Chapter 4

The Defense Function

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# Chapter 4

## The Defense Function

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INTRODUCTION

The first edition of the standards concerning the function of the criminal defense lawyer (and the companion standards on the function of the prosecutor) represented the first national effort to collect in an organized way guidelines that have long been adhered to by the best
defense advocates and best prosecutors. Because nearly ten years had elapsed since the first edition of the Defense Function standards was approved by the ABA, it was initially believed that it might be necessary to make major changes. However, as each standard was reviewed, debated, and compared with court decisions and recommendations of other groups, it was decided that most of the original black letter standards have stood the test of time. There are, of course, changes from the first edition, but they are for the most part relatively minor and blend well into the format of the standards as originally issued.

Like the first edition, this chapter contains standards pertaining to a wide variety of defense representation problems. Parts III–VIII govern the lawyer-client relationship, the investigation and preparation of cases, the control and direction of litigation, disposition without trial, trial, and duties of counsel after conviction. Part I contains general standards that do not neatly fit into any other subdivision, and part II concerns problems of access to counsel, which are dealt with more fully in the chapter on Providing Defense Services.

The black letter standards themselves also follow the format of the original edition of the Defense Function standards. Thus, the standards often refer to activity by a lawyer as “unprofessional conduct,” meaning that the conduct “is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility.” Where the term “unprofessional conduct” is not used, “the standard is intended as a guide to honorable professional conduct and performance.” See standard 4-1.1(f).

To a considerable degree, the changes that have been made in these standards are attributable to: (1) changes in concepts of what constitute the most acceptable defense practices, (2) significant legal developments, or, in several instances, (3) errors in phraseology contained in the first edition.

Standard 4-7.6(b) is an example of the first type of change. Contrary to the first edition, this standard now provides that defense counsel can vigorously cross-examine witnesses even when it is known or believed that they are testifying truthfully. Absent this permission, particularly in cases where the defendant does not plan to testify and has little or no defense, it was felt that defense lawyers would be unable, as a practical matter, to require the prosecution to prove its case beyond a reasonable doubt.

The second type of change is illustrated by standard 4-3.5(b), which declares that defense lawyers should ordinarily not represent codefend-
ants in criminal cases, and further states that before such representation is undertaken the informed consent of the defendants should be made a matter of judicial record. This provision is intended to discourage the representation of codefendants and was inspired by the Supreme Court’s 1978 decision in *Holloway v. Arkansas.* Although the Supreme Court in *Holloway* did not require that a judicial record be made that codefendants consent to joint representation, it did emphasize the considerable risks to codefendants when a lawyer undertakes multiple representation.

Standard 4-7.6(d) is an example of the third type of change—an error in phraseology in the first edition. The original standard stated that a defense lawyer should not ask on cross-examination “a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence.” But the presence of evidence to support a factual predicate on cross-examination is not the generally accepted evidentiary test; the test is whether the examiner has a “good faith” belief in the existence of the factual predicate, and the black letter standard has been changed accordingly.

**PART I. GENERAL STANDARDS**

**Standard 4-1.1. Role of defense counsel**

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

(b) The basic duty 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 or her 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. The defense lawyer has no duty to execute any directive of the accused which does not comport with law or such standards. The defense lawyer is the professional representative of the accused, not the accused's 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 chapter. The functions and duties of defense counsel are governed by such standards whether defense counsel is assigned or privately retained.

(f) As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of alleged misconduct of counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Code of Professional Responsibility DR1-102(A)(4), DR7-102(A)(5), EC9-6

ABA, Standards for Criminal Justice 3-1.1, 3-2.8
NDAA, National Prosecution Standards 25.1(A)
NLADA, National Study Commission Recommendations 5.10

**Commentary**

**Role of Defense Counsel**

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

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

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential honorable step in the defense, without regard to compensation or the nature of the appointment. The lawyer privately retained is free to require assurance of payment of reasonable compensation; if the lawyer has been appointed to provide representation, compensation is governed by other criteria.

Because the law is a learned profession, lawyers must take pains to

1. Guidelines for the assignment of attorneys for persons unable to afford counsel are contained in ch. 5, Providing Defense Services.
2. See ABA, Code of Professional Responsibility DR1-102(A).
4. See standards 5-1.3 and 5-2.4.
guarantee that their training is adequate and their knowledge up-to-date in order to fulfill their duty as advocates. Even after the most comprehensive training in fundamentals there remains the final—and large—step of learning the art of advocacy.

The Limits of Professional Conduct

The “alter ego” concept of a defense lawyer, which regards the lawyer as a “mouthpiece” for the 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.\(^5\) The lawyer’s value to each client stems in large part from the lawyer’s independent stance, as a professional representative rather than as an ordinary agent. What the lawyer can accomplish for any one client depends heavily on his or her reputation for professional integrity. Court and opposing counsel will treat the lawyer with the respect that facilitates furthering the client’s interests only if the lawyer maintains proper professional detachment and conduct in accord with accepted professional standards.

It is fundamental that in relations with the court, defense counsel must be scrupulously candid and truthful in representations of any matter before the court.\(^6\) This is not only a basic ethical requirement, but it is essential if the lawyer is to be effective in the role of advocate, for if the lawyer’s reputation for veracity is suspect, he or she will lack the confidence of the court when it is needed most to serve the client.

Familiarity with Professional Standards

Knowledge of the proper professional standards of conduct is obviously a prerequisite to their fulfillment. In recent years, both the law schools and the organized bar have taken steps to ensure that lawyers are cognizant of the standards governing their conduct. While no lawyer can perform adequately in ignorance of the applicable law, knowledge

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5. “Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim . . . that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause.” ABA, CANONS OF PROFESSIONAL ETHICS 15 (1968). “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .” ABA, CODE OF PROFESSIONAL RESPONSIBILITY EC7-1.

6. See ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR1-102, DR7-102(A)(5).
of the standards of conduct of the bar should receive the same priority as that accorded legal principles. There should be ongoing attention to ethical problems in law school curriculums and in continuing legal education programs. Likewise, the bar should undertake to see that every lawyer has access to the published standards of conduct and the decisions interpreting them.

Nature of Defense Counsel’s Employment

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

Relationship of Standards to Discipline and Judicial Decisions

The tensions of the role and the intensity of the pressure of multiple decisions during trial make it highly desirable that defense counsel be thoroughly familiar with these standards and imperative that counsel be knowledgeable of provisions of codes of professional responsibility governing the lawyer’s conduct. Counsel’s place in our adversary pro-

7. For a discussion of whether a poor defendant should be permitted to select a defender or an assigned lawyer, see commentary to standard 5-2.3.
cess of justice requires that counsel be guided constantly by the obligation to pursue the client’s interests. Counsel must not be asked to limit zeal in the pursuit of those interests except by definitive standards of professional conduct.

The ABA Code of Professional Responsibility subscribes to the principle that disciplinary rules backed up by sanctions should be stated with specificity. Thus, the ABA 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. These standards and the Prosecution Function standards adhere to a somewhat similar pattern. The term “unprofessional conduct” in the black letter standards has been chosen to denote “conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility.”

This category is reserved for those matters that are of the greatest gravity and that 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. Where these standards use phrases such as “the lawyer should,” the recommendation is offered as advice to those who seek it and as a guide to the conduct of lawyers, but it is not intended that discipline be imposed on 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 such decisions cast light on standards that courts have concluded are applicable to the conduct of counsel. It is beyond the scope of these standards, however, to attempt to determine the conditions under which deviation from the recommendations herein warrants reversal or vacation of a conviction.

Standard 4-1.2. Delays; punctuality

(a) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attend-

ance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

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

(c) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

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

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), (5)
ABA, Standards for Criminal Justice 3-2.9, 3-5.2(e), 12-1.3
NDAA, National Prosecution Standards 15.4(C)
NLADA, National Study Commission Recommendations 5.3

Commentary

Prompt Disposition; Punctuality

Lack of punctuality in attendance at 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 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 appearances may sometimes be grounds for punishment for contempt. Punctuality in the filing of briefs and motions is also important. As a corollary to counsel's obligation to be punctual, it is incumbent on

1. See, e.g., United States v. Lespie, 558 F.2d 624 (1st Cir. 1977); In re Allis, 531 F.2d 1391 (9th Cir. 1976).

2. See American College of Trial Lawyers, Code of Trial Conduct §21(d).
counsel to do everything possible to see to it that the client and witnesses 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.\(^3\)

**Misrepresentation to Obtain a Continuance**

Paragraph (b) recognizes that it is “unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.” This position is fully consistent with provisions in the ABA Code of Professional Responsibility\(^4\) and with court decisions.\(^5\) Equivocation in stating the grounds for a continuance also has been held to warrant disciplinary censure.\(^6\)

**Delay for Tactical Advantage**

A frequent complaint of the public against our system of justice is that excessive delays are permitted, which undermine the enforcement of law. This is perhaps as true today as when Roscoe Pound wrote about the problem around the turn of the century.\(^7\) Because it is essential that legal procedures be calm and deliberative rather than hasty and unreflective, to some extent the legal process could never be as expeditious as popular sentiment might wish it, especially when that sentiment is inflamed by an outrageous crime or during a period of crisis in law enforcement.

One of the great temptations that befall a lawyer is to abuse procedure and employ dilatory tactics in order to gain time for the advantage of a client. Delays sought in the hope that testimony will be lost or become stale or that the prosecuting parties will be inconvenienced until they abandon the case, or to continue illegal activity or for other corrupt

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3. For a standard dealing with continuances, see standard 12-1.3.
5. “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 representations, trifle with the court’s dignity and interfere with its business.” Albano v. Commonwealth, 53 N.E.2d 690, 692 (Mass. 1944).
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 the disadvantage of an accused.\textsuperscript{8} The abuse of procedure for purposes of delay ultimately leads to procedural restrictions that are harmful to those with legitimate needs. Thus, there is an obligation on the lawyer to “do everything possible to avoid delays and to expedite the trial.”\textsuperscript{9}

Since the reasons for invoking procedural devices that result in delay are buried in the mental processes of the lawyer, it is understandably difficult to enforce sanctions for the use of such devices. Indeed, an overly aggressive concern for delay may impel a lawyer to eschew a remedy which in good faith the lawyer believes should be pursued in the client’s interest. It may also tend to imply that the law is more concerned with expedition than with justice, an implication that inevitably will cause disrespect for its processes and thus undermine its 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. But instances undoubtedly do occur in which lawyers blatantly demand and courts grant delays without substantial cause, sometimes for crass motivations. Such conduct demeans the administration of justice. The responsibility must rest with counsel not to seek such favors\textsuperscript{10} and with the courts to refuse to grant them.

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Accepting an Excessive Volume of Work

Although lawyers, like other people, vary in their capacity for effective performance, there is a limit to how much work any one lawyer can effectively perform. Some sophisticated defendants have been known to engage a lawyer because the lawyer had so many cases on the calendar that normal priorities of the docket would preclude an additional case from trial for an inordinate period. Obviously it is improper for a


\textsuperscript{9} American College of Trial Lawyers, Code of Trial Conduct §21(d).

\textsuperscript{10} “In his representation of a client, a lawyer shall not . . . delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” ABA, Code of Professional Responsibility DR7-102(A)(1).
lawyer to participate in such a fraud on the courts; apart from that, the lawyer has a duty to accept no more employment than can be effectively performed without unreasonable delay. Elsewhere these standards provide that “[n]either defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.”

Standard 4-1.3. 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 standards on Fair Trial and Free Press herein. In some instances, as defined in codes of professional responsibility, the lawyer’s failure to do so will constitute unprofessional conduct.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR7-107
ABA, Standards for Criminal Justice 3-1.3(a), (b), 8-1.1
NDAA, National Prosecution Standards 26.2

Commentary

Personal Publicity

A minority of lawyers have sometimes exploited newsworthy cases for their own personal aggrandizement. Often this operates to the detriment of a particular client, and it is demeaning of the proper role of defense counsel. The opportunity for personal publicity may color the lawyer’s professional judgment and lead the lawyer to take steps that

11. Standard 5-4.3.
are not in the best interests of clients, the profession, and, most important, the administration of justice.

**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. Detailed provisions pertaining to fair trial/free press issues and the conduct of counsel in criminal cases are contained in these standards and in codes of professional responsibility. These guidelines strike a careful balance between the needs of the public for information and the necessity of preserving the fairness of the trial procedure. Moreover, they are designed to preserve and uphold the role of counsel as the advocate who defends the case by evidence and argument in the courtroom rather than by emotional and prejudicial appeal to the public outside the courtroom.

**Standard 4-1.4. 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 exists 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.

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1. Standard 8-1.1.
2. *E.g.*, ABA, Code of Professional Responsibility DR7-107(A) to (E).
History of Standard

There are stylistic changes only.

Related Standards

None

Commentary

Need for Advisory Councils

Disciplinary bodies of courts, local bars, and state bars interpret codes of professional responsibility and apply them in specific cases. These groups, however, invariably operate after the fact by way of judging questioned conduct rather than by acting as a council of advisers to lawyers who desire assistance and are in need of prompt answers. Bar advisory committees on legal ethics do deal with pending problems of lawyers, but the committees are often not constituted to act with the necessary dispatch. Moreover, these committees usually include a cross-section of the bar, so that many members are unfamiliar with the litigation or ethical problems submitted to them. In a bar in which trial lawyers are often a minority and defense lawyers an even smaller fraction, it is unlikely that many members of a disciplinary board or legal ethics committee of the bar will be thoroughly familiar with the problems confronted by defense lawyers in criminal cases.

