that statement a lawyer should scrupulously avoid any utterance he cannot support later with such evidence. See ABA Code DR 7-106(C)(1). See generally Annot., 28 A.L.R.2d 972 (1953). If, through honest inadvertence, his proof falls significantly short of his statement, he should ask the court to give a clarifying instruction to avoid either advantage or penalty. In other respects the opening statement is governed by the standards for closing argument, section 7.8, infra.

7.5 Presentation of evidence.

(a) It is unprofessional conduct for a lawyer knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses.

(b) It is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case unless there is a reasonable basis for its admission in evidence. When there is any doubt about the admissibility of such evidence it should be tendered by an offer of proof and a ruling obtained.
Commentary

a. Using false evidence or known perjury

The question of the lawyer's duty with respect to false evidence, fabricated documents or perjured testimony by witnesses is touched on by the Code of Professional Responsibility, which states that the duty of the lawyer to his client is to be performed "within the bounds of the law," ABA Code EC 7-1, and which requires that "a lawyer shall not: . . . Knowingly use perjured testimony or false evidence." ABA Code DR 7-102(A)(4). The presentation of false evidence has been considered ample grounds for disbarment. In re Allen, 52 Cal. 2d 762, 344 P.2d 609, 612 (1959). See generally Annot., 14 A.L.R. 868 (1921). The lawyer who presents a witness knowing that he intends to perjure himself thereby engages in subornation of perjury. People v. Davis, 48 Cal. 2d 241, 309 P.2d 1, 10 (1957) (dictum); see Commonwealth v. Commonwealth, 234 Ky. 153, 27 S.W.2d 702 (1930). Even if the witness does not realize the testimony will be false, the lawyer who knows that it is and nevertheless presents it may be guilty of an attempt to suborn perjury or a like offense. See People v. Mosley, 338 Mich. 559, 61 N.W.2d 785 (1953); People v. Clement, 127 Mich. 130, 86 N.W. 535 (1901). The related issue which arises where the defendant's own testimony is involved is governed by section 7.7, infra.

b. Presenting inadmissible evidence

The rules of evidence determine what can properly be presented to the trier of fact, whether judge or jury, and the procedures by which it must be presented. These rules operate to keep from the judge or jury incompetent, irrelevant and unreliable evidence and thus to limit the kinds of evidence which may be considered in deciding the case. The mere offer of inadmissible evidence or asking of an improper question may be sufficient to communicate the very fact that the rules of evidence are designed to keep from their attention. Moreover, the damage may be emphasized if it is underlined by an objection, so that the mere offer of inadmissible matter may leave the opposing party with no effective remedy. "Yet this is a common offense on the part of many who would resent the imputation of unfair practices, and no little in-
genuity is often employed to draw out statements that are promptly stricken out . . . and he who resorts to such methods places himself on the plane of the shyster and the pettifogger." Warvelle, Essays in Legal Ethics 110-11 (2d ed. 1920). This practice and the similar tactic of arguing to the bench or making comments on or off the record in a manner calculated to influence the jury are condemned by the Code of Professional Responsibility. ABA Code EC 7-25; DR 7-106 (C)(1). These tactics are particularly pernicious because the mere fact that evidence is ruled inadmissible, a question is deemed improper by the court, or argument is addressed to the court on a question of admissibility may tend to arouse the curiosity of the jury. If a lawyer is permitted to exploit that fact of human psychology the absurd situation is reached in which he is able to bring home to the jury most forcefully that evidence which the law excludes from consideration. Many cases have held such conduct to be ground for declaring a mistrial or granting a new trial. See, State v. Tolson, 248 Iowa 733, 82 N.W.2d 105 (1957). See generally Annot., 109 A.L.R. 1089 (1937). Such remedies are inadequate, however, because the matter may be held not to be prejudicial and, in criminal cases, because of the unavailability of an appeal by the government from an acquittal. If these practices are to be effectively prohibited, the sanctions of professional discipline must be brought to bear.

An important goal in the improvement of trial practice is the observance of the rules of evidence by counsel in such a manner that the necessity for objections to be made is greatly reduced, reserving them for those matters as to which there is honest doubt about the admissibility of the evidence in question. Even though bench conferences are to be kept to a minimum, counsel is free to state, out of the hearing of the jury, his intention to ask a particular question or offer certain evidence and secure a ruling, so that if objection to his proposer is sustained, the trial will not be tainted.

c. Display and tender of tangible evidence

The rationale underlying subsection (b) of section 7.5, as explained in the immediately preceding commentary, applies to the standards of
subsections (c) and (d). Tangible evidence involves special problems which require special treatment because such evidence is immediately visible once it is brought into the courtroom. As in subsection (b) dealing with testimonial evidence, the purpose of subsections (c) and (d) is to prevent tangible evidence from coming to the attention of the trier of fact unless and until it is offered. The premature display of a tangible article in the courtroom may be unduly inflammatory even though it is later admitted. Hence, such an article should not be exposed to view until it is formally offered for admission in evidence. Moreover, the offer must be made in good faith. If there is any doubt as to the admissibility of the article, the display and tender should be made outside the presence of the jury.

7.6 Examination of witnesses.

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

(b) A lawyer’s belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) It is unprofessional conduct for a lawyer to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege.

(d) It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence.

Commentary

a. Character and scope of direct and cross-examination

The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined beyond those which are contained in the rules of evidence. The Code of Professional Responsibility forbids a lawyer to “[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.” ABA CODE DR 7-106 (C) (2). See also id., EC 7-25. “A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended only to insult or degrade the witness.” AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT 10(d) (1963). “A lawyer should not ask questions which affect the witness’ credibility only by attacking his character, except those encompassed in recognized impeachment procedures.” Id., No. 10(e). Some states have by statute guaranteed “the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor. . . .” UTAH CODE ANN. § 78-24-11 (1953).

An eminent British barrister has spoken on the subject in these terms:

The right of cross examination is important: it is one of the things which distinguishes the procedures of trial in the common law countries from those derived from Roman law and I think distinguishes it to the advantage of our system. But it is a right easily abused. One has always to remember that its object is not to examine crossly, as Mr. Baron Alderson put it; not to blackguard the witness; not to bring out unhappy or discreditable things there may have been in the witnesses’ past unless they have a clear and direct bearing on the witnesses’ credibility in the instant case.

Shawcross, The Functions and Responsibilities of an Advocate, 13 RECORD OF N.Y.C.B.A. 483, 493-94 (1958). American lawyers consulted by the Committee concurred generally in this view of the limits of propriety which govern the examination of witnesses. In their opinion, the lawyer must always exercise discretion in determining to what extent the damage done to the reputation of a witness is justified by the
contribution which a particular line of questioning may make to the truth-finding function of the trial.

b. Undermining a truthful witness

The mere fact that defense counsel can, by use of impeachment, impair or destroy the credibility of an adverse witness does not impose on him a duty to do so. Cross-examination and impeachment are legal tools which are a monopoly of licensed lawyers, given for the high purpose of exposing falsehood, not to destroy truth or the reputation of a known truthful witness. Rules cannot be formulated to cover every situation but some examples may be useful. A prosecution witness, for example, may testify in a manner which confirms precisely what the defense lawyer has learned from his own client and has substantiated by investigation. But defense counsel may believe that the temperament, personality or inexperience of the witness provide an opportunity, by adroit cross-examination, to confuse the witness and undermine his testimony in the eyes of the jury. A number of leading American and British trial lawyers consulted by the Committee believed that because lawyers are afforded a monopoly of the tools of cross-examination and impeachment in order to expose falsehood it is not proper to use those tools to destroy truth, or to seek to confuse or embarrass the witness under these circumstances.

Another example of a situation where restraint is called for would be where a witness whose testimony the lawyer believes to be truthful is subject to impeachment by revealing to the jury that the witness was convicted of a crime many years earlier. It was agreed that the use of conventional methods of impeachment against a witness who had testified truthfully so undermines the administration of justice that it should be avoided. The reluctance of citizens to testify grows in part from the fear of being humiliated in this manner. Moreover, usually it is tactically unsound as well, since the jury is likely to recognize the undue humiliation and to react adversely to the lawyer for engaging in it and even against the client.

There is added a public policy factor underlying restraint in use of impeachment powers vested in a lawyer. The policy of the law is to encourage witnesses to come forward and give evidence in litigation. If witnesses are subjected to needless humiliation when they testify, the existing human tendency to avoid "becoming involved" will be increased. One of the experienced trial lawyers who consulted with this Committee told of an occasion when a key witness who was under subpoena came to him and asked if the opposing counsel could inquire concerning a prior criminal conviction. Upon being answered in the affirmative, he said he had entered a guilty plea to a non-violent felony committed 30 years before when he was a young man. At the time he was called as a witness he had become a prosperous and respected business man. He advised the lawyer that in the circumstances his memory concerning the current episode would "fail" him absent agreement from opposing counsel that he would not be impeached by the old conviction. Fortunately such agreement was forthcoming from a lawyer who recognized the limits placed on him and the testimony of the witness was secured.

Since the standards discussed above almost invariably involve matters which are subjective, they are addressed essentially to professional conscience and honor. While largely unenforceable, the limits which the best professional traditions place on an advocate are not wholly beyond reach of a special kind of enforcement at the hands of the lawyer's peers and of judges. Experienced advocates and judges can, over a period of time, identify the lawyer who practices in conformity with high standards as distinguished from those who do not. This is illustrated in the episode just described; it was cited by a trial judge of long experience and related to an event which occurred in his practice 30 or more years before. The lawyer who agreed that he should not and would not impeach the witness with what he considered an irrelevant criminal conviction stands out in the memory of his former adversary. That lawyer was not motivated by reasons of "policy," but the episode tends to suggest that his adherence to principle was indeed a sound policy which earned him a high reputation in the profession. Such a
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lawyer enters every courtroom with an added dimension which inevitably operates to the benefit of his clients.

c. Forcing claim of privilege before the jury

Although the situation arises more frequently for the prosecutor than it does for defense counsel, it is equally unprofessional for either to call a witness he knows will assert a claim of privilege in order to encourage the jury to draw inferences from the fact that the witness claims a privilege. If there is genuine doubt whether the witness will claim the privilege or whether the validity of the privilege will be recognized, the matter should be resolved out of the presence of the jury.

d. Unfounded question

The attempt to communicate impressions by innuendo through questions which are answered in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist Party?" or "Did you tell Mr. X that . . . ?" when the questioner has no evidence to support the innuendo, is an improper tactic which has often been condemned by the courts. See, e.g., Richardson v. United States, 150 F.2d 58, 64 (6th Cir. 1945); People v. DiPaolo, 355 Mich. 394, 115 N.W.2d 78 (1962); State v. Flowers, 262 Minn. 164, 114 N.W.2d 78 (1962). See generally 6 Wigmore, Evidence § 1808(2) (1940). See also ABA Code DR 7-106(C) (1); American College of Trial Lawyers, Code of Trial Conduct 20(c), (d), (g) (1963).

7.7 Testimony by the defendant.

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

Commentary

The absolute prohibition against subornation of perjury, see section 7.5, supra, applies where the defendant himself wishes to testify. Hence, a lawyer should withdraw from the case rather than place himself in the position of offering a perjurious witness. However, often the lawyer confronted by this situation will not be able to withdraw, either because trial has begun or it is so close to trial that withdrawal would leave the client without counsel, or because the court declines to allow withdrawal.