The standards of the profession are steadfast in their fundamental principles, but their application is frequently difficult in criminal cases, requiring an intimate knowledge of practice and procedure in litigation problems available only to trial specialists. Accordingly, this standard recommends in paragraph (a) that "[i]n every jurisdiction an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar ... be established as an advisory council on problems of professional conduct in criminal cases." The purpose of the council is to "provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases." Ordinarily the state bar, state bar association, or local bar association is the appropriate entity to initiate the creation of the advisory council.\(^1\)

Confidentiality of Advisory Council Opinions

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

This standard, although included in the first edition, appears not to have been implemented in any jurisdictions. Nevertheless, the standard has been retained because it is still believed that establishment of advisory councils is a sound idea. It remains exceedingly important for the legal profession to create a more prompt and reliable mechanism for

supplying to defense counsel authoritative information for their guidance in criminal cases.

**Standard 4-1.5. Trial lawyer’s duty to administration of justice**

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by 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.

**History of Standard**

There is a stylistic change only.

**Related Standards**

ABA, Code of Professional Responsibility EC2-26 to EC2-29
ABA, Standards for Criminal Justice 5-2.2
NAC, Courts 13.5
NLADA, National Study Commission Recommendations 2.15

**Commentary**

**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 ensure the availability of qualified counsel to every accused. However, lawyers and judges are unanimous in acknowledging that not every lawyer licensed to practice is actually able to try a case in court effectively. Though only a fraction of all criminal
cases go to trial, the judgment and experience of a trial lawyer are also essential in the process of negotiation leading to a disposition without trial. But the nature of a trial lawyer’s experience in civil trial practice is such as to qualify the lawyer for participation in criminal practice if additional training and experience in criminal law and procedure is acquired. Such training is, of course, available through the large number of continuing legal education programs sponsored by state and local bars and by private organizations. “On the job” experience can be appropriately gained by assigning lawyers with little or no criminal trial experience to act as associate counsel to lawyers who are more experienced in the criminal courts.

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

The highest tradition of the American bar is found in the obligation, in the lawyer’s oath, never to reject “from any consideration personal to myself, the cause of the defenseless or oppressed.” A lawyer has the duty to provide legal assistance “even to the most unpopular defendants.”2 The great tradition of the bar is reflected in the history of eminent lawyers — such as John Adams, who defended the British “redcoats” after the Boston Massacre — who have risked public disfavor to defend a hated defendant.3 The sure way to guarantee adherence to this tradition of denying no defendant competent legal representation is for all trial

1. This standard complements provisions in ch. 5, Providing Defense Services, e.g., “Assignments should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.” Standard 5-2.2. See also the commentary to standard 5-1.2.
lawyers to prepare themselves to act in criminal cases. Consistent with these standards, the ABA Code of Professional Responsibility admonishes lawyers not to decline proffered employment "lightly." However, declining to accept a case is justified when "the intensity of . . . personal feeling, as distinguished from a community attitude, may impair . . . effective representation of a prospective client." 

Announced Unwillingness to Take Criminal Cases

Lawyers who unabashedly state that they do not practice in the criminal courts denigrate their role and function as advocates. The bar should discourage lawyers from privately or publicly proclaiming that they disdain criminal practice. In a more positive vein, the leaders of the trial bar should take the initiative in accepting criminal cases and in encouraging their juniors to do so. More than a decade ago, the President's Crime Commission suggested that "law firms should not discourage prospective associates from a 2- to 5-year stint of defense or prosecution work and should be willing to grant leaves of absence to those of its young lawyers who would like to spend a period in criminal practice and then return." The commission also believed that "it is essential that law firms make lawyers available to handle assigned cases, or to assist a defender's office." 

In encouraging broader participation by 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 the firm.

Standard 4-1.6. Client interests paramount

The duties of a lawyer to a client are to represent the client's legitimate interests, and considerations of personal and professional advantage should not influence the lawyer's advice or performance.

5. Id. EC2-30.
7. Id.
History of Standard

In the first edition, this standard stated that the duties of counsel to represent the client’s legitimate interests did not differ regardless of whether the lawyer was “privately engaged, judicially appointed or serving as part of a legal aid system.” This language has been deleted due to its overlap with standard 4-3.9. In addition, the reference to “judicially appointed” was deemed inappropriate since the chapter on Providing Defense Services recommends that “[t]he selection of lawyers for specific cases should not normally be made by the judiciary or elected officials. . . .” The standard is otherwise unchanged, except for stylistic alterations.

Related Standards

ABA, Code of Professional Responsibility DR7-101(A)
ABA, Standards for Criminal Justice 5-1.3
NLADA, National Study Commission Recommendations 5.10

Commentary

Although it occurs infrequently, lawyers sometimes, possibly for reasons of personal aggrandizement, pursue a particular course in a case at the expense of the client’s best interests. The problem is so subjective in nature that it does not lend itself to anything other than a broadly stated standard.

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

1. Standard 5-1.3.
PART II. ACCESS TO COUNSEL

Standard 4-2.1. Communication

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

History of Standard
There are no changes.

Related Standards
ABA, Standards for Criminal Justice 5-5.1, 5-7.1
NLADA, National Study Commission Recommendations 1.3, 1.4

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.1 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. Commu-

1. E.g., CAL PENAL CODE §851.5 (West Cum. Supp. 1979) ("Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least two completed telephone calls..."); Mass. ANN. LAWS ch. 276 §33A (Michie/Law. Co-op 1968) ("The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person...to engage the services of an attorney"); Minn. Stat. Ann. §481.10 (West 1971) ("All officers or persons having in their custody a person restrained of his liberty upon any charge or cause alleged...upon request...shall notify any attorney residing in the county of the request for a consultation with him"); N.H. Rev. Stat. ANN. §594:15 (1974) ("The officer in charge of a police station...shall immediately secure from the prisoner, if possible, the name of the...attorney with whom the prisoner may desire to consult, and immediately notify such...attorney...Notice shall be given by telephone or messenger when practicable").
nication should be permitted until arrangements for counsel have been
completed. Communication facilities should be made available
promptly following arrest. In terms of implementation, this may require
not one but as many telephones as are reasonably needed to fill the need.
One such telephone may be adequate in a small precinct station or jail;
numerous phones may be needed in a larger facility. It is part of the
function of defense counsel to engage the aid of the organized bar to
ensure that adequate communication facilities are made available and
that the services of an adequate number of lawyers are available.

This standard is consistent with a similar provision in the chapter on
Providing Defense Services: “At the earliest opportunity a person in
custody should be effectively placed in communication with a lawyer.
There should be provided for this purpose access to a telephone, the
telephone number of the defender or assigned-counsel program, and
any other means necessary to establish communication with a lawyer.”

Standard 4-2.2. 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 ser-
vice 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 conspicu-
ously in police stations, jails, and wherever else it is likely to give
effective notice.

History of Standard

There is a stylistic change only.

Related Standards

None

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Commentary

Referral Service

The ABA has energetically supported lawyer reference plans for many years, and hundreds of such plans are now in existence throughout the nation. Typically, a supervisory committee of the local bar selects and maintains a list of attorneys willing to participate and a referral officer is appointed to administer the system. Many plans permit lawyers to indicate those areas of law in which they feel they are specifically qualified. Some provide for screening by the supervisory committee to determine whether the lawyers possess the special skill they claim. Lawyer reference plans have been acclaimed as being "in the highest traditions of public service"¹ and are specifically sanctioned by the ABA Code of Professional Responsibility.²

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

¹ Jacksonville Bar Assn. v. Wilson, 102 So. 2d 292, 294 (Fla. 1958).
² See ABA, Code of Professional Responsibility DR2-103(C)(1).
Publicity and Notices

A lawyer referral service cannot fulfill its function without publicity to make its existence and purpose known to those who need it. In addition to making the referral plan generally known to the public, there is the special need in criminal cases to give widespread notice of its existence, its purpose, and the manner of contacting the service at those places where accused persons are taken into custody. The idea of posted notice has been adopted in statutory provisions designed to assist accused persons in communicating with counsel.3

Standard 4-2.3. Prohibited referrals

(a) 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.

(b) 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.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR2-103(A), (B), (C)

Commentary

Unauthorized Referrals

The payment of compensation by one lawyer to another for referring a case violates established principles of ethical conduct.1 Where a com-

1. ABA, Code of Professional Responsibility DR2-103(B); Alpers v. Hunt, 86 Cal. 78, 24 P. 846 (1890).
mission is paid to a law enforcement officer for the referral of cases, or where other benefits or "rewards" are given, there is the highly undesirable temptation for the officer to make arrests or to adjust his or her evaluation of probable cause in order 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 layperson's exercising control over the lawyer's conduct of the case. This practice is forbidden because of the danger that someone who is not subject to the professional discipline of the bar will attempt to dictate the tactics to be used. If the referral is made by law enforcement personnel, the conflict between their public duty and private interest is apparent. Any solicitation of criminal cases through laypersons is ground for disbarment of a lawyer. However, under proper limitations a legitimate organization may undertake to provide legal services for its own members.

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. A "forwarding" fee is thus impermissible. Payment of such a fee undermines the concept that professional compensation is only for services rendered, and may result in either a client being charged more than he or she should be for services rendered or a lawyer rendering less service than charged for in an effort to offset the fee. In some states the payment of such a fee is not considered unprofessional conduct. There is evidence, however, that lawyers do not always respect the fee splitting prohibitions of the bar.

Regardless of the factor of compensation, the acceptance of regular referrals entails many of the pernicious consequences of compensated solicitation. Even where the police officer, bondsman, or court attaché making the referral is motivated by friendship for the lawyer or honest sympathy for the defendant's plight, the potential for abuse is substan-

2. ABA, Code of Professional Responsibility DR5-107(B).
5. See, e.g., ABA, Code of Professional Responsibility DR2-107(A); ABA Committee on Professional Ethics, Formal Opinion No. 265 (1945); New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 382 (1948).
tial. A potential conflict of interest exists, for example, when the person making the referral is a police officer regardless of whether or not compensation is involved, since the officer may be called as a witness in the proceedings. Moreover, any practice of police referrals is likely to direct the defense of criminal cases into the hands of a few lawyers, and not necessarily to the competent and ethical members of the bar.7

These prohibitions do not preclude a lawyer from accepting referrals from a member of the clergy or other person comparably situated.

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

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

PART III. LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1. Establishment of relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the lawyer 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

7. See standard 4-2.2
on the right of the accused to make the ultimate decisions on
certain specified matters, as delineated in chapter 5, part II.

(c) To ensure the privacy essential for confidential commu-
nication between lawyer and client, adequate facilities should be avail-
able for private discussions between counsel and accused in jails,
prisons, courthouses, 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 correspon-
dence between client and lawyer relating to legal action arising out
of charges or incarceration.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility, canon 4
NAC, Corrections 2.1, 2.2
NAC, Courts 10.1
NLADA, National Study Commission Recommendations 5.10

Commentary

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. Thus, important evi-
dence may not be obtained, valuable defenses neglected, and, perhaps
most significant, the lawyer may not be forewarned of evidence that will
be presented by the prosecution. The obligation of confidentiality in the
lawyer-client relation has been established to encourage candor and full
disclosure. The ABA Code of Professional Responsibility reflects the
ancient doctrine that a lawyer must preserve all confidences that relate
to the representation of the accused.1 There are several well-established

1. ABA, Code of Professional Responsibility DR A-101. See also 8 Wigmore, Evidence
§2290 (McNaughton rev. ed. 1961). "[T]he first duty of an attorney is to keep the secrets
exceptions to the duty of confidentiality: the lawyer is free of the obligation to the extent necessary to defend his or her own conduct where the client has called the lawyer's conduct into question, as in a postconviction proceeding or disciplinary proceeding against the lawyer, and the lawyer may disclose, and indeed may be obligated to disclose, the client's stated intention to commit a crime at a future time.  

Control of Conduct of a Case

Part V of this chapter deals with the necessity of the lawyer's controlling all technical legal aspects of the defense. However, since laypersons may not understand the reasons and need for the degree of control that the lawyer must have, it is essential that it be clarified at the inception of the lawyer-client relationship. Accordingly, the commentary to standard 4-5.2, which deals more specifically with control and direction of the case, is applicable here.

Facilities for Private Interview

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

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

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3. ABA, Code of Professional Responsibility DR4-101(C)(3); see standard 4-3.7(d).
client contacts. Defense counsel should protest any barriers to reasonable lawyer-client communication.

On a number of occasions courts have been called upon to consider invasions of privacy of attorney-client interviews. Placing a guard in a position to overhear conversations between lawyer and client has been held to be a violation of the right to counsel. It is not necessary that disclosure to the prosecution be shown; the risk of disclosure and the inhibiting effect on full communication are sufficient. Courts have looked even more harshly on secretive encroachment on the privacy of interviews, 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 or where an informant for the prosecution was present during the interview. At least one court has held that eavesdropping on the discussions between defense counsel and defendant in an interview room at the jail via a hidden microphone created such ineradicable prejudice to the defense that a new trial was not permitted and the case was dismissed. A responsibility rests heavily on the courts, the bar, and law enforcement authorities to see that such invasions of the privacy of the lawyer-client relation do not occur. Law enforcement personnel should be educated concerning 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.

Correspondence Between Lawyer and Client: Censorship of Mail

It is fundamental that the communication between client and lawyer be untrammeled. Courts frequently struggle with the question of censorship of correspondence between prisoner and lawyer. A traditional reluctance to interfere in prison administration and concern for the security of such institutions have led courts to uphold censorship regu-

lations that they have found to be reasonable. The Supreme Court has held that a state may constitutionally require that mail from an attorney to a prisoner be identified as such and that the attorney’s name and address appear on the communication and, as a protection against contraband, that the authorities may open such mail in the inmate’s presence. The Court further noted that “the ability to open the mail in the presence of inmates . . . could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate’s presence insures that prison officials will not read the mail.”

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

**Standard 4-3.2. Interviewing the client**

(a) As soon as practicable 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 the client in any way that the client 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.

**History of Standard**

There are stylistic changes only.