The experienced criminal lawyers consulted at length by the Committee favored the manner of resolving the problem adopted in this standard as the most reasonable accommodation of the competing demands of the lawyer's absolute obligation to refrain from introducing or aiding presentation of false testimony, on the one hand, and the defendant's absolute right on the other hand to testify in his own behalf, however ill-advised that course. These lawyers stated that this problem is not often faced by experienced lawyers in private criminal practice, partly because situations are infrequent when the client having admitted to facts constituting guilt thereafter insisted on testifying falsely; they also pointed to the greater leverage which a privately re-
tained lawyer can exercise over the conduct of the case. The power of
the privately retained lawyer to withdraw gives him a stronger posture
than that of the court appointed or public defender counsel.

It was the view of these experienced defense counsel that in the un-
usual situation in which this dilemma presents itself, at a point when
withdrawal from the case is not feasible, the lawyer should not partici-
pate in a fraud on the court by conducting direct examination in the
conventional manner or by referring in any way to his client’s perjury
in conducting the defense, but simply allow the accused to testify in
narrative form and in his own words. See ABA Code DR 7-102(A)
(7). Our legal system, permitting the defendant to testify under oath,
has not, in their view, completely foreclosed to him the opportunity
to speak to the jury or to permit him to do so only at the cost of being
abandoned by his lawyer in the midst of trial.

There is a division of opinion among lawyers on the question of
what should be said to the client when this juncture is reached. On one
hand, some lawyers hold that the lawyer’s general obligation to pro-
tect the court from fraud in its processes and the exception to the at-
torney-client privilege for statements of intention to commit a crime
may place the lawyer in the position of being required to disclose the
fact of perjury. Thus, the lawyer may need to warn the client of that
risk. On the other hand, there are lawyers who take the view that the
lawyer’s obligation of confidentiality does not permit him to disclose
the facts he has learned from his client which form the basis for his
conclusion that the client intends to perjure himself and that a warning
to the client would be inconsistent with the assurances of confiden-
tiality which counsel gave at the outset of the lawyer-client relation-
ship.

The existence of this dilemma is predicated upon the defendant’s ad-
mitting incriminatory facts to his lawyer which are corroborated by the
lawyer’s own investigation. So long as the defendant maintains his in-
occence, the lawyer’s realistic appraisal that he is in fact guilty does not
preclude a vigorous defense.

Because the lawyer may later have his conduct called into question
when his client testifies against the advice of counsel, it is desirable
that a record be made of the fact. However, if the trial judge is in-
formed of the situation, the defendant may be unduly prejudiced,
especially at sentencing, and the lawyer may feel that he is caught in
a dilemma between protecting himself by making such a record and
prejudicing his client’s case by making it with the court. The dilemma
can be avoided in most instances by making the record in some other
appropriate manner, for example, by having the defendant subscribe
to a file notation, witnessed, if possible, by another lawyer.

7.8 Argument to the jury.

(a) In closing argument to the jury the lawyer may argue all rea-
sonable inferences from the evidence in the record. It is unprofes-
sional conduct for a lawyer intentionally to misstate the evidence or
mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for a lawyer to express his per-
sonal belief or opinion in his client’s innocence or his personal belief
or opinion in the truth or falsity of any testimony or evidence, or to
attribute the crime to another person unless such an inference is war-
ranted by the evidence.

(c) A lawyer should not make arguments calculated to inflame the
passions or prejudices of the jury.

(d) A lawyer should refrain from argument which would divert the
jury from its duty to decide the case on the evidence by injecting
issues broader than the guilt or innocence of the accused under the
controlling law or by making predictions of the consequences of the
jury’s verdict.

Commentary

a. Inferences warranted by the evidence

Because of the general unavailability of government appeals, the
courts rarely have occasion to pass directly on the question of the
limits of propriety of argument to the jury by defense counsel. The
issue is raised indirectly, however, in many cases in which the pro-
priety of the prosecutor’s summation is questioned, since some courts
have held that statements made by the prosecutor that would otherwise
be improper will not lead to reversal if fairly responsive to impermissible arguments or questions of defense counsel. Evans v. State, 178 So. 2d 892 (Fla. 1965). It should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument. See State v. Simpson, 247 La. 883, 175 So. 2d 255 (1965); Read v. State, 99 So. 2d 455 (Miss. 1958).

American College of Trial Lawyers, Code of Trial Conduct 15(c) (1963) is consistent with the ABA Canons of Professional Ethics that “[i]t is not candid or fair for the lawyer knowingly to misquote . . . the testimony of a witness . . . or in argument to assert as a fact that which has not been proved.” ABA Canons of Professional Ethics No. 22 (1968). See also ABA Code EC 7-25; DR 7-106(C)(7). Defense counsel is no more entitled than a prosecutor to assert as fact that which has not been introduced in evidence. See State v. Powell, 357 S.W.2d 914 (Mo. 1962). The rules of evidence cannot be subverted by putting to the jury, in argument or opening statements, matters which are not in the record. For example, where the defendant’s willingness to take a lie-detector test has been held inadmissible, defense counsel has been precluded from suggesting that willingness in argument. State v. Anderson, 261 Minn. 431, 113 N.W.2d 4 (1962). On the other hand, attorneys are entitled to reasonable latitude in arguing inferences from the evidence. See State v. Hilliard, 89 Ariz. 129, 359 P.2d 66 (1961). His duty is to put his client’s “best foot forward.”

The difficult problem for defense counsel arises most often in cases where the evidence against the accused is overwhelming and no defense is realistically available. It may be a case in which he has unsuccessfully urged his client to plead guilty. With no solid evidence to argue to the jury, counsel may be tempted to violate basic rules. In this situation he may appropriately emphasize the jury’s sole power as factfinder, its exclusive power to judge credibility, and the burden of the prosecution to prove guilt beyond reasonable doubt. Defense counsel has no duty to, and should not, stultify himself and his profession by departing from standards of professional conduct in the mistaken idea that it is his function to secure an acquittal in every case.

There are often circumstances in which counsel may be entitled to argue to the jury that they should draw an inference adverse to the prosecution as the result of its failure to bring forth some particular item of evidence or to call as a witness someone who had a special relation to the facts of the case. Cf. State v. Mode, 57 Wash. 2d 829, 360 P.2d 159 (1961). But it is a form of misrepresentation, and therefore improper, for counsel to argue such an inference when he knows that the evidence was not presented because it had been excluded by the court or is inadmissible. In Rizzo v. United States, 304 F.2d 810, (8th Cir. 1962), defense counsel had objected to the admission into evidence of certain checks. In response, the prosecution stated that it would not offer them in evidence. Later, in his argument to the jury, defense counsel argued that “Miss Nafie testified that she never cashed a check for Mr. Rizzo and you can rest assured that if she had the proof would have been in here and it wasn’t here.” Id. at 829. The court held that the trial judge properly sustained an objection to such an argument. A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist.

The obligation to avoid misrepresentation to the jury is broad. An argument to the jury that the accused has a “clean record” when counsel is aware of prior convictions, although the evidence is silent, is an affirmative misrepresentation of a fact. On the other hand, if the record shows the accused has a long and stable work record, a family and other ties to the community, it is not improper to argue from this that he is a person whose credibility can be relied on.

b. Personal belief

“[A] lawyer shall not . . . assert his personal opinion . . . as to the guilt or innocence of an accused. . . .” ABA Code DR 7-106(C) (4).

There are several reasons for the rule, long established, that a lawyer may not properly state his personal belief either to the court or to the jury in the soundness of his case. In the first place, his personal belief has no real bearing on the issue; no witness would be permitted so to testify, even under
oath, and subject to cross-examination, much less the lawyer without either. Also, if expression of personal belief were permitted, it would give an improper advantage to the older and better known lawyer, whose opinion would carry more weight, and also with the jury at least, an undue advantage to the unscrupulous one. Furthermore, if such were permitted, for counsel to omit to make such a positive assertion might be taken as an admission that he did not believe in his case.

Drinker, Legal Ethics 147 (1953). These are ample grounds for the prohibition against expression of personal belief by counsel. In addition, it should be noted that this prohibition is essential to the maintenance of the appropriate independence of the lawyer from identification with his client. “He is the representative but not the alter ego... Counsel in England never says ‘I think.’ He says ‘I submit’ or, ‘I suggest,’ or, to the Judge or Jury, ‘You may think.’” Shawcross, The Functions and Responsibilities of an Advocate, 13 Record of N.Y.C. B.A. 483, 495 (1958). “[No] advocate in any circumstances should ever permit himself to assert his own belief in the merits of the case which he is arguing or in the innocence of the prisoner whom he is defending. The moment he does so he steps outside his role of the advocate.” Singleton, Conduct at the Bar 41 (1933). See generally Martin, Closing Argument to the Jury for the Defense in Criminal Cases, 58 J.Crim. L.C. & P.S. 2, 6 (1967).

The argument in a criminal case will sometimes include points based on probabilities, but this is permissible only if those probabilities are supported by the record or by common experience. Counsel may not suggest, for example, that the evidence is consistent with the probability that someone other than the defendant committed the crime unless there is some basis in the record for doing so. If an accomplice has testified against the defendant, defense counsel may argue that the accomplice is seeking to protect himself or a friend. Martin, supra, at 12-13. The naming of a specific person other than the defendant as the one responsible for the crime, however, is subject to an important limitation. Since such a line of argument could lead to the prosecution of the person named and, at least, may be destructive of his good name and reputation, counsel should not make such an argument unless there is reasonable ground in the evidence to support that position. This view is taken in American College of Trial Lawyers, Code of Trial Conduct 4(b) (1963) and is well grounded in our tradition of advocacy. See the discussion of Charles Phillips’ course of action in Courvoisier’s Case in Costigan, Cases on the Legal Profession 431, 439-41 (2d ed. 1933).

c. Appeals to prejudice; attacks on the prosecutor; digression from the evidence

The prohibition of personal attacks on the prosecutor in closing argument is but part of the larger duty of counsel to avoid acrimony in his relations with opposing counsel during trial and to confine argument to record evidence. See §§ 7.1, 7.5, supra. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncracies of opposing counsel. See American College of Trial Lawyers, Code of Trial Conduct (1963) 9(b). A personal attack by the prosecutor on defense counsel is improper. See Loveless v. State, 240 Ind. 534, 166 N.E.2d 864 (1960) (dictum). Obviously, the duty is reciprocal. See People v. Kennedy, 356 Ill. 151, 190 N.E. 296 (1934); cf. People v. Marks, 6 N.Y.2d 67, 188 N.Y.S.2d 465, 160 N.E.2d 26 (1959), cert. denied, 363 U.S. 912 (1960).

Remarks calculated to evoke bias, passions or prejudice “should never be made in a court of justice by anyone.” People v. Simon, 80 Cal. App. 675, 252 P.2d 758, 760 (1927). There are many cases in which courts have reversed convictions as the result of inflammatory remarks made by the prosecutor containing references to the defendant’s race, religion or ethnic background. See generally Annot., 45 A.L.R.2d 303 (1956). This duty is reciprocal and it is improper conduct for defense counsel to make arguments calculated to appeal to such prejudices. See State v. Simpson, 247 La. 883, 175 So. 2d 255 (1965). There are, of course, occasions in which the matter of prejudice is itself in issue. In such circumstances, reference to it in argument would be appropriate if restricted to the evidence.
It is also improper for counsel to divert the jury from its duty to decide the case on the evidence by introducing broad social issues which are not based on evidence in the record. State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963). Just as a prosecutor should not be permitted to argue to the jury that the defendant should be found guilty because of general criminal conditions of the community, it is improper for defense counsel to encourage the jury to disregard their duty because of the political or social implications of the case.

7.9 Facts outside the record.

It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

Commentary

The problem of digression from the record can arise at both the trial and appellate levels. At the trial level it is highly improper for a lawyer to refer in colloquy, argument or other context to factual matter beyond the scope of the evidence or the range of judicial notice. This is true whether the case is being tried to a court or to a jury, but it is particularly offensive in a jury trial. It can involve the risk of serious prejudice with a mistrial as a possible remedy. Ordinarily a trial court should summarily exclude any reference in argument or otherwise to factual matter which is beyond the scope of the evidence in any significant way. The broad discretion a trial court has in such matters enables it to deal with them as they arise by allowing a party to reopen his case or take other appropriate steps to enlarge the record so as to provide an evidentiary basis for the matter he wishes to argue but has for some reason failed to establish.

At the appellate level it is an even graver violation of ethical standards to argue factual matter outside the record, for an appellate court has less flexibility to deal with the problems of enlarging the record. This subject is discussed more fully in section 8.4, infra.

7.10 Post-trial motions.

The trial lawyer's responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the defendant's rights.

Commentary

The typical agreement for representation made by retained counsel in a criminal case provides for representation through trial, including post-trial motions. Nevertheless, some lawyers have been uncertain of their responsibilities with respect to post-trial motions. The Advisory Committee on Sentencing and Review of this Project has noted that a major problem in the administration of criminal justice today is the hiatus in proceedings as a case moves from the trial to the appellate court. . . .

Of particular concern is the need for the guiding hand and assistance of counsel in the final phases of the trial process and the immediate post-trial stage.

ABA Standards, Criminal Appeals § 2.2, Commentary at 47-48 (Tent. Draft, March 1969). Failure to make a motion for a new trial, Wainwright v. Simpson, 360 F.2d 307, 309 (5th Cir. 1966) (dictum), or to pursue a motion once filed, Goforth v. Dutton, 409 F.2d 651 (5th Cir. 1969), has been considered to be ineffective assistance of counsel. Continuity of representation at the stage of post-trial motions contributes to the efficiency of judicial administration, since the trial lawyer often can present his motions without the delay and expense of the preparation of a transcript of the entire trial. See also § 8.2, infra.

PART VIII. AFTER CONVICTION

Introductory Note

Discussions of the function of defense counsel in criminal cases most often tend to focus, as we have noted, on the trial and the preparations for trial. This is so because the trial itself is the ultimate process
for deciding the guilt of the accused; hence it is the subject of concentration of both the accused and his counsel. The well known tendency of news media and fiction writers to over dramatize trials tends to emphasize this preoccupation with the trial itself and render what follows a guilty verdict or plea an anticlimax.

The vast majority of criminal charges are disposed of—as they should be—without trial by discussions which lead to a plea of guilty. Viewed as a whole, therefore, the larger role of defense counsel is primarily one of preparation for these discussions which, hopefully, will lead to a disposition acceptable to both the accused and the prosecution. When we add to this the known fact that a large percentage of cases tried end with a verdict of guilty we see that, considering the whole spectrum, representation of the defendant in plea and sentencing is of highest importance. This is an area in which a significant service may be rendered and it is too little understood by lawyers.

Counsel's function in addressing the court in his client's behalf before sentence is pronounced is not a new one. However, the development of a wide variety of sentencing alternatives, the expansion of community resources for diagnosis and rehabilitation and the growth of probation services responsible for the preparation of formal presentence reports have gradually changed the character of the representation which is called for at this stage of the proceedings. A new, and desirable, trend is to make such facilities available to defense counsel at an early stage as an aid in evaluating his client's problems.

Similar changes have occurred in other aspects of the lawyer's role after conviction. The increasing complexity of the criminal law has made the lawyer's function in the appellate process a significant one. The English system of criminal law from which our's arose had little place for appeals in criminal cases. The right to appeal grew rapidly on American soil, but even so, until this century it was restricted in some jurisdictions. The appeal—especially for the indigent—is tending to become virtually automatic. The same kind of development can be traced with respect to post-conviction remedies, such as habeas corpus and coram nobis. Whereas once the invocation of such avenues of relief was rare, cases of this type now form a major category of litigation in our courts. Many observers believe there is widespread abuse of post-conviction procedures; hopefully this is a transitory problem. Implementation of the ABA Standards, Post-Conviction Remedies (Approved Draft, 1968) may help meet these problems.

These changes have brought with them a whole new set of problems in the definition of the defense lawyer's function and in the statement of the ethical limits of his conduct. Underlying many of these problems are unresolved questions about the extent to which the rules and approaches developed for the process of trial are applicable to the processes following conviction. There is one issue on which there is widespread agreement: the role of counsel after conviction has been slighted in the past and ought to be expanded. See President's Crime Comm'n, The Courts 19. In the words of one attorney, "a plea or finding of guilt may result in the termination of a criminal case, but it does not terminate the defendant." Douglas, The Role of Counsel at Sentencing: A Defender's View, 23 Legal Aid Brief Case 190 (1965).

8.1 Sentencing.

(a) The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to his client.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services.
(c) Counsel should alert the accused to his right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal.

Commentary

a. Sentencing alternatives and practices

The importance of the role of counsel in the sentencing stage of the criminal process is suggested in part by decisions invalidating sentences because no defense counsel were present. See, e.g., Lee v. State, 99 Ariz. 269, 408 P.2d 408 (1965); State v. Strickland, 27 Wis. 2d 623, 135 N.W.2d 295, 302-03 (1965). The Supreme Court has suggested that the need for counsel may be greater at sentencing than in the determination of guilt because “[t]here a judge usually moves within a large area of discretion and doubts... Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge.” Carter v. Illinois, 329 U.S. 173, 178 (1946). See also Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 MINN.L.REV. 803, 806-12, 828-32 (1961).

An important function of defense counsel in the sentencing process is the determination of the statutory alternatives available to the judge in exercising his discretion in sentencing for the particular offense involved. See Steffes, Advocacy Fully Achieved, 23 LEGAL AID BRIEF CASE 200, 201 (1965). But it is not enough for the lawyer to function as a check on the judge in this regard; he should serve also as a counsel to his client. “Most defendants are unaware of the effects of imprisonment or probation on their families or their own future. A defendant who understands the adjustments which his sentence demands is more likely to respond favorably.” PRESIDENT'S CRIME COMM’N, THE COURTS 20.

b. Preparation and presentation of sentencing data

One respect in which counsel’s function in the sentencing process has changed most drastically in recent years is in the nature of the preparation needed for his urging the court to exercise leniency. In a predominantly rural society the sentencing process tends to be informal and the determination rests on facts concerning the defendant’s background and prospects known generally throughout the community and thus noticed by judge and counsel. These conditions still obtain in some of our courts. But generally today sentencing takes place in a context in which neither judge nor counsel is personally acquainted with the defendant. Moreover, the prognosis for rehabilitation depends heavily on the opportunity for his gainful employment. This, in turn, may depend on educational opportunities. The defendant may be in need of family counseling or mental health assistance. In most courts these and other considerations are the subject of a presentence report prepared by a probation officer or other staff assistant to the court. Where the probation report is made available to the defense, counsel has a role to play in determining the accuracy of information on which it is based and in evaluating the soundness of its conclusions. To do so, he will need to make some independent investigation of his own. Where there is no such report or it is not released to the defense, he will need to develop a defense equivalent to the report for presentation to the court. This was the subject of a study in a demonstration project of the Institute of Criminal Law and Procedure, Georgetown University Law Center and the District of Columbia Legal Aid Agency. See PRESIDENT’S CRIME COMM’N, THE COURTS 19 (1967). The usefulness of such defense involvement has been shown in the quality of representation which has been achieved in recent years in some defender offices which have been equipped to provide this expanded type of legal service. See Pye, The Administration of Criminal Justice, 66 COLUM. L. REV. 286, 295-99 (1966).

In presenting to the court facts bearing on the sentence, defense counsel must often personally vouch for their accuracy, since the formal processes of receiving testimony are not usually employed at the sentencing stage. He may well advance the interest of his client best by demonstrating a measure of objectivity, but “he should continue, as he has done throughout the trial itself, to advance and protect the best interests of his client...”
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realistic as is consistent with illuminating the most favorable factors bearing upon the requested disposition.” See Steppes, *Advocacy Fully Achieved*, 23 Legal Aid Brief Case 200-01 (1965).

In the trial stage defense counsel is an advocate in a representative capacity participating in an adversary proceeding. Termination of the trial does not terminate counsel’s duties to his client, but his duties are not precisely the same as before. He may not present facts which he knows to be false in a manner which creates an inference that they are true. He may not, for example, present facts concerning the defendant’s character which would suggest to the judge that the defendant does not have a prior record of crime if he knows that the defendant has such a record and that fact has not been disclosed to the court.

This is not simply a matter of a puritan ethic, but a highly practical long range consideration. It is axiomatic that next in order of importance—and perhaps of equal importance—to having a “good case,” the best asset of an accused is to be represented by a lawyer who has the confidence of other lawyers and of the courts. Once this confidence is lost or impaired, the lawyer’s ability to perform his function in representing future clients effectively is gravely compromised. A defense lawyer who has deceived the prosecutor or withheld relevant adverse information from the court while purporting to be aiding the court in disposition of the case at the sentencing stage will no longer be an effective advocate in future cases.

c. Allocation

It sometimes happens that in the course of exercising the right of allocution, the defendant will freely admit the guilt which he has up to the time of verdict denied; he may have taken the stand and controverted the evidence against him by a denial of any participation. Most judges are not unduly surprised by this, but there are risks involved. Some judges may impose a heavier sentence if it is felt the defendant has committed gross perjury. Even more serious perhaps is that the statement on allocution admitting guilt is part of the record and, if the conviction is appealed, that admission may compromise his appeal, especially if it is based on insufficiency of the evidence.

The other side of the coin is that if the assumptions underlying the right of allocution are correct the right is one not to be waived lightly. The more realistic view may be that an accused does not often by his own utterance influence a sentence. Because of the risks of a judicial confession, defense counsel should be alert to the problem and would be well advised to recommend to the defendant that counsel make all statements in mitigation or that the client exercise the right of allocution with these hazards in mind.

8.2 Appeal.

(a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court’s judgment and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant’s own choice.

(b) The lawyer should take whatever steps are necessary to protect the defendant’s right of appeal.