11. Id. at 577
12. The Joint Committee on the Legal Status of Prisoners has recommended that prisoners’ correspondence “should be opened only pursuant to a search warrant issued on probable cause.” See Tentative Draft of Standards Relating to the Legal Status of Prisoners §6.1(a), 14 Am. Crim. L. Rev. (Winter 1977).
Related Standards

None

Commentary

Securing Facts from the Client

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

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

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

Calculated Ignorance of Facts by the Lawyer

The most flagrant form of "intentional ignorance" on the part of defense lawyers is the tactic of advising the client at the outset not to admit anything to the lawyer that might handicap the lawyer's freedom in calling witnesses or in otherwise making a defense. This tactic is most unfortunate in that the lawyer runs the risk of being the victim of

surprise at trial. A lawyer should make clear to the client the imperative need to know all aspects of the case; the lawyer should explain that all of the client's statements and those of other witnesses must be fully investigated. To secure candid disclosure from the client of facts that are often both incriminating and embarrassing, the client must be sure that these facts will not be divulged by the lawyer. Accordingly, an explanation of the privileged status of all information acquired from the client should be given in most cases, unless it is clear that the client is sophisticated enough to understand the lawyer's obligation of confidentiality. ²

Standard 4-3.3. 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 the lawyer or by others for the lawyer.

(c) It is unprofessional conduct for a lawyer to enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(d) It is unprofessional conduct for a lawyer to divide a fee with a nonlawyer, except as permitted by the Code of Professional Responsibility. A lawyer may share a fee with another lawyer only on the basis of their respective services and responsibility in a case, in accordance with the Code of Professional Responsibility.

(e) It is unprofessional conduct for a lawyer to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

² Both "confidences" and "secrets" are protected pursuant to the Code of Professional Responsibility. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA, Code of Professional Responsibility DR4-101(A).
History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR2-106, DR2-107, DR3-102

Commentary

Determination of Fee

The factors to be properly considered in establishing a lawyer’s compensation trace back at least as far as an ordinance of the City of London of 1280.¹ The factors listed in paragraph (a) to be considered by defense counsel in setting a fee are substantially the same factors set forth in the Code of Professional Responsibility.² Since it is common for lawyers to accept criminal cases only if the fee is paid or assured in advance, this requires that factors of time and effort be carefully estimated.

Implication That Fee Is for Other Than Professional Services

Clients in criminal cases are sometimes more willing to pay lawyers for results secured by unethical conduct than for skillful representation within the law and the rules of professional conduct. A lawyer should scrupulously avoid permitting an impression that the fee will be used for undefined purposes or vaguely defined purposes that may be interpreted as including bribery, or that the service provided has a special value because of the lawyer’s relationship to the prosecutor, judge, or other officials or because of any factors unrelated to the lawyer’s professional services. The creation of such an impression has been held to be ground for professional discipline.³

Overreaching

It is generally accepted in the United States that attorneys’ fees are a matter of agreement between lawyer and client, although the lawyer

¹ See H. Deiker, Legal Ethics 173 (1953).
² ABA, Code of Professional Responsibility DR2-106(B).
³ See In re Ferris, 340 Mo. 1206, 105 S.W.2d 921 (1937); State Bd. of Law Examiners v. Sheldon, 43 Wyo. 522, 7 P.2d 226 (1932).
should be guided by the considerations enumerated in paragraph (a). However, it is clear that a lawyer may be disciplined where a fee is flagrantly excessive or results from overreaching of the client.\(^4\) In criminal cases, because of the intensity of the values at stake, there is a special danger that a lawyer may exploit a client’s apprehensions and difficulties to the lawyer’s pecuniary advantage. As a result, disciplinary measures should be invoked when such overreaching can be clearly demonstrated. A lawyer who demands that the client pay an additional fee on the eve of trial beyond that which had been previously agreed is particularly suspect,\(^5\) since once the relationship of lawyer and client has been established the lawyer stands in a fiduciary relationship to the client and no longer can claim that the additional fee demanded in those circumstances results from arm’s-length bargaining.\(^6\) Misrepresentation to the client of the extent of the client’s predicament is a form of overreaching that should lead to discipline.

Family ties and loyalties often lead others to offer financial assistance to an accused, even though they are not legally obligated to pay for the defense. While it is not improper for a lawyer to accept fees derived from such sources if no conflict of interest results,\(^7\) a lawyer should avoid the appearance of overreaching that in some circumstances may follow if the lawyer urges the accused to appeal to such sources. A fortiori, the lawyer should not bypass the client and appeal directly to family and friends except when requested to do so by a client in custody.

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### Division of Fees

Any division of fees with laypersons is prohibited because of its tendency to promote 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.\(^8\) The layperson’s “fee” is also an added cost to the client.

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4. "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." ABA, Code of Professional Responsibility DR2-106(A); H. Deinzer, Legal Ethics 174 (1953).


7. See standard 4-3.5(c).


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Division of fees with another lawyer is also prohibited except on the basis of a fair division of responsibility and services in a case. The practice of lawyers sharing a "forwarding" fee to be paid out of the fee charged by the lawyer seems to be widespread, however.

Contingent Fees

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

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

Standard 4-3.4. Obtaining publication rights from the accused

It is unprofessional conduct for a lawyer, prior to conclusion of all aspects of the matter giving rise to his or her employment, to enter into any agreement or understanding with a client or a prospective client by which the lawyer acquires an interest in publication rights with respect to the subject matter of the employment or proposed employment.

9. Id. DR2-107(A)(2); fees paid for referrals are discussed in the commentary to standard 4-2.3.

10. See F. MacKinnon, Contingent Fees for Legal Services 52 (1964); see also ABA, Code of Professional Responsibility DR2-106(C).
History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR5-104(B)

Commentary

A grave conflict of interest can arise out of an agreement between a lawyer and an accused giving the lawyer the right to publish books, plays, articles, interviews, 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 the client 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 may constitute a blatant form of self-touting, which ought not be engaged in by members of the bar. There also are serious risks in disclosing facts of the client’s case to third parties inasmuch as such disclosures may violate the attorney-client privilege.

Standard 4-3.5. 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 or her.

(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 codefendants except in unusual situations when, after careful investigation, it is clear that:

(i) no conflict is likely to develop;
(ii) the several defendants give an informed consent to such multiple representation; and
(iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.

In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

(c) In accepting payment of fees by one person for the defense of another, a lawyer should be careful to determine that he or she will not be confronted with a conflict of loyalty since the lawyer's entire loyalty is due the accused. It is unprofessional conduct for the lawyer to accept such compensation except with the consent of the accused after full disclosure. It is unprofessional conduct for a lawyer to permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is or has been the prosecutor.

History of Standard

There has been added to paragraph (b) the requirement that the consent of multiple defendants be "made a matter of judicial record" before the joint representation of such defendants is undertaken. Also added to paragraph (b) is the statement that it is the trial judge's duty to determine that defendants who consent to multiple representation do so with full understanding of the implications of their decision. Specifically, paragraph (b) now provides that "the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest
of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.” This language is based on a provision that appeared in original Function of the Trial Judge standard 3.4(b). Finally, paragraph (b) now recognizes that “[i]n some instances” representation of multiple defendants may constitute “unprofessional conduct.” In addition, there are stylistic changes.

Related Standards
ABA, Code of Professional Responsibility DR5-101(A), DR5-105, DR5-107
ABA, Court Organization 2.20(b)
ABA, Standards for Criminal Justice 3-1.2

Commentary
Disclosure of Conflict of Interest

The obligation of an attorney 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 the attorney’s ability to guard the client’s confidences and zealously pursue the client’s interest governs members of the bar in all aspects of their professional activity.1 In a criminal case this responsibility rests heavily on the lawyer because the circumstances of the lawyer’s 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 client’s confrontation with the criminal law will loom so large that the client will be eager to obtain any representation as soon as possible and thus will not be particularly 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 that might cause a diminution in zeal of representation, there is a more subtle type of conflict that must also be avoided. Counsel may see in a criminal case an opportunity to further personal or general social interests that are not those of the client. The lawyer who takes a criminal case because of anticipated publicity is in danger of taking action that furthers the interest of the

lawyer's publicity at the expense of reaching a quieter disposition more favorable to the client. Another possibility for conflict exists 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. The lawyer, in pressing a particular client's case zealously, may risk antagonizing the judge or prosecutor in a way that might prove harmful in later relations with them in other cases. The basic rule that must guide every lawyer is that the lawyer's total loyalty is due each client in each case; the lawyer must never permit the pressing of one point or one case to be guided or influenced by the demands of another case. The risk of jeopardizing other cases, if it in fact exists, presents a conflict that must be resolved in such a way that the immediate responsibility is faithfully discharged.2

Representation of Codefendants

Normally, joint representation of codefendants in criminal cases should not occur, except for preliminary matters such as initial hearings or bail proceedings. Where joint representation does take place, it should be preceded by a "careful investigation" from which it is determined "that (i) no conflict is likely to develop; (ii) the several defendants give an informed consent to such multiple representation; and (iii) the consent of the defendants is made a matter of judicial record." This standard is based on the belief that conflicts of interest are either present or potentially present in the great majority of criminal cases where codefendants are represented by the same lawyer or law firm.3 When-

2. This problem is one of the arguments sometimes invoked against the desirability of full-time defender programs. There is evidence, however, that the inbred adversary tendencies of the lawyers from such offices are sufficient protection. See, e.g., SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NLADA, EQUAL JUSTICE FOR THE ACCUSED 61, 71, 74 (1959). In private defense representation and in prosecution offices many of these same risks are present to some degree. Here, too, the innate competitive instincts of the advocate and the integrity of the bar are society's protection.

3. If a single lawyer should not represent codefendants, it follows that "no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR5-105(D).
ever there are multiple defendants, frequently there are factual differences in the prosecutor’s case against them or in their defense to the charges, or, at the very least, differences in their backgrounds and social history that are relevant at sentencing. Where the differences are patent, separate counsel are obviously essential. If, for example, defendant X states that defendant Y committed the offense, and vice versa, the same attorney clearly cannot represent both parties.

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

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

If defense counsel does somehow manage to survive the pretrial, trial, and plea stages without confronting either an implicit or explicit conflict in the representation of multiple defendants, conflict problems are likely to be encountered at sentencing. Since the backgrounds of codefendants invariably differ to some degree, an attorney for multiple defendants must be exceedingly careful in arguments related to sentencing, lest it appear that the attorney is favoring one defendant for leniency in contrast to others. At sentencing, just as at all other
stages of criminal proceedings, a defendant is entitled to a lawyer who will aggressively advocate his or her cause and who is able to do so without concern for the effects of the representation on any other defendants.4

There may, of course, be some situations where codefendants desire the same attorney, have totally consistent defenses and similar backgrounds, and would be spared the expense of higher legal fees incident to separate counsel. Moreover, neither the Code of Professional Responsibility nor decisions of the Supreme Court prohibit representation of multiple defendants in criminal cases. The code urges that a lawyer “decline . . . employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected . . . or if [the employment] would be likely to involve him in representing differing interests. . . .”5 But even in these situations, representation of multiple clients is still permitted by the code if it is “obvious” that each client can be “adequately” represented and where each client consents after full disclosure of the possible conflict of interest.6 While the Supreme Court has not prohibited joint representation of criminal defendants, the Court has held that whenever impermissible joint representation occurs, reversal is automatic and no particularized showing of prejudice is required. To rule otherwise, the Court has observed, would be to require difficult judgments to be made respecting the impact of conflicts of interest on an attorney’s representation. The Court has also noted that the likelihood of prejudice to one or more clients is substantial when multiple defendants with conflicting interests are represented.7

Payment by One for Representing Another

There are other situations in which a conflict may arise. For example, counsel is commonly employed in criminal cases by a relative, friend, employer, or codefendant of the defendant. In such cases there is the

4. The ability of a jurisdiction to provide separate counsel for codefendants can be greatly facilitated if there is adherence to standard 5-1.2, which recommends that in each jurisdiction there be both defenders and assigned counsel. The presence of both groups of attorneys assures that there will be sufficient numbers of lawyers available to handle multiple defendant cases.

5. ABA, Code of Professional Responsibility DR5-105(A).

6. Id. DR5-105(C).

possibility that conflicting allegiances will develop. This possibility is especially aggravated if the person paying fees of counsel is a party defendant or witness to the alleged offense, as is sometimes the case where an employer pays for a lawyer for an employee when both the employer and the employee are indicted. There are inherent risks that the person paying the fees may regard himself or herself as the principal to whom counsel's primary loyalty is due. A lawyer for an accused must give complete loyalty to the accused without regard to the source of fees. Payment of fees and costs by a person other than the accused can never be allowed to dilute or influence the 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.8

Prosecutors and Their Partners as Defense Counsel

The particular form of conflict of interest that 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.9

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 counsel10 or first as defense counsel and later as prosecutor.11 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.12

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

8. See ABA, Code of Professional Responsibility DR5-107(B).
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 or her 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. Obviously, in our system of institutionalized prosecution offices, 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 public defenders, after they have left prosecution offices. Correspondingly, public defender staff members should be encouraged to move into prosecution offices.

Standard 4-3.6. 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 or her rights forthwith and take all necessary action to vindicate such rights. The lawyer should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

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

History of Standard

There are stylistic changes only.
4-3.6

The Defense Function

Related Standards

ABA, Standards for Criminal Justice 5-5.1, 10-5.5

Commentary

Prompt Protection of Legal Rights

Many of the rights that the law guarantees to an accused person can be vindicated only by prompt action. One of the lawyer’s most significant tasks is to inform the client of the nature, extent, and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropriate responses to be made to a lineup, interrogation, or problems relating to statements to news media.¹ Many cases require that special steps be taken to preserve existing evidence under the control of others or that prompt ballistics tests, handwriting tests, or medical examinations of the accused be made.

One of the most vital of the accused’s rights is the right to be released from custody pending trial. Not only is this essential to the accused’s immediate freedom, continuation of employment, and associations with family and friends, but it is also directly related to a favorable disposition of the case. In many cases the accused, if not confined, can personally assist counsel by identifying and locating material witnesses or securing evidence vital to the defense. Moreover, if the defendant is able to continue employment, the groundwork may be laid for a strong showing for probation in the event of a guilty finding.²

The particular procedural steps that should be taken to protect the rights of the accused will vary greatly from case to case. These standards reject the notion, however, that a lawyer is obligated to take every step the accused demands. Instead, the lawyer’s professional judgment that a particular step can be appropriately invoked to the client’s advantage should govern.³ Among the obvious steps to be considered at the outset are motions for pretrial release, for continuance of the preliminary hearing if that will benefit the accused, for suppression of evidence if

² See standard 10-1.1 and commentary.
³ See standard 4-5.2.
grounds exist, for change of venue if that will benefit the accused, or for pretrial psychiatric examination if any reason for such examination appears. At an early stage defense counsel may have to move for access, depending on the nature of the case, to such matters in the possession or control of the prosecution as ballistic test reports, autopsy reports, or other scientific evaluations of evidentiary matter that may be used at trial.

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

Lawyer as Bondsman

In some jurisdictions lawyers are restricted by rule of court or otherwise from acting as sureties on bail bonds. It is particularly important that a lawyer not act as surety with respect to a 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 that 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 or she does not represent the defendant being 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.

Standard 4-3.7. Advice and service on anticipated unlawful conduct

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

(b) It is unprofessional conduct for a lawyer to counsel a client in or knowingly assist a client to engage in conduct which the lawyer knows to be illegal or fraudulent.
(c) It is unprofessional conduct for a lawyer to agree in advance of the commission of a crime that the lawyer 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) A lawyer may reveal the expressed intention of a client to commit a crime and the information necessary to prevent the crime, and the lawyer 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 or her part is necessary to prevent it.

History of Standard

Paragraph (d) of the original standard stated, in effect, that its provisions did not apply to the situations dealt with in standard 7.7. Because a decision on whether to retain standard 4-7.7 has been deferred pending resolution of the question of what should be done in situations dealt with by standard 4-7.7 (see the editorial note to that standard), the cross-reference to standard 7.7 has been eliminated here as well. In addition, there are stylistic changes.

Related Standards

ABA, Code of Professional Responsibility DR4-101(C)(3), DR7-102(A)(7), EC7-4 to EC7-6.

Commentary

Advising Compliance with Law

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

A lawyer is entitled to seek withdrawal from a case at any stage if the client states an intent to violate the law. In addition, the attorney-client privilege does not require that a lawyer treat as confidential a client’s stated intention to commit a crime in the future.

Advising Unlawful Conduct

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

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

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.

Thus, it is obviously unprofessional conduct for a lawyer to enter into

2. 8 Wigmore, Evidence §2298 (McNaughton rev. ed. 1961); ABA, Code of Professional Responsibility DR4-101(C)(2).
3. ABA, Code of Professional Responsibility DR1-102, DR7-102.
5. New York County Lawyers’ Association Committee on Professional Ethics, Opinion No. 27 (1913).
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 or her willingness to defend.

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

A lawyer may properly agree in advance to defend a client who has stated an intention to violate a criminal statute 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.9

Duty to Report Threatened Crime

The lawyer's duty of confidentiality does not extend to threatened criminal acts. Not only is the lawyer free to reveal any stated intention of the client to commit a crime, but where the crime is one that would seriously endanger the life or safety of any person or corrupt the processes of the courts, the lawyer has a duty to take action to protect against its commission. Thus, should the client reveal an intention to bribe or coerce a juror or witness and the lawyer does not succeed in discouraging such action, the lawyer must report the matter to the authorities. Obviously, this is most clearly necessary where the lawyer learns that the client intends to injure person or property.10

8. See Note, 47 Yale L.J. 812, 815 (1938).
9. ABA, Code of Professional Responsibility EC7-4 to EC7-6.
10. Paragraph (d) is not intended to apply to the situation where a defense lawyer learns that the client intends to commit perjury. In the original edition, the problem posed when a client informed counsel of an intent to lie under oath was treated in original standard
Standard 4-3.8. Duty to keep client informed

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

History of Standard

There is a stylistic change only.

Related Standards

NLADA, National Study Commission Recommendations 5.10

Commentary

A common complaint of laypersons is that lawyers, whether acting in civil or criminal cases, fail to keep their clients adequately informed. Unfortunately, this sometimes occurs even when the lawyer is preoccupied with performing essential tasks for the client. At best it is difficult for a lawyer to establish and maintain a relationship of confidence and trust with an anxious client in a criminal case, especially one in custody, and this task is made more difficult if the client is not kept reasonably informed. A lawyer must remember that the case is the defendant's case, and the defendant is entitled to know of the progress of the lawyer's work. Here again, the lawyer's duty in this respect is the same whether the lawyer has been retained or assigned. The busy lawyer performing services in many cases at a personal sacrifice may regard the burden of reporting to the client as an added imposition, but it is important to keep the client aware that the lawyer is actively attending to the client's interests.

Standard 4-3.9. Obligations to client and duty to court

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

7.7. The present edition will defer to the upcoming report of the ABA Special Commission on Evaluation of Professional Standards (see editorial note to standard 4-7.7).
History of Standard

The standard no longer refers to lawyers being "appointed by the court." This is consistent with revisions in the chapter on Providing Defense Services, which recommends that counsel for the poor should not normally be appointed by the judiciary. In addition, there are stylistic changes.

Related Standards

None

Commentary

The problem of establishing a relationship of trust and confidence with the accused is discussed elsewhere in these standards. This relationship is often more difficult to establish when the lawyer is assigned or serves in a legal aid or defender system than when the accused has retained the lawyer. Unfortunately, the assigned lawyer is often regarded by the accused as part of the "government establishment" invoked against the accused.

In addition to other difficulties that impede the development of a close relationship with the assigned lawyer, "jailhouse lawyers" or the "jailhouse grapevine" sometimes encourages the accused to put pressure on the assigned lawyer to engage in dilatory or frivolous tactics involving multiple motions or other pretrial processes not warranted by the law or the facts. This situation may become acute if the accused is at liberty and wishes to postpone the proceedings.

Clearly, counsel should conduct a case under appointment no differently than counsel would a case for the client who had retained him or her; neither more nor less should be given, and at every stage the standards of professional responsibility must govern. Specifically, if an accused demands that a dilatory or groundless motion be made, the assigned lawyer should refuse to comply if the lawyer would so act with a private client.¹ Postconviction attacks on the assigned lawyer whose client is convicted is an occupational hazard of assigned counsel, although hardly limited to that relationship. When conflict with a client

¹ See ABA, Code of Professional Responsibility DR7-102(A)(1).
arises during trial proceedings, the lawyer is well advised to write a memorandum to the client explaining why the lawyer is declining to execute the request, or otherwise make some record of the circumstances. The creation of advisory councils would help to relieve the pressure on lawyers who face such problems.²

No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained and paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer’s informed professional judgment. On the contrary, to do so is unprofessional conduct.³

PART IV. INVESTIGATION AND PREPARATION

Standard 4-4.1. Duty to investigate

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. 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 the accused’s stated desire to plead guilty.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Standards for Criminal Justice 3-3.1(a)
NDAA, National Prosecution Standards 7.1(A)

² See standard 4-1.4.
³ See standard 4-1.2(c).
Commentary

Facts form the basis of effective representation. Effective representation consists of much more than the advocate's courtroom function per se. Adequate investigation may avert the need for courtroom confrontation. Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others. The resources of scientific laboratories may be required to evaluate certain kinds of evidence: analyses of fingerprints or handwriting, clothing, hair, or blood samples, or ballistics tests may be necessary. Neglect of any of these steps may preclude the presentation of an effective defense.

The prosecutor and law enforcement agencies are important sources of information needed by the defense lawyer. Apart from any formal processes of discovery that are available, prosecutors and law enforcement officers have in their possession facts that defense counsel must know. Prosecutors will often reveal facts freely in the hope of inducing a guilty plea. If defense counsel can secure the information known to the prosecutor, it will obviously facilitate investigation. Defense counsel should always urge the prosecutor to disclose facts even though defense counsel must then proceed to verify them. Overtures to the prosecution are not an indication of weakness, and experienced defense counsel routinely approach the prosecutor at an early stage of their own investigation.

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

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

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

Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If they were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate’s role. Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel.¹

**Standard 4-4.2. Illegal investigation**

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

History of Standard

There is a stylistic change only.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(3), (4), (5)
ABA, Standards for Criminal Justice 3-3.1(b)

Commentary

The use by investigators of wiretaps, electronic surveillance devices, and other prohibited means is common.¹ 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. One study recommends the use of professional standards for this purpose as a necessary adjunct to other forms of control.² Lawyers have a special responsibility to act within the bounds of law and to see that those they employ do so also.³ Lawyers must also forbid the use of oppressive methods of securing information, as by threats or intimidation. Obviously, the use of fabricated tangible evidence or false testimony is both illegal and forbidden by professional standards.⁴

Standard 4-4.3—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, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(b) It is not necessary for the lawyer or the lawyer's investigator,

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4. The use of such evidence is discussed in standard 4-7.5.
in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(c) A lawyer should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person, other than a client, or cause such person to be advised to decline to give to the prosecutor or counsel for codefendants information which such person has a right to give.

(d) Unless the lawyer for the accused is prepared to forgo 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 such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person.

**History of Standard**

There has been added to paragraph (a) authorization to pay witnesses for "attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews."

Original paragraph (b) stated that "it is proper but not mandatory" for a defense lawyer or the lawyer's investigator to caution a prospective witness concerning possible self-incrimination and the need for a lawyer. The standard now states that "[i]t is not necessary" that such advice be given. This change is due to the belief that the giving of such warnings is probably inconsistent with counsel's responsibilities under the adversary system. Defense counsel's primary duty is to the client, not to prospective witnesses, regardless of the extent to which they may happen to be in need of legal assistance. If the cautionary notice of paragraph (b) were to be given, undoubtedly some witnesses would refuse to speak with the defense, which is difficult to reconcile with the duty of counsel "to seek the lawful objectives of his client" as specified in the Code of Professional Responsibility.¹

There are stylistic changes to paragraphs (c) and (d).

**Related Standards**

ABA, Code of Professional Responsibility DR5-102, DR7-109(C)

ABA, Standards for Criminal Justice 3-3.1(c), (f), 3-3.2, 11-3.3, 11-4.1
NAC, Courts 10.7
NDAA, National Prosecution Standards 27.3(H)

Commentary

Compensation of Witnesses

Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony, 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. However, it is well accepted that the prohibition against paying for testimony does not forbid reimbursement of witnesses for their actual expenses and reasonable payment for loss of income. These standards are more explicit than the Code of Professional Responsibility, however, in specifically authorizing reimbursement to witnesses for attendance at depositions and at pretrial interviews. As a matter of sound trial tactics, it may be advisable to disclose whatever payments are made.

Self-Incrimination of Witnesses

Occasionally a prospective witness gives a statement to the defense that is helpful to the client on whose behalf the statement is obtained but at the cost of possibly incriminating the prospective witness. The lawyer’s paramount loyalty to his or her own client must govern in this situation; accordingly, these standards declare that “[i]t is not necessary for the lawyer or the lawyer’s investigator . . . to caution the witness concerning possible self-incrimination and the need for counsel.” At least one bar ethics committee considered this problem and concluded that the interest of the client seeking the statement must govern the attorney and investigator, provided the witness is not misled or deceived. The ABA Ethics Committee has considered the converse problem of whether it is proper for a defense lawyer to warn a witness for the prosecution that the testimony might incriminate the witness when

4. New York County Lawyers’ Association Committee on Professional Ethics, Opinion No. 307 (1933).
it is done for the purpose of discouraging the witness from testifying. It was held that such advice was proper.\footnote{ABA Committee on Professional Ethics, Informal Opinion No. 575 (1962).}

**Obstructing Communications Between Witnesses and the Prosecution**

Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is no legal obligation 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 be available for interview by counsel.\footnote{For cases in which prosecutors sought to prevent interviews of government witnesses by defense counsel, see, e.g., United States v. Clemones, 577 F.2d 1247 (9th Cir. 1978); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969).}

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

**Interviews by the Lawyer Personally**

Two possible problems can arise in relation to the impeachment of witnesses. The first may arise out of a defense lawyer's interview with a "friendly" witness, for example, an alibi witness. The friendly witness
is likely to be cooperative in giving and signing a statement, but the problem of impeaching the witness will arise only if, unexpectedly, the witness's testimony varies from the pretrial statement and takes counsel by surprise.

The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what the witness stated to defense counsel before trial. In such situations it is necessary to conduct interviews of witnesses with a third person present, particularly since prosecution witnesses do not often sign written statements for defense counsel. The availability of a third person is virtually the only effective means of impeaching an adverse witness. Defense counsel is in an exceedingly difficult situation in seeking leave to withdraw and to substitute other counsel in order to take the stand to relate what the adverse witness previously said to the lawyer. Although a lawyer is sometimes permitted to withdraw in order to testify, this is largely a matter entrusted to the court's discretion, and the court will undoubtedly be influenced by the importance of the testimony, whether other counsel is available to try the case or whether a mistrial must be declared. It is normally not appropriate for a lawyer to offer impeachment testimony and also remain in the case as counsel for the defendant. After counsel secures written statements from investigators, it is proper, and indeed wise, for counsel to interview such witnesses personally, not only to verify the investigators' reports but to become familiar with the personality of the witness in order to anticipate how the witness will react on the stand. Again, a third person should be present.

Standard 4-4.4. Relations with expert witnesses

(a) 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 or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.