Commentary

a. Advising defendant concerning appeal

A major problem in the administration of criminal justice is the defendant’s need for effective representation and advice in the relatively short period immediately following conviction when his decision whether to appeal must be made. This period is, in many ways, of crucial importance to the defendant; yet it frequently happens that no legal representation exists, sometimes for months, at this juncture. Lawyers, whether retained or assigned at trial, all too often take the view that their responsibilities have ended with the final judgment of the trial court and communication between the defendant and his attorney frequently ceases. See Buxton v. Brown, 222 Ga. 564, 150 S.E.2d 636 (1966). Whatever the cause, the effects are most undesirable. To make the right to counsel meaningful, representation must be continuous throughout the criminal process. Because of his intimate familiarity
with the record of the trial proceedings, trial counsel is in the best position to advise the defendant concerning the factors to be weighed in reaching the decision whether to appeal. See ABA STANDARDS, CRIMINAL APPEALS § 2.2 (Tent. Draft, March 1969).

Counsel's first duty is to make sure the defendant understands the meaning and consequences of the judgment of the court. For example, if the defendant has been sentenced to a term of imprisonment, counsel should explain to him the applicable provisions of law relating to parole and reduction of his sentence for good behavior.

Of greater importance is the duty of counsel to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal. Careful exploration should be made of the possible errors that could be pressed on appeal, their relative strengths and weaknesses, and the probable outcome of an appeal. Counsel should also attempt to learn and evaluate the doubts that the defendant himself may have about the adjudication of his case. To make the defendant's ultimate choice a meaningful one, counsel's evaluation of the case must be communicated in a manner so as to be comprehended. Possible disadvantages and risks involved in an appeal should also be explained to the defendant. The consequences of an appeal may not be apparent to him. In some circumstances even a successful appeal followed by a new trial may offer little prospect other than postponement of the service of his sentence. On the other hand, the defendant may be unduly chastened by the adverse verdict. Where it is appropriate to do so, the advantages of an appeal should be explained to him. Whatever his situation, the decision is a critical one, since claims of trial error are lost if they are not raised on appeal. Because of the importance of the decision, trial counsel should always consult promptly with the defendant concerning it, after making his own careful appraisal of the prospects.

Sound professional advice at this juncture serves the efficient and effective administration of criminal justice in another way. The conception of convicted defendants flooding appellate courts because they have nothing to lose overlooks the counter-view that the defendant who realizes his claims are without merit also knows he has nothing to gain by appeal. Forthright and forceful advice against pursuing a futile appeal would help to obviate wasteful expenditure of the already overburdened resources of the appellate courts. As pointed out above, there is much reason to believe that, to a substantial extent, there has been a lack of effective legal assistance at the critical point of the decision whether to appeal. Many defendants are completely without counsel at this point. Where defendants are receiving competent legal advice on the advisability of appeal from lawyers in whom they have confidence, it is not evident that any significant number act contrary to counsel's evaluation of the case. This is the most effective point of attack upon frivolous appeals. Many defendants sincerely believe they have grounds for appeal. This sincere belief may be brought on by self-deception, by simple ignorance, by bad advice from fellow prisoners or "jail house lawyers." It can be dispelled only by patient and understanding counsel. Time and effort expended at this point in explanation of the case and full exploration of the defendant's doubts and questions is worth much more than the time and effort later imposed upon counsel assigned to pursue a groundless appeal that should not have been taken in the first place.

b. Protecting the right of appeal

A considerable body of post-conviction litigation has been generated involving failures on the part of trial counsel to protect the defendant's right of appeal. A few state courts have held that the failure of counsel to advise the defendant of the right to appeal is not a basis for post-conviction relief. See, e.g., Buxton v. Brown, 222 Ga. 564, 150 S.E.2d 636 (1966); Petition of Graham, 106 N.H. 545, 215 A.2d 697 (1965); Richardson v. Williard, 341 Ore. 376, 406 P.2d 156 (1965). Federal district courts have reached similar conclusions in cases where, the court believed, the defendant had seemed satisfied at the time with the outcome of the litigation in the state trial court. Callahan v. Virginia, 262 F. Supp. 31 (W.D. Va. 1967); Gibson v. Peyton, 262 F. Supp. 574 (W.D. Va. 1966); Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966). In other recent federal habeas corpus cases based upon the failure of defense counsel to inform the defendant of the right to appeal, relief has been granted. See, Wynn v. Page, 369 F.2d 930 (10th Cir.
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In several other cases, habeas corpus relief has been granted on the related claim that defense counsel had known of possibly meritorious grounds for appeal which had not been communicated to defendants, who had not appealed. Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966). See also Camp v. United States, 352 F.2d 800 (5th Cir. 1965).

Where the claim for post-conviction relief has been based upon the failure of defense counsel to execute defendant's instructions to appeal, the cases are again mixed in outcome. A few courts have denied relief. Ex parte Wilson, 392 S.W.2d 134 (Tex. Crim 1965); Horton v. Bomar, 239 F.Supp. 271 (M.D. Tenn. 1964). Most, however, have granted a nunc pro tunc remedy to the defendant thus deprived of his appeal. See, United States ex rel. Maselli v. Reincke, 261 F. Supp. 457 (D. Conn. 1966), aff'd 383 F.2d 129 (2nd Cir. 1967); Coffman v. Bomar, 220 F. Supp. 343 (M.D. Tenn. 1963); People v. Collier, 43 Cal. Rptr. 1, 399 P.2d 569 (1965); People v. Brown, 39 Ill. 2d 307, 235 N.E.2d 562 (1968); Commonwealth v. Peake, 210 Pa. Super. 133, 231 A.2d 908 (1967).

The fact situations out of which many of these cases have arisen indicates genuine uncertainty on the part of many lawyers concerning their responsibilities after verdict. There is often misunderstanding between lawyer and client concerning the action that will be taken by each. See United States v. Robinson, 361 U.S. 220 (1960); People v. Diehl, 62 Cal. 2d 114, 41 Cal. Rptr. 281, 396 P.2d 697 (1964). Rather than continue to face the problem in the form of petitions for relief from time limitations on filing appeals or of post-conviction collateral attacks on the ground of inadequate representation, trial counsel's obligation to protect the defendant's right of appeal should be affirmed.

In a related context, the Advisory Committee on Sentencing and Review of this ABA Project has recommended the following standard for lawyers in post-conviction relief cases: "Even if appointed counsel is not expected to continue in a case beyond the level of the court appointing him, he should be responsible at a minimum to continue in the case, if the applicant wishes to proceed further, until an appeal is perfected or the necessary preliminary steps have been taken to bring the case before the reviewing court." ABA STANDARDS, POST-CONVICTION REMEDIES § 4.4(b) (Approved Draft, 1968).

§8.3 Counsel on appeal.

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal if the defendant elects to avail himself of that right unless new counsel is substituted by the defendant or the appropriate court.

(b) Appellate counsel should not seek to withdraw from a case solely on the basis of his own determination that the appeal lacks merit.

Commentary

a. Continuous representation by trial counsel

As a matter of general policy, the efficient functioning of the appellate process is best served by continued representation of the defendant by trial counsel, as on the prosecution side of the case. By virtue of his intimate familiarity with the issues and the trial proceedings, trial counsel is in the best position to perform promptly the tasks required in perfecting the appeal, such as designating the record on appeal and the points to be relied upon, and to prepare the brief and argue the appeal. See Holmes v. United States, 383 F.2d 925 (D.C. Cir. 1967). At the same time, however, it must be recognized that the client, especially the defendant who pays for the services, should have the right to substitute counsel for the appeal, and that trial counsel, on his part, should not be required to conduct the appeal.

The problems of delay engendered by substituting counsel on appeal may be obviated in the cases of paying clients by requiring strict adherence to the rules of the courts. It is in the cases of the legally indigent defendants who must depend upon the courts to safeguard their
right to representation that the problems of substituting counsel on appeal are most acute. A hiatus in representation after an appeal has been noted causes delays, for example, in the necessary participation by counsel in the preparation of the record on appeal and in the arrangement, where possible, of release on bail pending appeal. The time periods are sometimes substantial. A study by the Junior Bar Section of the District of Columbia Bar Association showed that, until January, 1967, there was typically a delay of two to three months, and sometimes six months, between the judgment of conviction and the appointment of appellate counsel. "...[T]he appointments systems remain islands of activity with no effective coordination among them. Each court has its own list of attorneys developed and maintained through its own efforts with no effective consultation with any other court." D.C. JUNIOR BAR SECTION, REPORT OF THE COMM. TO STUDY THE OPERATION OF THE CRIMINAL JUSTICE ACT IN THE DISTRICT OF COLUMBIA 12, 33 (1967) (hereinafter cited as D.C. JUNIOR BAR).

Such gaps in representation would not occur if assigned trial counsel were routinely assigned to conduct the appeal. Some jurisdictions have adopted various systems to ensure or encourage such continuous representation. For example, Pa. R. CRIM. P. 318(c) provides: "Where counsel has been appointed, such assignment shall be effective until final judgment, including any proceedings upon direct appeal." See also Wash. R. ON APPEAL 46(c) (i); Smith v. State, 192 So. 2d 346 (Fla. App. 1966). The United States Court of Appeals for the Second Circuit has adopted Rule 4(b), supplementing the Federal Rules of Appellate Procedure, which provides a comprehensive scheme for administering the continuous duty of trial counsel, retained or appointed, so as to prevent a gap in representation of the defendant. The Rule also ensures the appellate court's knowledge at all times of the status of the legal representation. This Advisory Committee on the Prosecution and Defense Functions of this Project has recommended that: "Counsel initially appointed should continue to represent the defendant through all stages of the proceedings [including sentencing, appeal and post-conviction review] unless a new appointment is made because geographical considerations or other factors make it necessary." ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.2 (Approved Draft, 1968). See also ABA STANDARDS, CRIMINAL APPEALS §§ 2.2(a), 3.2 (Tent. Draft, March 1969).

Some states have established public defender systems to provide counsel on appeal. Ore. Rev. Stat. § 138.770 (1968); Wis. Stat. Ann. § 957.265 (Supp., 1968). Where public defender or legal aid offices of sufficient size handle both trials and appeals, a division of functions between appellate lawyers and those who deal with cases at the trial would promote administrative efficiency. The trial and appellate counsel would both be part of a single organization with close cooperation possible, as is true in prosecutors' offices. It must be remembered that accused persons who are defended by retained counsel at trial are generally represented by the same counsel on appeal. No valid interest of fair administration of justice is served by a per se rule giving every indigent new counsel on appeal. A sounder approach would be to appoint trial counsel to carry on the appeal, unless the trial judge concludes that the interests of justice call for the appointment of new counsel.

b. Withdrawal of original counsel

The responsibility of counsel assigned to represent an indigent appellant requires that the lawyer serve his client as an advocate. It is not appropriate for counsel to act as an amicus curiae or as adviser to the court. Before the merits of an indigent's appeal are determined by a court, he is entitled to the advocacy of a lawyer in his behalf. See Anders v. California, 386 U.S. 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Ellis v. United States, 356 U.S. 674 (1958). If the lawyer acts as a court would, the position of the appellant is not at all improved and may be made worse. The Ninth Circuit expressed this concern in terms of lack of notice to the indigent appellant that counsel, if appointed, might give an ex parte communication to the court "which adds the weight of his opinion to the position of his client's adversary." Harders v. California, 373 F.2d 839, 843 (9th Cir. 1967).