8. See ABA, Code of Professional Responsibility DR5-101(B), DR5-102(A).
(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 the expert will give or the result in the case.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Code of Professional Responsibility DR7-109(C)
ABA, Standards for Criminal Justice 3-3.3

**Commentary**

**Advising the Expert Witness**

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

**Fees to Experts**

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

¹ ABA, Code of Professional Responsibility DR7-109(C)(3) (sanctioning payment of “[a] reasonable fee for the professional services of an expert witness”).
Standard 4-4.5. Compliance with discovery procedure

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

History of Standard

There are no changes.

Related Standards

ABA, Code of Professional Responsibility DR7-103(B)
ABA, Standards for Criminal Justice 3-3.11
NDAA, National Prosecution Standards 13.1(B)(3)

Commentary

The development of discovery procedures in criminal cases entails obligations on defense counsel to seek in good faith to make the procedures function effectively. Counsel for the accused should not compel the prosecution to resort to a court order for discovery in order to harass the prosecution, make it more costly, or obstruct the flow of information when defense counsel knows the information is discoverable. Guidelines concerning discovery in criminal cases are contained in chapter 11, Discovery and Procedure Before Trial.

PART V. CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1. Advising the defendant

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

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

(c) The lawyer should caution the 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.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Standards for Criminal Justice 14-1.3, 14-3.2

NLADA, National Study Commission Recommendations 5.10

**Commentary**

**Advice on the Plea**

The duty of the lawyer to investigate fully the facts of the case, regardless of the anticipated plea, is discussed elsewhere.¹ The lawyer's duty to be informed on the law is equally important; although the client may sometimes be capable of assisting in the fact investigation, the client is not educated in or familiar with the controlling law. The lawyer's responsibility to know the law is a challenging one, given the rapid pace of change in many areas of criminal law and procedure.²

The decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices.³ Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, the lawyer should use reasonable persuasion to guide the client to a sound decision.⁴ However, defense counsel 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

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¹. See standard 4-4.1.
⁴. See standard 4-6.1(b).
defendant to plead guilty merely because the defendant has admitted
guilt to the lawyer, without exploring all of the relevant facts or at-
ttempting to determine whether the prosecution can establish guilt, is
improper.\textsuperscript{5} Because of the elements of uncertainty that surround any
estimate of probable outcome, the lawyer who has fulfilled the duties
of investigation and analysis should not be faulted when subsequent
events show that the lawyer's prediction was incorrect.

The matters on which the defendant needs advice before entering a
plea go beyond appraisal of the likelihood of conviction or acquittal.
Counsel should inform the defendant of the maximum and minimum
sentences that can be imposed, but counsel should also be aware of the
actual sentencing practices of the court and advise the defendant, when
that is possible, what sentence is likely. If a decision is made to enter
a plea, counsel should carefully review with the defendant the various
subjects the court is likely to question the defendant on when the plea
is offered.\textsuperscript{6}

\begin{flushright}
\textbf{Misrepresenting the Risks, Hazards, or Prospects}
\end{flushright}

Overreaching the client by misrepresenting the prospects of the case
in order to obtain employment as counsel or to charge a larger fee is
unprofessional conduct requiring disciplinary sanction, and the courts
have so held.\textsuperscript{7} Considerations related to counsel's fee, moreover, should
never influence a lawyer's decisions or advice.

\begin{flushright}
\textbf{Cautioning the Client}
\end{flushright}

It is improper for a lawyer to communicate in any way with jurors
before and during trial or with prospective jurors about the trial or any
other subject, no matter how trivial,\textsuperscript{8} and, of course, it is equally im-

1975).

\textsuperscript{6} For the advice recommended to be given to defendants when a plea is tendered, see
standard 14-1.4.

\textsuperscript{7} State Bd. of Law Examiners v. Sheldon, 43 Wyo. 522, 7 P.2d 226 (1932); United
N.Y.S. 113, aff'd 206 N.Y. 473, 195 N.E. 160 (1934). See also People ex rel. Chicago Bar Assn.
v. Green, 353 Ill. 638, 187 N.E. 811 (1933).

\textsuperscript{8} See standard 4-7.3(a).
proper for the client to do so. Since the accused may be unaware that even casual communication with a juror is an impropriety, the accused should be so cautioned in order to avoid even the appearance of impropriety.

The client's relations with witnesses can pose complex problems. Often persons to be called as witnesses are relatives, friends, or fellow workers with whom normal communication cannot be avoided. The defendant's familiarity with witnesses and their whereabouts may require the defendant's participation in locating them, and the defendant's aid may be needed in securing their willingness to discuss the case with defense counsel and their appearance at trial. Contact by the accused with witnesses involves the risk that something may be said that could later give rise to embarrassment or misunderstanding. The lawyer should caution the defendant to avoid communication with witnesses unless approved by the lawyer.

Obviously, just as it is the lawyer's duty to tell all witnesses to tell the truth under all circumstances, so it is the lawyer's duty to admonish the client to so advise any witnesses the client may contact. Counsel should make clear to the client that any conduct of the client's that has even the appearance of an effort to influence or color the testimony of a witness may provide ammunition that the prosecution can use at trial to suggest a consciousness of guilt. Such conduct may also be used to impeach the credibility of the witness. At worst, improper conduct by the client could lead to a charge of obstructing justice or suborning perjury.

Standard 4-5.2. Control and direction of the case

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

(i) what plea to enter;
(ii) whether to waive jury trial; and
(iii) whether to testify in his or her 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 the client.

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

History of Standard
There are stylistic changes only.

Related Standards
ABA, Standards for Criminal Justice 14-1.3, 14-3.2, 15-1.2, 15-1.3

Commentary
Allocation of Decision-making Power

As established by the history of the criminal justice process and the rights vested in an accused under the Constitution, certain basic decisions have come to belong to the client while others 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. Similarly, the decision whether to waive a jury trial has been considered as belonging to the defendant. 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.”

of counsel. Although counsel should not demand that the defendant follow what counsel perceives as the desirable course, counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of these three decisions, so crucial to the accused’s fate, the accused must make the decisions.

Some other significant decisions fall into a gray zone. The Supreme Court has indicated, for example, 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 the petitioner deliberately bypassed the available state procedure. The court emphasized that the waiver would be found only if the defendant made the choice. The Court also has stated that the defendant would be bound by the attorney’s deliberate choice of a trial strategy to forgo an objection available on constitutional grounds.

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. The lawyer must be allowed to determine which witnesses should be called on behalf of the defendant. Similarly, the lawyer must be allowed to decide whether to object to the admission of evidence, whether and how a witness should be cross-examined, and whether to stipulate to certain facts. Cases that 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 should have heeded the client’s wishes on such matters, but on a determination that these actions of counsel in these cases were not strategic or tactical decisions but, rather, revealed ineptitude, inexperience, lack of prepara-

7. See Vess v. Peyton, 352 F.2d 325 (4th Cir. 1965).
8. See Hester v. United States, 303 F.2d 47 (10th Cir. 1962); People v. Rideaux, 61 Cal. 2d 537, 393 P.2d 703, 39 Cal. Rptr. 391 (1964).
tion, or unfamiliarity with basic legal principles amounting to ineffective assistance of counsel.\textsuperscript{11} Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile. Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge’s charge while the client “plucks at the attorney’s sleeve” offering gratuitous suggestions. Some decisions, especially those involving which witnesses to call 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 the 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 the lawyer should completely ignore the client in making them. The lawyer should seek to maintain a cooperative relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case.

It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant’s decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter.

\textbf{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 postconvic-

tion 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 on the gravity of the problem. If advisory councils are established, a new means will be available to lawyers to meet this problem.*

12. See standard 4-1.4.

*Note on the deletion of original standard 5.3. — Essentially, original standard 5.3 provided that if a defendant seeks to plead guilty, acknowledging guilt in open court but privately maintaining to defense counsel that he or she is innocent, counsel is obliged to inform the court of the defendant's true position. This standard is unnecessary if the court is willing to accept a guilty plea even though the defendant claims innocence. Such pleas may be accepted by trial judges, as the Supreme Court made clear in North Carolina v. Alford, 400 U.S. 25 (1970), and the chapter on Pleas of Guilty recommends that such pleas not be refused in the absence of "specific reasons for doing so which are made a matter of record." See standard 14-1.6. If, however, a so-called Alford plea is either not accepted by the court or is not offered by the defendant, it does not follow that defense counsel should be required to reveal to the court that the defendant privately denies guilt to counsel. As long as the defendant openly acknowledges guilt to the court and a factual basis for the plea is present, this is deemed sufficient. If counsel were to tell the court that the defendant privately insists that he or she is innocent, the result is likely to be unsatisfactory. The defendant will most likely insist to the court that he or she is, in fact, guilty because the defendant wants the plea to be accepted, and that any statements previously made to counsel were false. It is probable, moreover, that prior to entry of the guilty plea, defense counsel will have devoted considerable effort to convincing the defendant to do just what the defendant has finally done — to openly admit wrongdoing. When the defendant finally does plead guilty, and defense counsel then reports to the court that the defendant privately maintains innocence, the defendant is likely to find counsel's actions baffling. Meanwhile, acceptance of the guilty plea will be jeopardized, despite the presence of a factual basis and the defendant's public admission of guilt. The attorney-client relationship will also probably have been destroyed. As a matter of practice among defense counsel, it is believed that adherence to original standard 5.3 was virtually nonexistent. Under no circumstances, however, should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial. See standards 4-4.1, 4-5.1(a), and 4-6.1(b).

If the defendant is placed under oath when the plea is offered, the problem for defense counsel seemingly becomes more difficult because the defendant's statements will be perjurious. This situation obviously is similar to that confronted when a defendant seeks to lie under oath at his or her trial. This chapter, however, does not address the so-called client perjury problem. See the editorial note to 4-7.7.
PART VI. DISPOSITION WITHOUT TRIAL

Standard 4-6.1. 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) A lawyer may engage in plea discussions with the prosecutor, although ordinarily the client's consent to engage in such discussions should be obtained in advance. Under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

History of Standard

Original paragraph (b) stated that a lawyer should seek to engage in plea discussions when the lawyer determines, based upon full investigation and study, that conviction is probable. As revised, the standard does not require that defense counsel conclude that conviction is probable before engaging in plea negotiations. Indeed, even in instances where counsel believes that acquittal is likely, counsel may still wish to ascertain whether, for example, there are lesser charges to which the prosecutor would accept a plea. The suggestion that the permission of the defendant "ordinarily" be obtained before engaging in plea discussions was contained in the original standard in a separately lettered paragraph (c). There also has been added to paragraph (b) the suggestion that counsel not urge acceptance of a plea by the defendant "unless a full investigation and study of the case has been completed." This provision complements standard 4-4.1, which states that "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."

Related Standards

ABA, Standards for Criminal Justice 4-4.1, 11-5.2, 14-3.2
Commentary

Exploring Early Diversion

The criminal process is only one of a number of methods society uses to deal with antisocial conduct. But in many cases involving law violations it may not be in the best interests of either society or the accused to pursue criminal prosecution. Prosecutors long have exercised their discretion to informally defer prosecution when they have concluded that an offender, particularly a first offender, ought not be subjected to full-scale criminal prosecution, for example, where an offender is seeking psychiatric or other expert assistance. This practice is described and endorsed in the chapter on the Prosecution Function.1 The existence of diversionary procedures or the willingness occasionally to work out a specialized form of diversion from the criminal process emphasizes the need for defense counsel to be aware both of the prosecutor’s attitudes in appropriate cases and of the need to outline to the prosecutor an appropriate course of action outside the criminal process.

Participation in Plea Discussions

Most cases are disposed of not by trial but as the result of a plea of guilty. In large measure this reflects the fulfillment by prosecutors of their screening function and their obligation not to press charges unless a conviction is likely. The disposition by plea satisfies a variety of interests of the administration of justice as a whole as well as of the defendant. To the defendant it affords the opportunity of avoiding the ordeal of trial, mitigating the penalties, and of having sentence determined without the sentencing court hearing all of the adverse testimony that would be produced at trial. To the prosecutor it offers the certainty of conviction with the least drain on prosecutorial resources and in an atmosphere free of the tensions of conflict. To the administration of justice as a whole, disposition by plea represents substantial savings to the public in terms of prosecutorial and judicial time, and also a greater confidence in the certainty of the guilt of the accused. Moreover, assuming an adequate record will be made of the factual basis for the plea at the time of plea and sentence, the problems of postconviction attacks are lessened.2

1. See standard 3-3.8.
2. Guidelines for plea negotiations and the acceptance of guilty pleas are contained in standards 14-1.4 to 14-1.6, 14-3.1, and 14-3.3.
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 that guide the exercise of their discretion. These standards and rules of thumb are not to be found in codes, case reports, and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the 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 the defense lawyer lacks sufficient personal experience, he or she should consult experienced colleagues. The staff of defender offices also serves as a repository of such information, to which all members of the bar may turn.

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

Plea discussions should be considered the norm and failure to seek such 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 of 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 possibility of reducing the charge or making a plea may arise and counsel may have an opportunity to advance the 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 when some discussion, perhaps only of a very tentative and preliminary nature, will occur before an opportunity arises to obtain the defendant’s consent. Especially when good professional relations exist between the lawyer and the prosecutor, even the most casual and informal discussion of the case can produce information useful to the defense.

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.

Standard 4-6.2. 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.

History of Standard

There are no changes.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), DR5-106, DR7-102(A)(5)

ABA, Standards for Criminal Justice 3-4.1, 3-4.2, 14-3.1
Commentary

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 defense counsel may proceed on the assumption, for purposes of discussion, 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 that the lawyer yields on the position that the accused can, if the accused desires, put the prosecution to its proof.

Although statements made during plea discussions by counsel cannot be used against the accused in the event of trial, admissions made directly by the accused may be admissible against the accused in a minority of jurisdictions.1 This is one reason, among others, why it may be undesirable for the accused to be present during plea discussions. If the accused is present, either because the accused insists or because counsel considers it advantageous, the accused should be cautioned by counsel against making any statements that have not been carefully explored in advance with counsel.

Apart from the risk of admissions, the presence of the client during plea discussions may be a hindrance in other ways. The discussions are best conducted on a level of mutual professional respect that may be undermined by the presence of the accused, or indeed misunderstood by the accused. Both sides may be hampered by an unwillingness to be as candid as necessary in the presence of the accused, or by the added burden of explaining to the accused the significance of what is taking place.

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

1. See standard 14-3.4 and commentary.
It is also important that the accused be informed that the action of the sentencing judge cannot be definitely predicted. Sometimes an accused who has consented to a particular plea on the basis of discussions between the prosecutor and defense counsel has the impression either that the judge is a party to the arrangement or that estimates made by the lawyer are guarantees of what the sentence will be. This situation should be anticipated by defense counsel. If the lawyer has any doubt about the defendant's complete understanding of the alternatives, the lawyer should seek to clarify the situation, for example, by calling in a relative of the accused or a trusted friend, with the defendant's permission.2

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 the judge is authorized to do by law. An accused under tension, whether incarcerated or at large, will sometimes not easily distinguish among or remember matters that are clear to the lawyer. Moreover, the "jailhouse lawyer" with whom the accused confers may leave him or her confused by the difference between what is heard in the cellblock and what the defense lawyer says. 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 not possible. Even if the choice is in fact an informed and voluntary one, it is important that the record demonstrate this.3

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2. For the duty of the trial court to ascertain that the defendant understands the plea agreement, see standards 14-1.5 and 14-3.3(g).
3. For the responsibilities of the trial court in accepting a plea of guilty, see standards 14-1.4 to 14-1.6.
plea discussions — indeed, counsel must preserve the client’s confidences unless granted consent to make disclosures for this purpose — truth is required in the presentation to the prosecutor of facts relating to the case or any mitigating facts. Not only does misrepresentation reflect on the integrity of counsel, but it severely handicaps counsel’s usefulness to the accused and to future clients, since the prosecutor will understandably be reluctant to negotiate with a lawyer who cannot be trusted.

Trading the Interest of One Client for That of Another

The fear has sometimes been expressed that lawyers, particularly public defenders, may be tempted to compromise the interest of one client in return for advantages to another. In reply to this concern, it should be noted that the pressure on defenders is little different from that which confronts private counsel having a substantial criminal law practice. Whether the lawyer is a public defender or is privately retained, the lawyer may have pending other cases that the prosecutor is eager to dispose of without trial, and defense counsel may volunteer the suggestion or be offered the possibility of a more favorable disposition of the case at hand if defense counsel will “cooperate” in the disposition of some other case. Regardless of the motivation for the proposal and whether it originates with the defense attorney or the prosecutor, such conduct plainly violates the lawyer’s fundamental duty of undivided loyalty to each client.

PART VII. TRIAL

Standard 4-7.1. 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, jurors, and others in the courtroom.

(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 the lawyer has a duty to have the record reflect adverse rulings or judicial conduct which the lawyer considers prejudicial to his or her client's legitimate interests. The lawyer has a right to make respectful requests for reconsiderations of adverse rulings.

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

**History of Standard**

There has been added to paragraph (a) the requirement that defense counsel manifest respect toward "others in the courtroom," as well as toward the judge, opposing counsel, witnesses, and jurors. This change makes the paragraph consistent with a similar provision in the Prosecution Function chapter. In addition, there are stylistic changes.

**Related Standards**

- ABA, Code of Professional Responsibility DR7-106(A), (C)(6)
- ABA, Standards for Criminal Justice 3-5.2
- NDAA, National Prosecution Standards 17.1, 23.5

**Commentary**

**Dignity of Judicial Proceedings**

Rules or standards of conduct are needed to ensure that contending advocates 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 an atmosphere of mutual respect by all participants. This can be achieved only by strict adherence to firm standards of what may be called, for want of a better
term, professional etiquette and deportment. There is no place and no occasion for rudeness or overbearing, 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, in order that issues may be resolved on the merits, and proceedings not be diverted by the intrusion of factors such as personality, acrimonious exchanges between advocates or between advocates and witnesses, and histrionics in an effort to sway jurors by other than legitimate evidence. "Baiting" of witnesses of the other side, or of the trial judge, blurs and confuses the very issues that the trial is intended to sharpen and clarify. Lawyers must expect that every intrusion of bad manners or other rudeness into a trial will be dealt with swiftly and sternly by the presiding judge. Necessarily, the "ground rules" of professional conduct must be known by counsel and violations of rules made the subject of disciplinary action by courts and bar grievance committees.

The same considerations that call for certain standards of conduct for advocates require that the judge 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.

Exchanges Between Lawyers

A breach of courtroom decorum occurs when lawyers address each other directly, rather than through the court. Such exchanges may begin with innocent purpose relating to the trial and escalate because of the natural tensions of the courtroom. Sometimes a lawyer will deliberately "bait" a less-experienced opponent to shake the lawyer's composure or to impress the jury. In the courtroom, as in legislative bodies or where other formal proceedings occur, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. A challenge to a statement of opposing counsel should be made in the form of an objection or a request to the judge rather than
to 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 that reduces the risk of friction. The need to curb direct exchanges between counsel is greatest when a jury is present, since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers.

Respect for the Judge, Opposing Counsel, and Witnesses

The obligation of the lawyer to maintain a respectful attitude toward the court is necessary to give due recognition to the position held by the judge in the administration of the law. The lawyer’s attitude communicates to the layperson in the courtroom the professional relation that exists between judge and lawyer. The appropriate way to challenge the judge’s decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by seeking to impress the client by a show of belligerency that exceeds the need to make a record of what the lawyer believes is error in the case. A restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, is a mechanism that depends on evidence and the rule of law, not vituperation or personality conflicts.¹

A reasonable balance must be reached on matters of conduct so that judicial proceedings are not permitted to degenerate to the level of donnybrooks, but it is also important that no artificial standards of courtroom conduct impede lawyers from rendering vigorous advocacy of their viewpoints. It is for this reason that the law grants lawyers an absolute privilege against defamation actions for anything said or written in the course of judicial proceedings pertinent to that proceeding, under a broad standard of pertinence.²

Public respect for law derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must also be the appearance of justice. The law is a great teacher not only in its substantive principles but also in the example it

¹ See, e.g., In re Schofield, 362 Pa. 201, 66 A.2d 675 (1949); H. Deiker, Legal Ethics 69-70 (1953).
sets of dispassionate and rational methods for the resolution of conflicts. An important aspect of the image of justice is the relations that are seen to exist in the courtroom among the lawyer-participants: defense counsel, prosecutor, and judge.\textsuperscript{3}

Of necessity, the lawyer must often be forceful and vigorous in questioning witnesses and in arguing to the jury. This does not mean, however, that the lawyer 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 such a line if the advocates fail to stay within reasonable bounds.\textsuperscript{4}

These standards seek to suggest certain limited forms of courtroom misconduct deserving imposition of disciplinary sanctions. To avoid undue limitation on appropriate advocacy, extreme sanctions are limited to conduct 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.

**Compliance with Court Orders**

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

Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. . . . But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge — his right is only respectfully to preserve his point for appeal.\textsuperscript{5}

Corresponding 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.


\textsuperscript{4} See ABA, Code of Professional Responsibility DR7-106(C)(2), (6).

Code of Decorum

The particular formalities observed in American courts differ from place to place. A lawyer is entitled to know what standards of decorum are expected in a particular court, especially with regard to the use of conventional forms of address, when the lawyer is required to stand, and where he or she is allowed to be in the courtroom during trial, and other such 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.

Standard 4-7.2. Selection of jurors

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

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

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

History of Standard

There are stylistic changes in paragraphs (a) and (b). Original paragraph (c) referred to those "jurisdictions where counsel is permitted personally to question jurors on voir dire." This language has been deleted, due to concern that it may have been construed to imply tacit approval of jurisdictions where lawyers are not permitted to question
jurors personally. Chapter 15, on Trial by Jury, recommends that “counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel.”

**Related Standards**

ABA, Code of Professional Responsibility DR7-106(C)(1), DR7-108(E)
ABA, Standards for Criminal Justice 3-5.3, 15-2.4

**Commentary**

**Preparation for Jury Selection**

The selection of a jury is an important phase of the trial, although the process is sometimes beyond the comprehension of the lay client and prospective jurors. The procedure requires the alert attention of the lawyer. As elsewhere in the trial, in the selection of the jury the advocate’s decisions must be made under time pressure. They can be made wisely only if the lawyer has prepared adequately before trial. The lawyer should consider whether the case is an appropriate one to raise objections to the jury selection mechanism as it operates in the particular jurisdiction. More frequently, counsel needs to prepare carefully for the exercise of challenges for cause and peremptory challenges.

**Pretrial Investigation of Jurors**

Pretrial investigation of jurors may permit a more informed exercise of challenges than reliance solely on voir dire affords. The practice of conducting out-of-court investigations of jurors presents serious problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. To minimize these risks, counsel should be careful to conduct investigations of jurors in a manner that avoids invasions of privacy. Except in unusual circumstances of necessity, counsel should limit the inquiry to records already in existence rather than, for example, question contemporaneously a potential juror’s neighbors.¹

¹ See ABA, Code of Professional Responsibility DR7-108(E), EC7-29 to EC7-31.
Use of Voir Dire

The process of voir dire examination of prospective jurors by the lawyer is often needlessly time consuming and is frequently used to influence the jury in its view of the case. These standards elsewhere recommend that jurors be questioned "initially and primarily by the judge, but counsel for each side should have the opportunity . . . to question jurors directly. . . ." In those jurisdictions that retain the practice of permitting the lawyer to conduct all of the questioning of jurors, the responsibility must rest with the lawyer, supervised by the court, to limit questions to those that are designed to lay a basis for the lawyer's challenges. The observation that the voir dire may be used to influence the jury in its view of the case is rejected as an improper use of the right of reasonable inquiry to ensure a fair and impartial jury.

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

Standard 4-7.3. 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 discharge of the jury from further consideration of a case, it is unprofessional conduct for a lawyer to intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If the lawyer believes that the verdict may be subject to legal challenge, the lawyer may

properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

**History of Standard**

Paragraph (c) now provides that it is "unprofessional conduct" for a lawyer to engage intentionally in the conduct proscribed by this standard. Also, the original standard applied "after verdict." This has been modified and the standard is now applicable "after discharge of the jury from further consideration of a case." Finally, the last sentence of paragraph (c) permits a lawyer to communicate with jurors to determine whether a legal challenge to the verdict is available. Unlike the first edition, the standard now does not require that a lawyer have "reasonable grounds" before embarking upon such an inquiry nor must notice that such an inquiry is going to be made be furnished to the prosecutor and the court. However, the lawyer should "believe" that the verdict may be subject to legal challenge. Paragraphs (a) and (b) are unchanged.

**Related Standards**

ABA, Code of Professional Responsibility DR7-108(A), (B), (D), EC7-36
ABA, Standards for Criminal Justice 3-5.4, 15-4.7
NDAA, National Prosecution Standards 17.1(D)(5)

**Commentary**

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.\(^1\) Courts have sometimes considered the broader question of the propriety of any conversation, however innocent in purpose or trivial in content, between counsel and juror during trial, since the mere fact that counsel is seen conversing with a juror may raise the question of whether the juror reached the verdict solely on the evidence.\(^2\) The issue usually is raised as a ground for a new trial, and the lawyer's communication with a juror may

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1. ABA, Code of Professional Responsibility DR7-108(B).
constitute reversible error.\(^3\) 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 or may not be impaneled as jurors in a particular case.

**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."\(^4\) Referring to individual jurors by name during trial has been ruled unethical,\(^5\) and courts also have condemned the practice.\(^6\) Just as respect for the position of the judge requires that the judge be addressed formally as "your honor," the jury's symbolic position as 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."

**Posttrial Interrogation**

Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict.\(^7\) Where there is evidence of juror misconduct that might undermine the verdict, a lawyer may make inquiries for the purpose of ascertaining the facts, carefully avoiding any harassment. A lawyer also may properly

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4. ABA, Code of Professional Responsibility EC7-36.


inquire as to the nature and basis of the division where the jury did not reach a verdict, for guidance in the subsequent course of action in the case. Finally, it has been 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." 8

Standard 4-7.4. Opening statement

The lawyer's opening statement should be confined to a brief statement of the issues in the case and evidence the lawyer intends to offer which the lawyer 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.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 3-5.5
NAC, Courts 4.15
NDAA, National Prosecution Standards 17.5

Commentary

The purpose of the opening statement is to narrowly limit defense counsel to a brief outline of the issues and the matters counsel believes can be supported with competent and admissible evidence. 1 In that statement the lawyer should scrupulously avoid any utterance that cannot later be supported with such evidence. 2 If, through honest inadvertence, counsel's proof falls significantly short of the opening state-

8. ABA, COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINION 319 (1967).
ment, the court should be asked to give a clarifying instruction to avoid either advantage or penalty. In other respects, the opening statement is governed by the standards for closing argument.3

Standard 4-7.5. 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, or fail to seek withdrawal thereof upon discovery of its falsity.

(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 substantial doubt about the admissibility of such evidence it should be tendered by an offer of proof and a ruling obtained.

History of Standard

The standard is unchanged except for the addition of the word “substantial” to the last sentence of paragraph (d).