The possibility exists in every appeal, by indigent and non-indigent
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Principal among them is the request for leave to withdraw from the case. Others have been more or less overt, more or less professionally responsible actions by the attorney to dissociate himself from the groundless contentions.

By far the greater attention has been focused to date on the matter of counsel’s withdrawal and the effect upon the litigation of such withdrawal. The leading case, *Anders v. California*, *supra*, affirms the power, if not the duty, of counsel to withdraw in some cases: “Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” 386 U.S. at 744. The Court had made similar statements before. See *Ellis v. United States*, 356 U.S. 674, 675 (1958). The Court found that permitting counsel’s withdrawal in *Anders* was improper because his stated basis for so acting was only an opinion that there was no merit in the appeal; the Court did not equate such a no-merit statement with an evaluation of the appeal as frivolous.

The *Anders* decision thus appears to rest narrowly on the distinction between complete frivolity and absence of merit. The latter is not enough to support either a request by counsel to withdraw, nor the granting of such a request by the court. The Supreme Court announced the procedure to be followed whenever counsel concludes that the appeal is wholly frivolous:

That request [for permission to withdraw] must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744.

The Court did not explain the apparent inconsistency of limiting
valid requests by counsel to withdraw to situations where counsel finds no point that is arguable and at the same time requiring that such requests be accompanied by a brief arguing anything in the record that might support the appeal. Plainly the Court wanted to prevent withdrawing counsel from filing a brief against the appellant's position in order to demonstrate frivolity. The Court also believed that the brief of withdrawing counsel for the appellant could be quite useful to the appellate court:

It would . . . induce the court to pursue all the more vigorously its own review because of the ready reference not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate.

_Id._ at 745. Neither of these laudable purposes solves the dilemma posed for counsel who is required to brief the unbrievable.

The Supreme Court has not yet had occasion to rule upon actions by counsel other than requests to withdraw. In a recent Michigan case the lawyer filed a letter indicating his view that the case lacked merit together with an unqualified assertion that he would not file a motion for new trial; the Michigan Court of Appeals held the lawyer in contempt. _State v. Hoffman, 9 Mich. App. 342, 155 N.W. 2d 708 (1968)._ However, the Michigan Supreme Court reversed. _382 Mich. 66, 168 N.W. 2d 229 (1969);_ _cf._ _State v. Ortiz, 98 Ariz. 65, 402 P.2d 14 (1965) (counsel's decision upheld)._ In another case counsel advised his client that he would do no more than file whatever papers were prepared by the client. _Hodge v. Reincke, 25 Conn. Sup. 257, 200 A.2d 252 (1964) (counsel's action not upheld)._ See also _People v. Jones, 52 Cal. Rptr. 924 (Dist. Ct. App., 1966) (counsel's action upheld)._ In still another instance, the lawyer did nothing and allowed the case to be dismissed for want of prosecution. _See Starke v. United States, 338 F.2d 648 (4th Cir. 1964) (counsel's action not upheld);_ _See Davis v. Boles, 247 F.Supp. 751 (N.D.W.Va. 1965) (counsel's action not upheld)._ 

In an appeal that is not entirely frivolous in counsel's estimate, the problem may arise of a particular question that the appellant insists upon including in the appeal despite counsel's protest that it is frivolous. In such a situation, the lawyer might briefly and argue the points he believes supportable and totally omit the others. See _State ex rel. Henderson v. Boone Circuit Court, 246 Ind. 207, 204 N.E.2d 346 (1965) (counsel's action upheld);_ _cf._ _Bennett v. State, 161 Me. 489, 214 A.2d 667 (1965) (retained counsel; action upheld)._ Alternatively, the lawyer might include the frivolous question in his brief, but deal with it sketchily and without developing it in detail or pressing it on the court. See _Wallace v. State, 247 Ind. 405, 215 N.E.2d 354 (1966) (counsel's action upheld);_ _Johnson v. United States, 360 F.2d 844, 847 (D.C. Cir. 1966) (concurring opinion)._ Another possibility is for counsel to present the grounds but openly to dissociate himself from them. See _Brown v. State, 223 Md. 401, 164 A.2d 722 (1960) (counsel's action upheld)._ 

The underlying problem in these situations is to reconcile the professional and personal integrity of the attorney with the right of the defendant to assistance of counsel. Lawyers are deemed to owe a general duty to courts not to present frivolous claims. _FLA. RULES OF COURT 1967, Bar Rule B, Ethics Governing Attorneys, Section (1), ¶ 44;_ _Rumph v. United States, 343 F.2d 580 (5th Cir. 1965);_ _Petition of Stillabower, 246 Ind. 695, 210 N.E.2d 665 (1965)._ 

Separate from the duty of the lawyer to the court, there is sometimes expressed the need to preserve the dignity and self-respect of the lawyer in his own mind. See _FLA. RULES OF COURT, supra._ In the same vein, a federal court of appeals has said: "We do not understand that we are required to appoint counsel to stultify themselves by pressing hopeless appeals." _United States ex rel. Tierney v. Richmond, 245 F.2d 222 (2d Cir. 1957)._ 

While ethical considerations militate strongly against advancing weak or frivolous contentions that would not otherwise be presented, a rather different situation arises if those questions will face the court in any event. The court must deal with the questions, no matter how farfetched. The court's processes will be aided, not impeded, if a trained
legal mind has been applied to the presentation of the issues. This consideration surely underlies the Supreme Court's position in *Anders*. It has been controlling in the attitude of the United States Court of Appeals for the District of Columbia Circuit, which routinely gives assigned counsel a prepared statement designed to minimize withdrawals. The statement says in part: "As a general rule, the court will be greatly aided if appointed counsel remains in a case, even though he may be subjectively unimpressed with the merits of the available points." Suggs v. United States, 291 F.2d 971, 977-78 (D.C. Cir. 1968). After indicating that counsel may seek leave to withdraw if, after conscientious investigation, he finds no non-frivolous issues, the statement adds:

The motion shall be accompanied by a brief in which it shall be counsel's purpose to make as effective a statement of such points and issues [as appellant seeks to assert or counsel has considered as possible bases for appeal] as is possible under the circumstances. This brief shall include relevant record references, and shall cite and deal with those cases which appear to bear upon the points in question.

*Id.* at 778.

The statement notes that such a brief is not to be given to the prosecution, although a copy must be sent to the appellant. The latter has 30 days in which to comment. Thereafter, the court considers the motion for leave to withdraw, the brief and the appellant's comments. If the motion is denied, presumably the normal appellate process follows. Johnson v. United States, 360 F.2d 844 (D.C. Cir. 1966); see Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968); Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966). Compare United States v. Camodeco, 367 F.2d 146 (2nd Cir. 1966).

It should be noted that no attorney in the United States Court of Appeals for the District of Columbia Circuit was allowed to withdraw in 1996 for failure to find a non-frivolous issue. D.C. JUNIOR BAR 32.

On the premise that the lawyer is of greater aid to the court by remaining with a weak or groundless appeal than by withdrawing, the preferable position is for him to remain even at some cost to the concept of professional independence of the lawyer. The lawyer cannot properly engage in advocacy calculated to mislead or deceive the court, and no lawyer should do so. But, in this situation, appearance of counsel is not an implicit representation to the court that he believes in the legal substantiality of the contentions advanced. The court should not take an absence of a request to withdraw as an indication of the lawyer's own estimate of the case. Nor should the lawyer compromise his relationship with and duty toward his client by subtle or open disclaimers of personal belief in the merits of any given argument. He can, in good conscience, communicate to the court the issues and whatever can be said in support of them without, at the same time, advising the court that he is aware of the weakness of the position.

Remaining in the case does not necessitate that the lawyer litigate it to the utmost. A lawyer who has filed a brief advocating as well as possible only grounds which he finds weak or hopeless need not be called upon to stand up in court and attempt to make an oral argument that conceals the deficiencies in the case. In such a situation, it ought to be permissible for the lawyer to suggest to the court, after appellee's brief and any reply brief have been filed, that appellant would be satisfied to have the case submitted on the briefs. Where the lawyer has presented a brief coupling sound arguments with frivolous arguments insisted upon by the client, oral argument can be addressed to the stronger issues alone, unless the court requests otherwise.

The approach recommended in the standard, as elaborated in the foregoing commentary, supplements the standard recommended by this Advisory Committee in the report, ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.3 (Approved Draft, 1968), as follows: "Counsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards." (See also ABA STANDARDS, CRIMINAL APPEALS § 3.2 (b) (Tent. Draft, March 1969)). The commentary relating to Section 5.3 noted that the procedures in force in many jurisdictions put defense counsel in the awkward position of arguing against his client and the reviewing court in the unsatisfactory situation of having to review the record itself (thus, in effect, considering the merits) in order to determine whether counsel should be relieved.
To avoid such a conflict of interest and duplication of effort, the Committee recommended that counsel present to the court whatever there is to present, recognizing that in many instances this will amount to a presentation of contentions that are not well founded in any established case law. See Johnson v. United States, 360 F.2d 844, 847 (D.C. Cir. 1966) (concurring opinion); Gallegos v. Turner, 256 F.Supp. 670 (D. Utah 1966). Counsel thus serves his function by appearing on behalf of his client and presenting the client’s arguments. He is not, of course, required to distort the state of the law in so doing; indeed, he is obligated to reveal to the court any decisions directly adverse to his client’s contentions, if they have not already been presented to the court by the government. ABA OPINIONS No. 280.

This procedure satisfies the principles of Anders and avoids placing defense counsel in a position in which he may be tempted to take too narrow a view of the arguments that may be made in his client’s behalf. At the same time, the lawyer remains consistent to his professional obligation to be candid with the court in the presentation of the appeal.

8.4 Conduct of appeal.

(a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.

(b) Appellate counsel should be scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief and on his oral argument.

(c) It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Commentary

a. Diligence in prosecuting appeal

As at the pretrial and trial stages of a criminal case, it is the duty of the lawyer to avoid unnecessary delay in performing the various steps involved in the processing and submission of an appeal to the appellate court. Compare section 1.2(a), supra. The various steps in the appellate process—e.g., designation of the record, specification of errors, filing of briefs—are governed by rules prescribing time limits within which the particular actions must be performed. Such rules are designed to expedite the orderly disposition of criminal appeals. The lawyer has a duty to comply with them; he must not ask for additional time except for good cause fairly and honestly presented to the appellate court. Compare section 1.2(b), supra. Above all, he must not seek delay merely to accommodate the selfish interest of his client to postpone as long as possible the execution of the judgment under review. Dilatory tactics for that purpose constitute abusive use of the right to appellate review, are demeaning to the lawyer, and are contrary to his duties as an officer of the court in the administration of criminal justice.

b. Accuracy in brief and oral argument

In presenting the facts and issues to the appellate court in his brief and on oral argument, the lawyer must confine himself to the record made in the trial court and carefully observe the distinction between recorded matter and argumentation. In reviewing the evidence and happenings at the trial, his statement must be objective, accurate and free of distorting or argumentative coloration. Adverse as well as favorable evidence should be set forth. All evidence and other factual matter of record relevant to an issue on the appeal should be presented fairly and accurately in the lawyer’s statement of the case. Argumentative contentions concerning the import of testimony, inferences derived from the evidence, and rulings of the trial judge should be presented for what they are—the lawyer’s arguments in support of his claims of reversible error at the trial. He must not mislead the court by misrepresenting the record or by ignoring matters of record which are adverse to his contentions.

Similarly, it is the duty of the lawyer to be accurate in citing precedents which he claims support his contentions. He should not burden the court with citations of authorities which are inapposite in the context of his case. Fairness also requires that he cite any legal authority adverse to his position; but, having done so, the adversary system contemplates that he is free to challenge the soundness of such authority.
If the lawyer discovers that material matter has been omitted from the record on appeal, his proper course is to cure such omission by an appropriate motion. He should not undertake to deal with the matter on the hypothesis that it is already properly before the appellate court.

c. Matter not of record

Under no circumstances should the lawyer refer to or rely upon matter which is completely extraneous to the record made in the trial court and beyond the scope of the doctrine of judicial notice. Too often inexperienced appellate counsel approaches his task as though he were dealing with the case de novo at the appellate level. This is improper for essentially similar reasons that deviation from the record would have been improper in closing arguments at trial. An appellate court’s function is limited to review of what took place in the trial court. In an appellate court a lawyer must take the case as it was tried and on that record alone.

In cases where new counsel appears on the appeal review of the transcript sometimes leads to further inquiry, but matter discovered by such inquiry may not be used on the appeal. Means are provided for presenting newly discovered evidence in rules of court or statutes. Usually they require that leave be secured from the appellate court to file a motion in the trial court in relation to the newly discovered evidence. Those mechanisms need not be discussed here.

The trend toward virtually automatic appeals for indigents has brought a great increase in appeals in criminal cases and the appearance of many court appointed lawyers, many of whom have little experience in litigation. When a lawyer goes outside the record in a trial court he is likely to be met with objection or an admonition from the trial judge. At that stage, before evidence has been inadvertently overlooked, a trial judge has broad discretion to allow a reopening to remedy the omission should the ends of justice call for such action.

At the appellate level there is little such flexibility unless a showing can be made that newly discovered and important evidence has come to the notice of counsel. Absent such a showing it is a grave violation of ethical standards to refer to evidence outside the record and most appellate courts deal promptly and severely with such violations. References in briefs or argument to non-record factual matters are obviously made to influence the appellate court. With no evidence of record on the point, a lawyer’s reference to such facts is in effect unworn testimony and hearsay. Opposing counsel is placed at a great disadvantage for he cannot challenge the foundation, he cannot cross-examine, and he is faced with a “phantom” not subject to the limitations which a sworn witness carries. For example, if a prosecutor were to state in closing argument that a weapon which he has not placed in evidence was used by the defendant and was “a long, sharp and dangerous knife,” he would be severely disciplined by a trial court. Were he to do this on appeal, he would be subject to the same criticism, but in some respects the offense is more grave. To make a statement of a significant non-record fact on appeal would obviously be a distortion of the appellate process, and yet its introduction into the case can be disturbing. No experienced lawyer would present a non-record fact to an appellate court except in a formal motion by way of explanation of why he should be granted leave to return the case to trial court jurisdiction for purposes of presenting a motion for a new trial based on newly discovered evidence which he is then prepared to tender.

8.5 Post-conviction remedies.

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result he should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post-conviction proceeding unless he has agreed to do so. In other respects the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

Commentary

a. Advising the defendant

The situation of appellate counsel after an appeal has resulted in the affirmance of a conviction is fundamentally the same as that of trial
counsel after a judgment of conviction. His first task is to evaluate the prospects of further relief open to his client. One avenue of such relief may be further appellate review, if any is available, assuming the first appeal was in an intermediate appellate court. In many cases, however, the only course may be resort to a post-conviction remedy. Of course, if there are contentions to be made arising out of facts not developed at the trial, a proceeding in which those facts can be alleged and proved will be the only appropriate method of relief.

In advising the defendant concerning the use of post-conviction remedies, counsel must be careful to point out that even if the claim is successful the ultimate result may not be beneficial to the defendant.

For example, an applicant close to parole eligibility may be unwise to seek judicial relief in a post-conviction proceeding if the tendency of such litigation jeopardizes parole consideration. . . . Many applicants are under apprehension that, if successful, they will get immediate freedom without chance of reprobation.

ABA STANDARDS, POST-CONVICTIO N REMEDIES § 4.4, Commentary at 67 (Approved Draft, 1968).

b. Assistance in obtaining counsel

The nature of the lawyer’s obligation to take steps to secure post-conviction relief for a client he has represented at an earlier stage of the proceedings and his function in assisting the client in obtaining counsel if requested to do so are governed by the considerations set forth in the Commentary to section 8.2, supra.

c. Conduct of lawyers in post-conviction proceedings

Since a post-conviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation, preparation and trial, the standards governing lawyers in these tasks are essentially the same as those outlined in these standards for the defense of a criminal case.

The recommendations in this standard should not be read as sug-
willingness of his brother lawyers to expose his inadequacy. Lawyers must be especially careful to avoid permitting their personal regard for a fellow lawyer to blind them to his failure to provide the effective assistance to which every defendant is entitled as a matter of constitutional right. Of course, a lawyer owes it to the lawyer attacked, as he would to the person who is the object of any legal attack, not to proceed in a matter which is not grounded in fact and law and is merely vindictive and intended to harass the accused lawyer or the courts. See ABA Code DR 1-103; 7-102(A). See also People v. Gaither, 173 Cal. App. 2d 662, 343 P.2d 799 (1959), cert. denied, 362 U.S. 991 (1960), which one author has characterized as "an extreme example of an unwanted attack on trial counsel" by successor counsel. Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U. L. Rev. 289, 292 n.15 (1964). The basic determinant of whether an attack on counsel’s representation is warranted is to be found in this set of standards and the established body of law on the subject of adequacy of trial representation. See generally Waltz, supra; Note, 20 Sw. L.J. 136 (1966); Note, 4 U.C.L.A.L. Rev. 400 (1957).

b. Action when prior representation was effective

The logical and fair corollary to the standard of subsection(a) is that if succeeding counsel, after full investigation, concludes that the claim of ineffective legal assistance is groundless he must candidly say so to the client and decline to proceed further. Any other course would be unprofessional harassment of counsel and an imposition on the court. Moreover, unjustified proceedings against former counsel would demean lawyers to the alter ego or "mouthpiece" role firmly rejected earlier in this report.

c. Waiver of attorney-client privilege

"A lawyer may reveal . . . [c]onfidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct." ABA Code DR 4-101(D). It has often been held that a lawyer is justified in testifying in a proceeding in which his pro-

fessional conduct has been called into question and is not precluded from testifying to matters that would otherwise be protected by the attorney-client privilege. See State v. Bastedo, 253 Iowa 103, 111 N.W. 2d 255 (1961); 8 Wigmore, Evidence § 2327, at 638 (McNaughton rev. 1961). This intrusion on the confidentiality of lawyer-client communications is necessary to prevent an injustice to the attorney; moreover, by raising the issue, the client draws the true facts into controversy and waives the privilege. "However, the line should be strictly drawn in determining the materiality and relevancy of what the lawyer may properly disclose, since the fear of his disclosure of confidential information as to his client might easily be used to stifle" the proceedings in which his conduct is drawn in question. ABA Opinions No. 19 (1930).
Defense Appendix: Professional Standards, Ethics and Discipline of Advocates in England

A REPORT SUBMITTED TO
THE AMERICAN BAR ASSOCIATION PROJECT ON
STANDARDS FOR CRIMINAL JUSTICE

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In England the legal profession is divided into barristers and solicitors. Each branch is separately organised and controlled, and, in the broadest terms, has different functions to perform in relation to legal business. In certain respects, and particularly in regard to advocacy in the courts, there is a certain overlapping of function. Barristers are members of the Bar and are referred to as counsel. They are primarily specialist advocates and enjoy exclusive rights of audience in the superior courts where trial is before judges and juries. Solicitors undertake advocacy in the civil county courts and in the magistrates courts which are the lower criminal courts with limited powers of sentencing. Quantitatively, solicitors have the greater share of advocacy in the lower courts where they enjoy equal rights of audience with barristers. There are more than a thousand magistrates courts and nearly four hundred county courts located throughout England and Wales. The magistrates courts dispose of some 97 per cent of all criminal prosecutions brought forward annually, and a large proportion of these in which the accused is legally represented is handled by solicitors and not by barristers. There are 23,000 solicitors working in offices in towns and cities of every size spread all over the country. The comparatively small corps of 2,379 barristers have their chambers in London and the big cities, but the services of a barrister are available in any court.

Thus the maintenance of high standards of conduct and professional ethics, and the existence of effective disciplinary procedures, is equally necessary in the public interest in the case of both barristers and solicitors. Although the methods employed are different for the two branches of the profession the objectives are naturally the same and may be summed up in the words of the General Introduction to these Reports “the achievement of professionalism with honor”.

There are features of the organisation of the judiciary and legal profession in England which help to ensure high standards. Outstandingly, the corporateness of the English Bench and Bar leads to uniformity of outlook and the maintenance of standards without recourse to sanctions. Every barrister must be a member of one of the four Inns of Court—Lincoln’s Inn, the Inner and Middle Temples and Gray’s Inn. The Inns are unincorporated voluntary societies, independent of the State, and subject only to government by the Benchers of the Inn and the visitatorial jurisdiction of the Judges. The Benchers, consisting of eighty to a hundred of the senior members of the Inn, form the governing body of the Inn; the President is elected annually and is known as the Treasurer.

To become a barrister it is first of all necessary to join an Inn as a student, to “keep terms” by dining in the Hall of the Inn, to pass exams and finally to be called to the Bar by the Benchers. Unless disbarred, either at his own request or for some grave delinquency, a barrister remains a member of his Inn for the rest of his life, whether or not he becomes a Judge or continues in practice at the Bar. His Inn is his professional home and its traditions will have a powerful effect on his professional development and outlook. Then, all Judges of the superior courts, and nearly all permanent Judges of the inferior courts, are selected from the ranks of barristers who have themselves had long experience as trial lawyers. Judges and barristers have therefore had the same training in professional standards and ethics, and are equally sensitive to the importance of maintaining the integrity of professional conduct in the administration of justice. Solicitors, whether practising as advocates or not, are no less imbued with these principles, and look to the professional Judges as well as to their own organisations to maintain them.

The organisations and procedures responsible for maintaining standards of conduct for the two branches of the profession are quite distinct and it will be convenient to consider them separately. In each case there are both formal and informal procedures. In each case it may be said that the most important, indeed the essential, components are the advisory services provided by the professional organisations. These are instantly and readily available to any barrister or solicitor in need of ethical guidance on day to day problems.

I. BARRISTERS.

In the case of barristers the maintenance of standards of professional conduct and ethics, and the exercise of discipline, are in the hands of the
Inns of Court, the Senate, the General Council of the Bar, and the Circuit or Bar Messes (which are organisations of barristers practising at certain courts). In general the functions of the Inns of Court and the Senate are disciplinary, while those of the Bar Council and the Bar Messes are consultative and advisory.