Related Standards

ABA, Code of Professional Responsibility DR7-102(A)(4), DR7-106(C)(1)
ABA, Standards for Criminal Justice 3-5.6
NAC, Courts 4.15(2)
NDAA, National Prosecution Standards 17.1(A)(2), (C), (D)(6)

3. See standard 4-7.8.
Commentary

Using False Evidence or Known Perjury

The subject of the lawyer's duty with respect to false evidence, fabricated documents, or perjured testimony by witnesses is also covered in the Code of Professional Responsibility, which states that the duty of the lawyer to the client is to be performed "within the bounds of the law," and which requires that "a lawyer shall not . . . knowingly use perjured testimony or false evidence." The presentation of false evidence has been considered ample grounds for disbarment. The lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in subornation of perjury. 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.

Presenting Inadmissible Evidence

The rules of evidence determine what can properly be presented to the trier of fact, whether judge or jury, and the procedures by which it must be presented. These rules operate to keep from the judge or jury incompetent, irrelevant, and unreliable evidence and thus to limit the kinds of evidence that may be considered in deciding a case. The mere offer of inadmissible evidence or asking an improper question may be sufficient to communicate the precise fact that the rules of evidence are designed to keep from the fact finder. Moreover, the damage may be emphasized if it is challenged by an objection, so that the mere offer of inadmissible matter may leave the opposing party with no effective remedy.

Yet this is a common offense on the part of many who would resent the imputation of unfair practices, and not little ingenuity is often employed

1. *ABA, Code of Professional Responsibility BC7-1.*
2. *id. DR7-102(A)(4).*
5. *See People v. Mosley, 338 Mich. 559, 61 N.W.2d 785 (1953); People v. Clement, 127 Mich. 130, 66 N.W. 535 (1901). The related problem of perjury proposed by the defendant is treated in standard 4-7.7. See editorial note to that standard.*
to draw out statements that are promptly stricken out. . . . [H]e who resorts to such methods places himself on the plane of the shyster and the petitifogger.\textsuperscript{6}

These practices and the similar tactic of arguing to the bench or making comments on or off the record in a manner calculated to influence the jury are condemned by the Code of Professional Responsibility.\textsuperscript{7} These tactics are particularly pernicious because the mere fact that evidence is ruled inadmissible, a question is deemed improper by the court, or an argument is addressed to the court on a question of admissibility may tend to arouse the curiosity of the jury. Many cases have held such conduct to be ground for declaring a mistrial or granting a new trial.\textsuperscript{8} 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. When counsel is honestly uncertain about whether a particular question or item of evidence is subject to objection, counsel should be permitted to inquire of the court, out of the presence of the jury, regarding the propriety of the proposed action and to secure a ruling.\textsuperscript{9}

Display and Tender of Tangible Evidence

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

\textsuperscript{6} G. Warvelle, \textit{Essays in Legal Ethics} 110-111 (2d ed. 1920).
\textsuperscript{7} See ABA, \textit{Code of Professional Responsibility} DR7-106(C)(1), (2), (6), EC7-25.
\textsuperscript{9} See American College of Trial Lawyers, \textit{Code of Trial Conduct} §19(g).
Standard 4-7.6. Examination of witnesses

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

(b) A lawyer’s belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination.

(c) A lawyer should not call a witness who the lawyer knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, doing so will constitute unprofessional conduct.

(d) It is unprofessional conduct for a lawyer to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

History of Standard

Original paragraph (b) provided that defense counsel “should not misuse the power of cross-examination or impeach a witness if he knows the witness is testifying truthfully.” This standard has been changed to make clear that it is permissible, if necessary, for defense counsel to cross-examine vigorously witnesses who are believed or known to be testifying truthfully. There are some cases where, unless counsel challenges the prosecution’s known truthful witnesses, there will be no opposition to the prosecution’s evidence and the defendant will be denied an effective defense. However, lawyers are encouraged in paragraph (b) to take into consideration in conducting cross-examination the fact that the state’s witness is testifying truthfully.

Original paragraph (d) stated that “[i]t is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence.” The accepted test, however, for determining the propriety of questions on cross-examination is whether the examiner has a good faith belief for the questions asked, not whether evidence is available to introduce in support of the
question. Accordingly, paragraph (d) has been changed and now contains a "good faith" test as the basis for asking cross-examination questions.

There are stylistic changes in paragraphs (a) and (c).

**Related Standards**

ABA, Code of Professional Responsibility DR7-102(A)(5), DR7-106(C)(1), (2)

ABA, Standards for Criminal Justice 3-5.7

NDAA, National Prosecution Standards 17.1(D)(4), 17.6(A), (B), (F), (G)

**Commentary**

**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 contained in 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."¹ Another source states that "[a] lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended not legitimately to impeach but only to insult or degrade the witness."² 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. . . ."³ 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

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¹ ABA, Code of Professional Responsibility DR7-106(C)(2). See also EC7-25.
² American College of Trial Lawyers, Code of Trial Conduct §15(e).
or discreditable things there may have been in the witness's past unless
they have a clear and direct bearing on the witness's credibility in the
instant case.4

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

Undermining a Truthful Witness

The mere fact that defense counsel can, by use of impeachment,
impair or destroy the credibility of an adverse witness does not impose
on counsel a duty to do so. Cross-examination and impeachment are
legal tools that are a monopoly of licensed lawyers, given primarily for
the purpose of exposing falsehood. A prosecution witness, for example,
may testify in a manner that confirms precisely what the defense lawyer
has learned from the defendant 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 the witness's testi-
mony in the eyes of the jury. If defense counsel can provide an effective
defense for the accused and also avoid confusion or embarrassment of
the witness, counsel should seek to do so.

Another example of a situation where restraint may be called for is
where a witness whose testimony the lawyer believes to be truthful is
subject to impeachment by revealing to the jury that the witness was
convicted of a crime many years earlier. The use of this conventional
method of impeachment against a witness who has testified truthfully
should be avoided if it is possible for defense counsel to do so without
jeopardizing the defense of the accused. In deciding whether to use such
impeachment, counsel undoubtedly will want to consider the tactical
implications, since the jury may recognize the undue humiliation to the
witness and thus react adversely to the lawyer.

There also is a public policy factor underlying restraint in use of
impeachment powers vested in a lawyer. The policy of the law is to

4. Shawcross, The Functions and Responsibilities of an Advocate, 13 Rec. Assn. B. City N.Y. 483,
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.

Notwithstanding the foregoing comments, there unquestionably are many cases where defense counsel cannot provide the accused with a defense at all if counsel is precluded from engaging in vigorous cross-examination of witnesses either believed or known to have testified truthfully. For example, where the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witnesses is essential. Indeed, were counsel in this circumstance to forgo vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed to the client. Justice White, in a 1967 Supreme Court opinion, addressed the sometimes professional obligation of defense counsel to impeach truthful witnesses:

[A]bsent a voluntary plea of guilty, we... insist that [defense counsel] defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his, normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.6

Forcing Claim of Privilege Before the Jury

Although the situation arises more frequently for the prosecutor than it does for defense counsel, it is equally unprofessional for either to call a witness he or she knows will assert a claim of privilege 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.

Unfounded Question

It is an improper tactic for either the prosecutor or defense counsel to attempt to communicate impressions by innuendo through questions that would be to the defendant's advantage to answer in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist party?" or "Did you tell Mr. X that . . . ?" when the questioner has no evidence to support the innuendo. Generally, a question may be asked on cross-examination if, as recommended in paragraph (d), a "good faith belief" in the factual predicate implied in the question is present.

[Standard 4-7.7. Testimony by the defendant]

(a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.

7. See ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(C)(1); 6 Wigmore, EVIDENCE §1808(2) (Chadbourn rev. 1976).
8. See, e.g., United States v. Pugh, 436 F.2d 222 (D.C. Cir. 1970); People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); Hazel v. United States, 319 A.2d 136 (D.C. 1974). However, in some situations in some jurisdictions, it may be necessary to have more than a good faith basis present for asking a question on cross-examination. It has been held, e.g., that a witness may not be cross-examined as to prior convictions if the examiner does not have a certified record of the conviction available to rebut a denial of the conviction. See, e.g., State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973); People v. Di Paolo, 366 Mich. 394, 115 N.W.2d 78 (1962). Contra, People v. Lewis.
[(b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

[(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. 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 may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.]

Editorial Note

This proposed standard was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn prior to submission of this chapter to the ABA House of Delegates. Instead, the question of what should be done in situations dealt with by the standard has been deferred until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations.

Standard 4-7.8. 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 un-
professional 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 a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence, 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.

(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

History of Standard

Paragraph (e) has been added. The substance of this addition appeared as standard 5.10 of the original Function of the Trial Judge standards. In addition there are stylistic changes.

Related Standards

ABA, Code of Professional Responsibility DR7-102(A)(5), DR7-106(C)(3), (4)
ABA, Standards for Criminal Justice 3-5.8
NAC, Courts 4.15(3)
NDAA, National Prosecution Standards 17.17(A)

Commentary

Inferences Warranted by the Evidence

Because of the general unavailability of government appeals, 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 has been raised indirectly, however, in many cases in which the propriety of the prosecutor's summation has been questioned, where some courts
have held that statements made by the prosecutor that would otherwise be improper would not lead to reversal because the statements were fairly responsive to impermissible arguments or questions of defense counsel.1 It should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument.2

Defense counsel is no more entitled than the prosecutor to assert as fact that which has not been introduced in evidence.3 The rules of evidence cannot be subverted by putting to the jury, in argument or opening statements, matters not in the record. For example, where the defendant's willingness to take a lie detector test has been held inadmissible, defense counsel has been precluded from suggesting that willingness in argument.4 On the other hand, attorneys are entitled to reasonable latitude in arguing inferences from the evidence.5

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 has a special relation to the facts of the case.6 But it is a form of misrepresentation, and therefore improper, for counsel to argue such an inference when counsel knows that the evidence was not presented because it had been excluded by the court or is inadmissible.7 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

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1. See United States v. Alpern, 564 F.2d 755 (7th Cir. 1977); United States v. Bastone, 526 F.2d 971 (7th Cir. 1975).
3. See State v. Powell, 357 S.W.2d 914 (Mo. 1962).
7. 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 Nasie testified 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.
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 the accused is a person whose credibility can be relied on.

The Code of Professional Responsibility provides that a lawyer shall not "[k]nowingly make a false statement of . . . fact" or "[s]tate or allude to any matter that . . . will not be supported by admissible evidence." 8

Personal Belief

"[A] lawyer shall not . . . [a]ssert his personal opinion . . . as to the guilt or innocence of an accused. . . ." 9 This statement of the profession's well-established rule, contained in the Code of Professional Responsibility, is justified on several grounds:

In the first place, [the lawyer's] 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 an 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. 10

In addition, this prohibition is essential to the maintenance of the appropriate independence of the lawyer from identification with the 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.'" 11 "[N]o 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." 12

8. ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(5), 7-106(C)(1). See also id. EC7-25.
9. Id. DR7-106(C)(4).
10. H. BRINKER, LEGAL ETHICS 147 (1953).
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. Thus, if an accomplice has testified against the defendant, defense counsel may argue that the accomplice is seeking self-protection or the protection of a friend. 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 the person’s good name and reputation, counsel should not make such an argument unless there is reasonable ground in the evidence to support that position.

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 relations with opposing counsel during trial and to confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

Remarks calculated to evoke bias, passions, or prejudice “should never be made in a court of justice by any one.” There are many cases in which courts have reversed convictions as the result of inflammatory remarks made by the prosecutor containing references to the defendant’s race, religion, or ethnic background. This duty is reciprocal and it is improper conduct for defense counsel to make arguments calculated to appeal to such prejudices. There are, of

13. See standards 4-7.1 and 4-7.5.
14. See American College of Trial Lawyers, Code of Trial Conduct §14(b).
course, occasions on which the matter of prejudice is itself an 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 that are not based on evidence in the record. Just as a prosecutor should not be permitted to argue to the jury that the defendant should be found guilty because of widespread crime in the community, it is improper for defense counsel to encourage the jury to disregard their duty because of political or social implications of the case.

**Standard 4-7.9. 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.

**History of Standard**

There are no changes.

**Related Standards**

ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 3-5.9

**Commentary**

The problem of digression from the record can arise at both the trial and the appellate levels. At the trial level it is highly improper for a lawyer to refer in colloquy, argument, or 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

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should summarily exclude any reference to factual matter beyond the scope of the evidence in any significant way. The broad discretion a trial court has in such matters enables it to deal with them as they arise by allowing a party to reopen the case or to take other appropriate steps to enlarge the record, so as to provide an evidentiary basis for the matter the party wishes to argue but has for some reason failed to establish. At the appellate level it is also a grave violation of ethical standards to argue factual matters outside the record.¹

Standard 4-7.10. Posttrial motions

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

History of Standard

There are no changes.

Related Standards

ABA, Standards for Criminal Justice 5-5.2
NAC, Courts 13.1

Commentary

The typical agreement for representation made by retained counsel in a criminal case provides for representation through trial, including posttrial motions. This is as it should be. Consistent with this notion, these standards elsewhere provide that “[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings,” which is explained as including the filing of any necessary posttrial motions.¹ Moreover, failure to make a motion for a new trial, or to pursue a motion once filed, has been considered ineffective assistance of counsel.² Continuity of representation at the stage of posttrial mo-

¹. See standard 4-8.4(c).
1. Standard 5-5.2.
tions contributes to the efficiency of judicial administration, since the trial lawyer often can present motions without the delay and expense of the preparation of a transcript of the entire trial.  

PART VIII. AFTER CONVICTION

Standard 4-8.1. 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 the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, the lawyer 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 the lawyer’s exploration of employment, educational, and other opportunities made available by community services.

(c) Counsel should alert the accused to the 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 an appeal.

History of Standard

There are stylistic changes only.

3. See also standard 4-8.2.
Related Standards

ABA, Standards for Criminal Justice 3-6.1, 3-6.2, 18-5.5(b), 18-6.3
NAC, Corrections 5.18
NDAA, National Prosecution Standards 18.1(E)

Commentary

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 of the absence of defense counsel at the sentencing proceeding.1 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."2 Additionally, defense counsel should determine the statutory alternatives available to the judge in exercising discretion in sentencing for the particular offense involved. But it is not enough for the lawyer to function as a check on the judge in this regard; the lawyer should serve also as counsel to the client. The lawyer should carefully explain to the defendant the sentencing alternatives available to the court and what they will mean for the defendant personally should any of them be selected.

Preparation and Presentation of Sentencing Data

Sentencing normally takes place in a context in which neither judge nor counsel is personally acquainted with the defendant. Moreover, the prognosis for rehabilitation depends heavily on the opportunities available to the defendant for 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

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a probation officer or other staff assistant to the court. Where the probation report is made available to the defense, counsel has a role to play in determining the accuracy of information on which the report is based and in evaluating the soundness of its conclusions. To do so, counsel will need to make some independent investigation. Where there is no such report or it is not released to the defense, counsel will need to develop a defense equivalent to the report for presentation to the court. But even when a presentence report on the defendant has been prepared by the court, counsel may still wish to file with the court written information concerning the defendant’s background.

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. Counsel may well advance the interest of the client best by demonstrating a measure of objectivity, but “[h]e should continue, as he has done throughout the trial itself, to advance and protect the best interests of his client . . . . [H]is participation should be as objective and realistic as is consistent with illuminating the most favorable factors bearing upon the requested disposition.”

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

Allocation

It sometimes happens that in the course of exercising the right of allocation, the defendant will freely admit the guilt that he or she has, up to the time of verdict, denied; the defendant, for example, may have taken the stand and controverted the evidence by a denial of any participation. 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

The defendant has committed gross perjury. Even more serious perhaps is that the defendant's statement on allocution admitting guilt is part of the record and, if the conviction is appealed, that admission may compromise the appeal, especially if 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 or her own utterance influence the 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.

**Standard 4-8.2. Appeal**

(a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. The lawyer should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. The lawyer 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.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Standards for Criminal Justice 5-5.2, 21-2.2(b), 21-3.2(b)(i)

4. The Supreme Court has held that a judge may take into consideration in imposing sentence his or her belief that the defendant testified falsely during the trial. United States v. Grayson, 438 U.S. 41 (1978).
Commentary

Advising Defendant Concerning Appeal

A defendant needs effective representation and advice in the relatively short period immediately following conviction when the decision whether to appeal must be made. Yet it happens on occasion that no legal representation exists, sometimes for months, at this juncture. Lawyers, whether retained or assigned at trial, sometimes take the view that their responsibilities end with the final judgment of the trial court and communication between defendant and attorney frequently ceases. ¹ Whatever the cause, the effects are most undesirable. To make the right to counsel meaningful, representation must be continuous throughout the criminal process. Because of the intimate familiarity with the record of the trial proceedings, trial counsel is in the best position to advise the defendant concerning the factors to be weighed in reaching the decision whether to appeal. ²

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

Of greater importance is the duty of counsel to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal. Careful exploration should be made of the possible errors that could be pressed on appeal, their relative strengths and weaknesses, and the probable outcome of an appeal. Counsel should also attempt to learn and evaluate the doubts that the defendant may have about the adjudication of the case. To make the defendant's ultimate choice a meaningful one, counsel's evaluation of the case must be communicated in a comprehensible manner. Possible disadvantages and risks involved in an appeal should also be explained to the defendant. The consequences of an appeal may not be apparent to the defendant. In some circumstances even a successful appeal followed by a new trial may offer little prospect other than postponement of the service of the sentence. On the other hand, the defendant may be unduly chastened by the adverse verdict. Where it is appropriate to do so, the advantages of an appeal should be explained to the defendant. Whatever the de-

² See standard 21-2.2, which is similar to standard 4-8.2.
fendant's 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 after making a careful appraisal of the prospects of an appeal.

Protecting the Right of Appeal

A considerable body of postconviction 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 postconviction relief.\(^3\) Federal district courts have reached similar conclusions where the courts believed the defendants had seemed satisfied with the outcome of the litigation at the state trial court stage.\(^4\) In other federal habeas corpus cases based on the failure of defense counsel to inform the defendant of the right to appeal, relief has been granted.\(^5\) In 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.\(^6\)

Where the claim for postconviction relief has been based on 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.\(^7\) Most, however, have granted a nunc pro tunc remedy to the defendant thus deprived of appeal.\(^8\) The fact situations out of which many cases


6. See, e.g., 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).


8. See, e.g., Attilus v. United States, 406 F.2d 694 (5th Cir. 1969); Kent v. United States, 423 F.2d 1050 (5th Cir. 1970); Byrd v. Smith, 407 F.2d 363 (5th Cir. 1969); Williams v.
have arisen indicate genuine uncertainty on the part of lawyers concerning their responsibilities after verdict. There is often misunderstanding between lawyer and client concerning the action that will be taken by each. Rather than continue to face the problem in the form of petitions for relief from time limitations on filing appeals or of postconviction collateral attacks on the ground of inadequate representation, trial counsel’s obligation to protect the defendant’s right of appeal should be affirmed. Accordingly, paragraph (b) recommends that “[t]he lawyer . . . take whatever steps are necessary to protect the defendant’s right of appeal.” Frequently this will include perfecting the appeal, even though arrangements may have to be made for other counsel to represent the defendant before the appellate court.

Standard 4-8.3. Counsel on appeal

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

History of Standard

In the original edition, this standard provided that “[t]rial 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.” This language has been deleted in view of a provision in chapter 5, on Providing Defense Services, recommending that counsel “should continue to represent the defendant throughout the trial court proceedings.” As the commentary to standard 5-5.2 reflects, the failure to recommend that counsel initially appointed should continue to represent the defendant throughout the appellate proceedings is deliberate. The chapter on Providing Defense Services also urges that counsel not be appointed by


judges. Except for a stylistic change, the single sentence constituting the instant standard is unchanged from the first edition.

**Related Standards**

ABA, Standards for Criminal Justice 5-5.2, 5-5.3, 20-2.2(c), 21-2.2(a), (b), 21-3.2(b)

NAC, Courts 13.1

NLADA, National Study Commission Recommendations 4.3(a), 5.11, 5.12

**Commentary**

The responsibility of counsel assigned to represent a person unable to afford representation requires that the lawyer serve the 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 appeal are determined by a court, the defendant is entitled to the advocacy of a lawyer.¹ The possibility exists in every appeal, by those with retained as well as assigned counsel, that the defendant will want to raise claims that the lawyer finds lack merit. The defendant who has selected a lawyer and is paying for the service is not likely to reject counsel's advice. Where counsel has been assigned and receives no compensation from the client, the chances are greater that the client will take a position independent of, and perhaps in total opposition to, that recommended by the lawyer.

As stated earlier, every lawyer has a primary obligation to give the client sound professional advice on the matter for which the lawyer is retained.² If a convicted defendant wants to appeal on entirely frivolous grounds, trial counsel should attempt to dissuade the defendant from appealing and appellate counsel should seek to persuade the defendant to withdraw the appeal. Such advice should be given freely and forcefully. Assigned counsel has a special responsibility to develop a relationship of trust and confidence with the client so that the client will appreciate that the lawyer knows the case and has the client's best interests clearly in mind.

Counsel, however, should not conclude too quickly that an appeal is

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² See standard 4-8.2(a).
frivolous. A defendant is entitled to more than merely a negative reaction to the supposed errors that the convicted defendant thinks are present in the case. The lawyer should examine and analyze the record, as the lawyer would do if a client were paying a fee for this service. In some instances, even where the existing doctrine does not support a case for reversal on appeal, there may be a sound basis for arguing for a change in the law.\(^3\)

Despite counsel's best effort to find meritorious grounds for appeal, there will arise situations in which counsel is faced with an appeal in which the entire case, or part of the case, is frivolous. In such circumstances, a variety of responses by assigned counsel have been found. Principal among them is the request for leave to withdraw from the case. Others have been more or less overt, professionally responsible actions by the attorney to dissociate himself or herself from the groundless contentions.

Considerable attention has been focused to date on the matter of counsel's withdrawal and the effect on the litigation of such withdrawal. In *Anders v. California*,\(^4\) the Supreme Court affirmed 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."\(^5\) The Court found that permitting counsel's withdrawal in *Anders* was improper because counsel's 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 on the distinction between complete frivolity and absence of merit. The latter is not enough to support either a request by counsel to withdraw or the granting of such a request by the court. The Supreme Court outlined the procedure to be followed when counsel concludes that an 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

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5. Id. at 744. See also Ellis v. United States, 356 U.S. 674, 675 (1958).
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.6

In an appeal that is not entirely frivolous in counsel's estimate, the problem may arise of the appellant insisting on including in the appeal a particular point despite counsel's protest that it is frivolous. In such a situation, the lawyer might brief and argue the points he or she believes are supportable and omit the others.7 Alternatively, the lawyer might include the frivolous question in the brief but deal with it sketchily and without developing it in detail or pressing it on the court.8 Another possibility is for counsel to present the grounds but openly dissociate himself or herself from them.9

Standard 4-8.4. 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 counsel relies in the presentation to the court of briefs and 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.

6. 386 U.S. at 744.
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History of Standard
There are stylistic changes only.

Related Standards
ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 3-5.9, 21-3.2(b)

Commentary
Diligence in Prosecuting Appeal

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

Accuracy in Brief and Oral Argument

In presenting the facts and issues to the appellate court in the brief and on oral argument, the lawyer must confine himself or herself to the record made in the trial court and carefully observe the distinction between recorded matter and argumentation. In reviewing the evidence and happenings at the trial, counsel’s statement must be objective, accurate, and free of distorting or argumentative coloration. Adverse as

1. Compare standard 4-1.2(a).
2. Compare standard 4-1.2(b).
well as favorable evidence should be set forth. All evidence and other factual matter of record relevant to an issue on appeal should be presented fairly and accurately in the lawyer's statement of the case. Argumentative contentions concerning the import of testimony, inferences derived from the evidence, and rulings of the trial judge should be presented for what they are — the lawyer's arguments in support of claims of reversible error at the trial. Counsel must not mislead the court by misrepresenting the record or by ignoring matters of record that are adverse to counsel's contentions.

Similarly, it is the duty of the lawyer to be accurate in citing precedents that support the lawyer's contentions. The Code of Professional Responsibility requires that "a lawyer . . . disclose [l]egal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." But having done so, the lawyer is free, under the adversary system, to challenge the soundness of such authority.

If the lawyer discovers that material matter has been omitted from the record on appeal, the proper course is to cure such omission by an appropriate motion. The lawyer should not undertake to deal with the matter on the hypothesis that it is already properly before the appellate court.

Matter Not of Record

Under no circumstances should the lawyer refer to or rely on matter that is completely extraneous to the record made in the trial court and beyond the scope of the doctrine of judicial notice. This is improper for the same reason that deviation from the record would have been improper in closing arguments at trial. An appellate court's function is limited to review of what took place in the trial court. In an appellate court a lawyer must take the case as it was tried and on that record alone.

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

3. ABA, Code of Professional Responsibility DR7-106(B)(1).
4. See id. DR7-102(A)(2).
Standard 4-8.5. Postconviction remedies

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

History of Standard
There are stylistic changes only.

Related Standards
ABA, Standards for Criminal Justice 22-4.3
NAC, Courts 13.1

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

Assistance in Obtaining Counsel
The nature of the lawyer’s obligation to take steps to secure postconviction relief for a client the lawyer represented at an earlier stage of the
proceedings and the lawyer's function in assisting the client in obtaining counsel if requested to do so are governed by the considerations set forth in the commentary to standard 4-8.2.

Conduct of Lawyers in Postconviction Proceedings

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

The recommendations in this standard should not be read as suggesting that the lawyer has a duty to invoke postconviction remedies. If there is no basis for pursuing such a remedy, it is the duty of the lawyer to advise the client candidly. This is especially true where the relief available is nothing more than a new trial, and the more so when a new trial is likely to result in a conviction before another judge and jury.

Standard 4-8.6. 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 or she 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 or she should so advise the client and 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.

History of Standard

There are stylistic changes only.
Related Standards

ABA, Code of Professional Responsibility DR1-103, DR4-101(C)(4), (D)

Commentary

Raising the Ineffectiveness of Another Lawyer’s Representation

The traditional position of the bar that a lawyer must stand ready to challenge the conduct of a colleague where that is necessary to the protection of a client’s rights is an essential of our system of justice. Nothing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose the inadequacy. Lawyers must be especially careful to avoid permitting their personal regard for a fellow lawyer to blind them to that lawyer’s failure to provide the effective assistance to which every defendant is entitled as a matter of constitutional right. Of course, a lawyer owes it to the lawyer attacked, as he or she would to the person who is the object of any legal attack, not to proceed in a matter that is not grounded in fact and law and is merely vindictive and intended to harass the accused lawyer or the courts.1

Action When Prior Representation Was Effective

The logical and fair corollary to the standard of paragraph (a) is that if succeeding counsel, after full investigation, concludes that the claim of ineffective legal assistance is groundless, he or she must candidly say so to the client and decline to proceed further. Any other course would be unprofessional harassment of counsel and an imposition on the court. Moreover, unjustified proceedings against former counsel would demean lawyers and reduce them to serving as alter egos for their clients — a role for defense counsel that is rejected in these standards.

Waiver of Attorney-Client Privilege

The Code of Professional Responsibility states that "[a] lawyer may reveal . . . [c]onfidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct." It has often been held, moreover, that a lawyer is justified in testifying in a proceeding in which the lawyer's professional conduct has been called into question and is not precluded from testifying to matters that would otherwise be protected by the attorney-client privilege. 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. It has been argued, however, that "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.

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2. ABA, Code of Professional Responsibility DR4-101(C)(4).
4. ABA, Committee on Professional Ethics, Formal Opinion 19 (1930).