A. The Advisory Services.

The General Council of the Bar: The General Council of the Bar is the principal organisation regulating the professional conduct and etiquette of the English Bar. It is constituted and governed by regulations approved by the Bar in general meeting. They provide that the Council shall be the accredited representative of the Bar and that “it’s duty shall be to deal with all matters affecting the profession and to take full action thereon as may be deemed expedient”. Matters affecting the profession as a whole include the maintenance of the honour and independence of the Bar; the defence of the Bar in its relations with the executive and the judiciary; the encouragement of legal education and the study of jurisprudence; the improvement of the administration of justice; the operation of the legal aid system; the promotion and support of law reform; questions of professional conduct, discipline and etiquette; the furtherance of good relations and co-operation between the two branches of the profession; the furtherance of good relations between the Bar and lawyers of other countries; the furtherance of good relations and understanding between the Bar and the public; and the protection of the public right of access to the courts and of representation by counsel before courts and tribunals. The courts have recognised that the duty of the Bar Council is to “answer questions and lay down rules regulating the etiquette and practice of the profession, but that the Bar Council has no direct disciplinary power. It's rules are only matters of etiquette and not of law, and are not binding outside the profession”. Formal recognition of the Bar Council has been accorded in numerous Acts of Parliament.

The Bar Council consists of four official members, the Attorney General and the Solicitor General for the time being and the Chairman and Vice-Chairman of the Council; 48 elected members; 17 additional members nominated by the Council (if it so decides); and certain honorary members. The elected members consist of 12 Queen’s Counsel and 24 members of the junior Bar, six of whom must be of less than ten years standing at the Bar. There is a Secretariat consisting of a secretary and an assistant secretary and a small staff. The Council’s offices are in the Temple. The operations of the Council are financed by voluntary subscriptions from the Bar and by contributions from each of the Inns of Court.

The important advisory functions of the Bar Council are performed mainly through its Professional Conduct Committee and its Secretary. Since its formation in 1895 the Bar Council has given a large number of rulings on matters of professional conduct and etiquette, many but not all of which have been published in Annual Statements, issued by the Council each year. These Statements together represent the rules governing professional conduct and etiquette of the Bar. They are very comprehensive and cover such matters as the general duty of a barrister to his client; the defence of prisoners (for example, how a barrister should behave when there has been a confession of guilt); the duties of counsel for the prosecution; the relations between barristers and solicitors both in contentious and non-contentious business; the conduct of barristers before courts and tribunals, including such matters as the wearing of robes. Then there are the rules relating to general and special retainers, as to counsel’s fees (including the controversial relationship between the fees payable to a Queen’s Counsel and the junior appearing with him), rules relating to advertising, touting and publicity, to the engagement by members of the Bar in supplementary activities and occupations, and regulations governing chambers and pupillage. The most important rulings will be found in “Conduct and Etiquette at the Bar” by W. W. Boulton, the secretary of the Bar Council (Fourth Edition, Butterworths, London, 1965).

The interpretation and application of these rulings in current circumstances may be difficult, and a great deal of advice, particularly in urgent cases, is given to barristers by the very experienced Secretary, whose wide knowledge is an invaluable source of help to the Bar. Advice is instantly available by telephone, by letter or by personal interview. In cases of doubt or difficulty, particularly where the problem is novel, the matter will be referred to the Professional Conduct Committee which will give a ruling, and submit the matter at a later date for confirmation by the Council.

It is difficult to exaggerate the importance of these advisory services to the Bar. It is not easy for a barrister to be readily aware of every ruling which expressly or impliedly governs a particular course of conduct. Novel circumstances are constantly arising, but a barrister who takes the precaution of consulting the Bar Council before he acts is not likely to suffer the consequences of wrong action.

Circuit and Bar Messes: The advisory services of the Professional Conduct Committee of the Bar Council and of the Secretary are available to every member of the Bar. The majority of barristers practise wholly or mainly in London, but about a quarter of the total number practise in the largest cities and towns outside London. These barristers, and many barristers based on London, appear at the local Courts of Assize and Quarter Ses-
sions located throughout England and Wales. The Bar practising at these Courts are organised on seven circuits, the Northern, the North Eastern, Midland, South Eastern, Oxford, Western, and Wales and Chester. Each circuit has its own Bar, composed of those barristers who have joined the Circuit and have been elected members of the Circuit Mess, which is an organisation of barristers practising on the Circuit. Originally formed for the social purpose of dining, the Circuit Mess supervises the professional conduct of its members and lays down rules by which its members are bound with reference to professional etiquette on Circuit. Similarly some courts of Quarter Sessions where barristers appear regularly have their own organisations known as Sessions Messes. In general, although each Circuit and Sessions has its own special rules, the regulations affecting conduct and discipline do not vary significantly from one Circuit or Sessions to another or from the general standards laid down by the Bar Council. On the other hand the Circuit and Sessions Messes have an important function to perform in relation to maintaining local standards in the cities and towns outside London.

Informal Advisory Services: In addition to the organised advisory services mentioned above, the corporateness of the English judiciary and legal profession, and the relatively close communities in which they operate, afford ample opportunities to barristers who want to seek informal advice on matters of professional standards, etiquette and ethics. Barristers conduct their business in chambers, sets of rooms occupied by three to twenty barristers, each independent of the other (for any form of partnership is forbidden at the Bar), but served by a common team of clerks. The reputation of a set of chambers is a matter of high importance to every member of it, and the senior member, the head of chambers, will make it his business to give advice to any other member who needs it. Similarly any barrister who is a member of a circuit or a sessions mess is entitled to consult the leader or president, usually the senior barrister practising on the circuit or at sessions. Advice of this kind is frequently sought and readily given. Sometimes a barrister may approach the Attorney General who traditionally is the leader of the Bar and who has special responsibility in regard to the prosecuting functions of the Bar. Many barristers avail themselves of the advice of their senior clerks who, although not professionally qualified, are among the most experienced and wisest of counsellors. In general the fraternity of the Bar is such that advice and help is never lacking to those in need.

B. Discipline.

The maintenance of standards of conduct promulgated by the General Council of the Bar is secured in the last resort by effective disciplinary sanctions. As stated above, the functions of the Council and the Bar Messes are consultative and advisory, while discipline is in the hands of Inns of Court and the Senate, a recently created body which acts on behalf of the four Inns in matters of common interest and upon which a common policy is essential. Such matters include disciplinary powers over barristers.

The Senate consists of 38 members including the Treasurers of the Inns, the Attorney General, the Solicitor General, the Chairman of the Bar Council and the Chairman of the Council of Legal Education ex-officio; six representatives of the Benchers of each Inn, of whom are must be practising barristers; and six representatives of the Bar Council.

Complaints alleging misconduct by barristers may be made to the Senate by the Treasurers of the Inns, by the Bar Council, by the Law Society or by members of the public, and are considered by a standing committee of the Senate known as “The Complaints Committee”. “Misconduct” is defined as both misconduct in a professional capacity and conduct unbefitting a member of the Bar. It is specifically provided that information that a barrister has been convicted of “a serious criminal offence” shall be treated as a complaint of misconduct.

If after investigation of the complaint the Complaints Committee decide that it should form the subject of a specific charge or charges of misconduct, the matter is considered by a Disciplinary Committee which consists of not less than five members of the senate, four of whom must be practising barristers. The hearings are in private unless the barrister charged requests, and the chairman agrees, to a public hearing.

A barrister found guilty of misconduct by a Disciplinary Committee may be disbarred, suspended (either unconditionally or subject to conditions), ordered to forgo or to repay professional fees, or be reprimanded. The findings of the Committee and the statement of facts upon which they are based are sent to the Treasurer of the barrister’s Inn. If the sentence is disbarment or suspension the Treasurer is required to publish the charges, the findings and the sentence. If the lesser penalties are to be exacted, or if the Committee has decided that the charge is proved but that no action should be taken against the barrister, publication is at the discretion of the President of the Senate, but the barrister may insist on publication. Publication involves notices being put up in the Hall, in the Bench’s Rooms and in the Under-Treasurer’s Office of the barrister’s Inn, a process known as “screening”. Notice is also given to the Lord Chancellor, the Treasurers of the other Inns, the Chairman of the Bar Council, the press and to the barrister himself.

A barrister aggrieved by a decision of the Senate may appeal to the judges acting as Visitors of the Inns of Court. The Lord Chancellor appoints five
or more judges to hear the appeal: none of them must be members of the same Inn as the barrister charged. Procedure is by way of re-hearing and is usually in private. Full legal representation is allowed to the appellant.

II. SOLICITORS.

A. The Advisory Services.

_The Law Society:_ The Law Society, which dates from 1831, is the established body recognised as concerned with the welfare and good name of the solicitors branch of the legal profession. It acts in relation to solicitors in most, but not in all, respects as the Inns of Court and the Bar Council act in relation to barristers. The courts exercise a greater control over solicitors than they do over barristers, but over the years Parliament has granted increasing authority over solicitors to the Law Society, whose powers are largely derived from statute. For example, although membership of the Law Society is still voluntary, no solicitor is entitled to practice as such unless he has in force a practising certificate issued by the Law Society. The governing body of the Law Society is the Council, consisting of not more than seventy or less than twenty solicitors who hold office for five years and are eligible for re-election.

The Law Society has power under Act of Parliament to make rules governing the admission of solicitors, the issue of practising certificates, the keeping and certification of proper accounts for client’s monies, and for regulating by Solicitors Practice Rules certain major aspects of conduct, for example, prohibiting unfair attraction of business, undercutting of fees, and sharing of profits with non-lawyers.

Like the Bar Council in the case of barristers, one of the most important functions of the Law Society is to give advice and guidance to solicitors on professional conduct and etiquette. This is the function of the Society’s Professional Purposes Committee, which has a considerable staff including six professionally qualified solicitors, the senior of whom has held office for twenty years. The Solicitors Practice Rules are in wide terms, and their application to current circumstances requires constant attention by the Committee and their staff. It is said that the staff deal with upwards of one hundred inquiries a day from solicitors all over the country. The Professional Purposes Committee of the Law Society do not publish their rulings systematically in annual statements, but suitable publicity is given to the more important items in professional publications issued monthly or weekly. The main principles are conveniently described in Sir Thomas Lund’s book “The Professional Conduct and Etiquette of Solicitors” (1960). Not surprisingly the rules governing the professional conduct and ethics of solicitors

in relation to advocacy and the conduct of court proceedings will be found to be similar to those governing barristers.

As in the case of the Bar, the organisation of the solicitor’s profession in England affords ample opportunity for individual solicitors to obtain advice on ethical problems. Solicitors practise either in partnership or in single man firms. They are also employed (whole or part-time) as magistrates’ clerks, coroners, clerks to General Commissioners of Taxes, Town Clerks, Clerks to Counties, Clerks of Urban and Rural District Councils, and in whole-time employment as legal advisers to companies in commerce or industry. Solicitors in local government service have their own Local Government Societies, but maintain contact with The Law Society through a Joint Consultative Committee. Solicitors in commerce and industry may join the Society’s Commerce and Industry Group, and there is also a Salaried Solicitors’ Committee of The Law Society at which matters of common interest to salaried solicitors may be discussed with the Council of the Law Society.

For a solicitor practising in partnership the senior partner’s advice is always available, and it would be unusual to find any solicitor who could not get another member of his profession to help him with guidance on a matter of professional conduct, whether he practises in partnership or on his own account. Apart from the nation-wide Law Society there are a great many Local Law Societies in counties and cities covering the whole country. These local societies provide a corporateness and sense of fraternity to their solicitor members and consequently a source of advice in case of need. Nor would a solicitor hesitate to consult informally a local judge or a barrister with whom he was acquainted. As a result it is considered that solicitors have adequate means of obtaining advice informally on any matter of professional conduct and ethics. These informal means are an important supplement to the more formal machinery provided by or through the Law Society itself.

B. Discipline.

Disciplinary powers over solicitors are exercised by a Disciplinary Committee set up by statute. Although this Committee consists of certain members or former members of the Council who are practising solicitors, it is not a committee of the Law Society and is independent of it.

The grounds for bringing a solicitor before the Disciplinary Committee may be statutory or non-statutory. Statutory grounds include such matters as failure to comply with the Law Society’s rules as to professional conduct or practice; failure to comply with the Solicitors Accounts Rules, or to observe regulations as to the employment of articled clerks and certain other persons in solicitor’s offices. Non-statutory grounds cover “conduct
unbefitting a solicitor", for example, criminal convictions or conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency. Criminal convictions are those of a serious nature, such as shooting with intent to murder, manslaughter, indecency, words and behaviour conducing to a breach of the peace, perjury, forgery, bribery, or assisting a criminal to escape. "Unbefitting conduct" has been held to include breaches of trust, mis-appropriating clients' money or mis-using clients' money for the solicitor's own benefit or that of other clients. In relation to the Law Society itself or to the responsibilities of solicitors to the legal aid scheme such conduct can include failure to submit an annual accountant's report, to reply to letters, or to render reports on cases.

The Disciplinary Committee has power to strike a solicitor off the roll (which deprives him of his professional status), to suspend him from practice, to fine him to an amount not exceeding £750 (the fine being payable to the Crown), or to reprimand him. Hearings are by at least three members of the Committee sitting in private. The solicitor charged may appear by himself or by solicitor or counsel. The findings and order of the Committee are pronounced in public, they are filed with the Law Society and published in the London Gazette which is an official publication. An appeal from an order of the Disciplinary Committee lies to a Divisional Court consisting of three judges of the Queen's Bench Division of the High Court of Justice. There is a further appeal to the Court of Appeal, but only with the leave of that court.

It is usual for an application to the Disciplinary Committee to be made by the Law Society since in the normal way complaints against the conduct of solicitors are made to the Society and investigated by them at the expense of the profession without cost to the complainant. The Law Society has statutory powers enabling it to investigate the accounts of solicitors and to require an explanation of a solicitor's conduct. Failure to supply a sufficient and satisfactory explanation entitles the Society to refuse to issue a practising certificate to the solicitor concerned, and in certain circumstances to take over a client's case which has been the subject of a complaint of delay and hand it to another solicitor nominated by the Society. A complainant may, if he chooses, make his complaint to the Disciplinary Committee direct, but if his application is unsuccessful he may be personally involved in expense. In practice the vast majority of such applications are made by the Society.

The Function of the Courts.

In England the judges have an important role in helping to maintain high standards of professional ethics and conduct for the courts have an inherent jurisdiction to control those who practice professionally in them. The control of the court over solicitors is more direct, as solicitors are officers of the court but barristers are not. Thus the courts have no power to dis-bar a barrister, but they may strike a solicitor off the roll or may suspend him from practice or fine him. Further the courts have power, which they occasionally exercise, to demonstrate their displeasure with the conduct of a case by a solicitor by ordering him to pay the expenses of the proceedings out of his own pocket.

The courts can commit barristers and solicitors for contempt, that is to say for scandalous behaviour such as the use of grossly insulting language to the judge or jury, or a contemptuous interference with the administration of justice. But the usual procedure in cases where the court considers that a barrister's or solicitor's conduct has fallen short of recognised professional standards is for the judge to refer the matter to the appropriate professional organisation, the General Council of the Bar in the case of barristers, and the Law Society in the case of solicitors. Most judges are circumspect in the manner in which they indicate that they propose to take this course. Public censure of a barrister or solicitor in the course of proceedings is fairly certain to be reported in the national press and can do lasting damage to the individual concerned, even when on investigation the degree of blame attributed by the court is found subsequently not to be supported by the facts. It is not unusual for the judge to send for the barrister or solicitor concerned after the conclusion of the case and to ask for an explanation of his conduct. The interview may end with a warning for improved behaviour in the future.

Apart from serious cases of misbehaviour the judges exercise control over the conduct of advocates during the trial. Indications will be given that a particular course of examination of witnesses ought not to be pursued or that a series of interventions are not assisting the court. Not all such indications are acceptable by those to whom they are directed, and an advocate's duty is to act with courage and firmness on behalf of his client, and with respect and dignity to and before the court. Nevertheless the obligation on the judiciary to act with the bar and with solicitor advocates in maintaining high standards, is an accepted feature of English court procedures.
General Appendix A: Table of Parallel Sections in Prosecution and Defense Reports and Providing Defense Services Report

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General Appendix B: Selected Bibliography

Books, Reports and Bar Publications
(For reports in this Project, see inside back cover).
ABA Code of Professional Responsibility (Final Draft, 1969)
ABA Canons of Professional Ethics (1968)
Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases (1967)
Boulton, Conduct and Etiquette at the Bar (1967)
ABA Committee on Professional Ethics, Opinions (1967)
ABA Committee on Professional Ethics, Informal Opinions (1966)
Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966)
Skolnick, Justice Without Trial (1966)
American College of Trial Lawyers, Code of Trial Conduct (1963)
M. Schwartz, Cases and Materials on Professional Responsibility and the Administration of Criminal Justice (1962)
Opinions of the Committees on Professional Ethics of the Ass'n of the Bar of the City of New York and the New York County Lawyers' Association (1956)
Drinker, Legal Ethics (1953)
Wickersham Commission, Report on Prosecution (1931)
Moley, Politics and Criminal Prosecution (1929)

Articles
Carney, Fuller, A Study of Plea Bargaining in Murder Cases in Massachusetts, 3 Suffolk Law Review 292 (1969)
Lindsay, New Directions for the Administration of Criminal Justice, 52 Judicature 228 (1969)
Achsel, The Prosecutor's Role in Plea Bargaining, 36 Univ. of Chicago Law Review 50 (1968)
Banfield & Anderson, Continuances in the Cook County Criminal Courts, 35 Univ. of Chicago Law Review 259 (1968)
Folberg, The "Bargained for" Guilty Plea—An Evaluation, 4 Criminal Law Bulletin 201 (1968)
Hare, Voir Dire and Jury Selection, 29 Alabama Law 160 (1968)
Morris, Lawyers Role in the War on Crime, 43 L.A.B. Bull. 205 (1968)
Title, Voir Dire Examination of Jurors in Criminal Cases, 43 California State Bar Journal 70 (1968)
Wright, Courtroom Decorum and the Trial Process, 51 Judicature 378 (1968)
Blumberg, The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession, 1 Law and Soc'y Review 15 (1967)
Prosecution and Defense Functions

Kaplan, Prosecutorial Discretion—A Comment, 60 Northwestern Univ. Law Review 174 (1965)
Ori, The Politicized Nature of the County Prosecutor's Office, Fact or Fancy?—The Case in Indiana, 40 Notre Dame Law 289 (1965)
Remington, The Law, the Law School, and Criminal Justice Administration, 43 Texas Law Review 275 (1965)


Carter, Suppression of Evidence Favorable to an Accused, 34 F.R.D. 87 (1964)

Doherty, Selection of a Jury in a Criminal Case (A Check List), 2 Ill. Cont. Legal Ed. 103 (1964)


Pollitt, Counsel for Unpopular Cause: The "Hazard of Being Undone", 43 North Carolina Law Review 9 (1964)

Slovenko, Attitudes on Legal Representation of Accused Persons, 2 American Criminal Law Quarterly 101 (1964)

Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Northwestern Univ. Law Review 289 (1964)


Polstein, How to "Settle" a Criminal Case, 8 Pract. Law 35 (1962)
Prosecution and Defense Functions

Rostow, The Lawyer and his Clients, 48 A.B.A. Journal 25 (1962)
Cates, Can We Ignore the Laws? Discretion Not to Prosecute, 14 Alabama Law Review 1 (1961)
Remington & Joseph, Charging, Conviction and Sentencing the Multiple Criminal Offender, Wisconsin Law Rev. 528 (1961)
Thode, The Ethics of the Advocate, 39 Texas Law Rev. 575 (1961)
Breiter, Controls in Criminal Law Enforcement, 27 Univ. of Chicago Law Review 427 (1960)
Shawcross, The Function and Responsibilities of an Advocate, 13 Record of New York County Bar Association 483 (1958)
Levy, Some Comments on the Trial of a Criminal Case, 10 Record of New York County Bar Association 203 (1955)
Schwartz, Federal Criminal Jurisdiction and Prosecutor’s Discretion, 13 Law and Contemp. Prob. 64 (1948)
Miller, The Compromise of Criminal Cases, 1 Southern California Law Review 1 (1927)

Notes and Comments

Actions Against Prosecutors who Suppress or Falsify Evidence, 47 Texas Law Review 642 (1969)
After the Verdict: May Counsel Interrogate Jurors? 17 Catholic University Law Review 465 (1968)
The Ethical Duty of the Lawyer to the Unpopular Client, 19 Ala. Law Review 428 (1967)
Duty of the Prosecutor to Call Witnesses whose Testimony will Help the

Accused to Establish his Innocence, Wash. Univ. Law. Quarterly 68 (1966)
The Attorney and His Client’s Privileges, 74 Yale L.J. 539 (1965)
Discovery and Disclosure: Dual Aspects of the Prosecutor’s Role in Criminal Procedure, 34 George Washington Law Review 92 (1965)
Effective Assistance of Counsel for the Indigent Defendant, 78 Harvard Law Review 1434 (1965)
The Plea of Nolo Contendere, 25 Maryland Law Review 227 (1965)
Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts, 40 New York University Law Review 759 (1965)
Effective Representation—An Evasive Substantive Notion Masquerading as Procedure, 39 Washington Law Review 819 (1964)
Guilty Plea Bargaining: Compromise by Prosecutors to Secure Guilty Pleas, 112 Univ. of Pennsylvania Law Review 865 (1964)
Official Inducements to Plead Guilty: Suggested Morals for A Marketplace, 32 Univ. of Chicago Law Review 167 (1964)
Project Publications

FAIR TRIAL AND FREE PRESS (Consists of Tentative Draft of December 1966 and Supplement of March 1968)

POST-CONVICTION REMEDIES (Consists of Tentative Draft of January 1967)

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AND

THE DEFENSE FUNCTION

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THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS*

THE URBAN POLICE FUNCTION

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Approved Draft, 1968

Approved Draft, 1968

Approved Draft, 1968

Approved Draft, 1968

Approved Draft, 1968

Approved Draft, 1968

Approved Draft, 1970

Approved Draft, 1970

Approved Draft, 1970

Approved Draft, 1970

Approved Draft, 1970

Approved Draft, 1971

Approved Draft, 1971

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*This report is integrated into the forthcoming report on The Function of the Trial Judge and is no longer available as a separate publication.